

31, 2012 (**Policies**)² so that Assurance can advance Defense Costs (as defined in the Policy) pursuant to the terms of the Policies. By its support for the Motion, Assurance does not waive any rights or defenses it may have, or expand any coverage available, under the Policies.

2. From the start of its participation in this case, Assurance has sought to discharge its obligation to honor the terms and conditions of the Policies. Assurance has also communicated to This Court Assurance's domestic regulator's direction that rights under the Policies are not varied and the insureds' interests are secured. [ECF Doc. No. 519]

3. Resistance to the notion that the Policies should operate according to their terms arose initially from persons making claims against the Debtors and their former directors, officers and employees. Eventually, the Debtors joined with the initial claimants (such claimants and the Debtors, collectively, the **Claimants**) to prosecute claims against such former directors, officers and employees. MFGI formed an alliance with certain plaintiffs firms for such purpose [Case No: 11-02790 ECF Doc. Nos. 3581, 3764]. On April 1, 2013, Holdings filed with This Court a reorganization plan that established a litigation trust for the purpose of claiming against certain of the Individual Insureds (as defined in the Policy) [ECF Doc. No. 1350]. For the most part, the claims against the former MF Global directors, officers and employees were consolidated in a multidistrict litigation conducted in the United States District Court for the Southern District of New York (**District Court**) bearing index number 11-Civ-7866 (the **MDL**).

4. In furtherance of the prosecution of their claims, the Claimants argued that the proceeds of the Policies should be paid over to, or preserved for the benefit of, the Claimants

² The Policies were provided in Assurance's filing at ECF Doc. No. 519. The primary Policy sets the terms for itself and the following excess Policies; all references to Policy sections or definitions will be to the primary Policy.

prior to resolution of the claims and that the Individual Insureds should not receive any funding of their Defense Costs under the Policies. The obvious result of that approach is that the Claimants would enjoy a litigation advantage as the Individual Insureds would not have access to the Policies to cover the cost of mounting an appropriate defense of their interests in the MDL.

5. To date, the Claimants have been at least partially successful in obtaining litigation advantage because stretches of many months have passed during which the Individual Insureds have been unable to obtain funding of their Defense Costs from the Policies and certain directors and officers liability policies (**D&O Policies**) that also include Individual Insureds as insureds.

6. Further to the initial litigation regarding use of the Policies and the D&O Policies, This Court's April 10, 2012 Memorandum Opinion (**Memorandum Opinion**) [ECF Doc. No. 619] and its April 25, 2012 Order [ECF Doc. No. 652] (together with the Memorandum Opinion, the **April 25 Order**) provided an initial "soft cap" that permitted the advance of Defense Costs up to \$30 million. That initial limit was exhausted and the necessary parties agreed to an extension per the terms of the April 25 Order, however, This Court denied the extension in a September 20, 2013 Order [EFC Doc. No. 1649]. This cut off the Individual Insureds' access to the Policies and the D&O Policies until May 30, 2014. Following its hearing on that date in response to letters addressed to This Court [ECF Doc. Nos. 1861, 1863] from the Individual Insureds, This Court permitted an extension of the "soft cap" to cover then outstanding Defense Costs but did not permit access to the Policies or the D&O Policies for ongoing Defense Costs [EFC Doc. No. 1901].

7. Pursuant to the Individual Insureds' Motion for Relief from Stay, dated July 25, 2014 [ECF Doc. No. 1956], This Court issued a September 4, 2014 Memorandum Opinion and

Order [ECF Doc. No.1988] (**September 4 Order**) providing that the Individual Insureds were entitled to access the full amount of the D&O Policies, except for \$13.06 million, to fund Defense Costs permitted under those D&O Policies.

8. The September 4 Order did not address the proceeds of the Policies, which maintained the status quo that the Individual Insureds could not access the Policies for Defense Costs that were not provided for under the D&O Policies. When conducting the August 21, 2014 hearing on the Individual Insureds' Motion for Relief from Stay, however, this Court requested that the parties agree on a simple order that increased the "soft cap" to \$55 million pending a decision on the hearing. See transcript of the August 21, 2014 hearing at pages 66/7. The Individual Insureds and the insurers prepared immediately a simple order that increased the cap and preserved the terms of the prior orders, but could not obtain agreement from the Debtors, as Holdings insisted on new requirements, which allowed it to avoid a stipulation until the arrival of This Court's decision could be said to eliminate the request for the stipulation.

9. The Individual Insureds, Assurance and other insurers then continued to attempt to negotiate a resolution of the use of the Policies with the Debtors, as This Court had urged in May and August of this year, but were unable to coax out a compromise that included Holdings, which continued to enjoy a litigation advantage absent any such compromise. How the long stretches of being denied policy benefits impact the Individual Insureds' ability to defend themselves was anticipated in the initial pleadings in 2012 [ECF Doc. No. 519] and is more fully set out in the Individual Insureds' Motion, as well as prior letters addressed to This Court [ECF Doc. Nos. 1861 & 1863].

10. After six months of failed efforts to negotiate a fair resolution, the Individual Insureds brought the instant Motion. Assurance is aware of the additional reporting requirements

set out in paragraph 19 of the Motion, which Assurance offered in the attempted negotiations, and is prepared to provide such reporting in the hopes of ending the costly and protracted litigation regarding the use of the Policies.

11. Accordingly, Assurance supports the provision of the relief requested in the Motion so that the Policies can operate to provide the benefit they were designed to provide. Section 2.19 of the Policies expressly includes an Individual Insured's Defense Costs as a type of "loss." Further, the Policies require that the Individual Insureds' Defense Costs shall be advanced before the underlying claim is determined. Specifically, Section 5.8 of the Policies states:

Except as to the extent that the *insurer* has denied a *loss*, and subject to the *limit of liability* and *retention*, the *insurer* shall advance *defense costs* incurred to the *insured* in respect of any *claim* prior to the final resolution of the *claim*.

12. While supporting the Individual Insureds for the relief requested in their Motion, Assurance also submits that applicable law requires the Policies to operate without any limitation imposed by the Stay. This Court previously determined that "New York State Insurance Law and the McCarren-Ferguson Act clearly provide that the scope and purpose of insurance policies should be specifically adhered to in bankruptcy cases, and the Court will not stray from this premise." Memorandum Opinion at p. 27. The Memorandum Opinion was upheld on appeal to the District Court. Assurance briefed the issues arising with respect to the New York State Insurance Law and the McCarren-Ferguson Act more fully to this Court [ECF Docs. Nos. 518, 590, 1872], as well as in connection with the appeal to the District Court [Case No.12-mc-00143-KBF ECF Doc. Nos. 7, 29] and the Court of Appeals for Second Circuit [Court of Appeals

Docket: 12-4732 ECF Doc. No. 87]. Assurance reserves the rights to address all such arguments in any subsequent proceeding before This Court.

Conclusion

Pursuant to the above, Assurance supports the Individual Insureds' application for a modification of the Stay, to the extent necessary, for an extension of the "soft cap" so that the Stay does not interfere with the Policies being applied pursuant to their terms and conditions and, most specifically, so that Defense Costs can be advanced in accordance with the terms of the Policies.

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/s/ Steven Doody
Stephen Doody
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 610-6300
Stephen.Doody@AllenOvery.com
Attorneys for MFG Assurance Company Limited