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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
MF GLOBAL HOLDINGS LTD, et al. Debtors	Chapter 11 Case No. 11-15059 (MG)

COMMODITY CUSTOMER COALITION'S AMENDED OBJECTION TO THE MOTION OF THE DEBTORS FOR INTERIM AND FINAL ORDERS UNDER 11 U.S.C. §§ 105, 361, 362, 363(c), AND 363(e) AND BANKRUPTCY RULES 2002, 4001, 6003, 6004 AND 9014 (I) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO THE LIQUIDITY FACILITY LENDERS, AND (III) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND (c)

The Commodity Customer Coalition ("CCC") provides this amended objection ("Amended Objection") to the Motion of the Debtors for Interim and Final Orders ("Motion") in order to emphasize the importance of treating commodity customer funds with the absolute priority to which they are entitled under the CFTC Regulations and the Bankruptcy Code.[1] In support of its Amended Objection, the CCC states as follows:

[1] This Amended Objection adds to, but does not supersede, the CCC's original objection [Dkt. No. 83]. Capitalized terms that are otherwise not defined in this Amended Objection shall have the same meaning ascribed to them in Commodity Customer Coalition's Objection.

INTRODUCTION

After over a month of examination by forensic accountants from Deloitte and Ernst & Young, the Trustee overseeing the MF Global, Inc. bankruptcy reports that there is an "apparent significant shortfall in U.S. Segregated Customer Equity" (Mot. to Approve Further Transfers at 2) that may be as much as $1.2 billion. *See* Nov. 21, 2011, Statement from the Office of the Trustee for the Liquidation of MF Global, Inc., http://dm.epiq11.com/MFG/Project/default.aspx (last accessed on Dec. 5, 2011) ("the apparent shortfall … may be as much as $1.2 billion"). Recent news reports suggest that $200 million of these funds may have been transferred to JPMorgan Chase ("Chase") and that there also may have been commingling between commodity customer segregated funds and securities customers' accounts. *See* Nov. 28, 2011, Ben Protess and Azam Ahmed, "Money Found in Britain May Belong to MF Global Customers," http://dealbook.nytimes.com/2011/11/28/money-found-in-britain-may-belong-to-mf-global/ (last accessed on December 4, 2011) (discussing $200 million); *see also* Dec. 3, 2011, Christopher Doering, "Exclusive: MF Global mixed funds, transferred abroad," http://www.reuters.com/article/2011/12/03/us-mfglobal-funds-idUSTRE7B203J20111203 (last accessed on December 4, 2011) (discussing commingling of futures and securities accounts). In short, with respect to the hunt for missing commodity customer funds in the MF Global debacle, there remain far more questions than answers at this point.

Despite this uncertainty, the Debtors seek to use cash from an existing liquidity facility (defined in the Motion as "Cash Collateral Fund") in order to pay professionals—

including attorneys from Skadden, Arps, Slate, Meagher & Flom LLP, Dewey & LeBoeuf LLP and Morrison Foerster LLP, and forensic accountants from FTI Consulting—and the costs associated with a Chapter 11 bankruptcy. (*See, e.g.*, Motion at ¶10(c).) They also seek to give "adequate security" to the provider of such liquidity by giving JP Morgan Chase Bank, N.A. ("Chase") a super-priority lien on all "unencumbered property of the Debtors" in exchange for use of the so-called Cash Collateral Fund. (Motion at ¶10(e).)

Yet, because it seems unlikely that the Debtors can ***unequivocally prove*** title to the Cash Collateral Fund (in light of reports of commingling and use of commodity customers' segregated funds ("Customer Segregated Funds") to pay shortfalls at Chase), it is inappropriate for them to use the Cash Collateral Fund, much less give liens on unencumbered property in exchange for such use. *See* 11 U.S.C. § 363(a). It seems more likely, in light of the evidence known to date (and very little seems known except that hundreds of millions of dollars in commodity customer money is missing) that MF Global, Inc.'s commodity customers' ("Customers") funds have been converted to pay down the Liquidity Facility—which may make Cash Collateral Fund the property of the Customers. As a result, it is premature—if not improper altogether—to give Debtors the right to use or convey an interest in the Cash Collateral Fund until such time as it is established that the Debtors own the Cash Collateral Fund.[2]

[2] It should be made clear that the CCC does not object to Chase having protection for extending credit on a post-petition basis. Instead, the CCC objects to the Debtors' attempt to provide any interest to Chase or any other party in Customer Segregated Funds, which unequivocally belong to Customers. In short, any creditor extending post-petition credit should receive adequate protection—just not from property that does not belong to the Debtors.

Accordingly, the CCC requests that the Court forego ruling on the Motion at this time. The CCC requests that, instead, the Court require the Debtors (and the Trustee for the MF Global, Inc. SIPA liquidation) to prepare a report that (i) details the payments that have been made on the Chase Liquidity Facility and (ii) demonstrates the extent to which any unencumbered assets of the Debtors have been purchased with, maintained, or in any way paid for out of Customer Segregated Funds. To the extent that any Customer Segregated Funds were used to make payments on the Chase Liquidity Facility, the CCC suggests that the Motion must be denied. If, on the other hand, Customer Segregated Funds that have been used to make payments on any unencumbered assets of the Debtors, CCC requests that any order granting super-priority liens for the use of Cash Collateral Fund be modified to specify that no priority can be superior to the interest of MF Global, Inc., commodity customers in property, securities or cash traceable to Customer Segregated Funds.

With that said, although, in light of the Bankruptcy Rules' strict provisions governing motions for reconsideration, CCC has not moved the Court for reconsideration of its November 2, 2011, Interim Order granting the right to use $8 million in Cash Collateral [Dkt. No. 24], if the forensic accountants conclude that there has been massive commingling affecting the Cash Collateral Fund, CCC respectfully requests that the Court exercise its power to review its own interlocutory orders. Compare Bankr. SDNY Local R. 9023-1 (allowing fourteen days in which to bring motion for reconsideration) with Fed. R. Bankr. P. 7054(a) (incorporating Fed. R. Civ. P. 54(b), which states that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.").

ARGUMENT

The So-Called Cash Collateral Is Not Property of the Debtors' Estate

The Debtors' request to use the $26 million held by Chase (the Cash Collateral Fund) pursuant to Section 363(c) of the Bankruptcy Code should be denied as premature, since it does not appear that the Cash Collateral Fund is property of the Debtors' estate. First, the Debtor cannot meet its burden to show an interest in the Cash Collateral Fund, under Section 363(a), given the uncertainty surrounding where Customer Segregated Funds have gone and the suggestion that they may be commingled with funds at Chase. Second, the reported use of Customer Segregated Funds to pay Chase (perhaps to make payments on the Liquidity Facility), if true, suggests that the Cash Collateral Fund ought to be put in trust, in whole or in part, for the Customers.

Under Section 363(a), the Debtors have the burden of proving their interest in the Cash Collateral Fund and must meet this burden before they can use those funds for their benefit. 11 U.S.C. § 363(a) ("cash collateral" means "cash … in which the estate … has an interest"). As noted above, there is at least a $1.2 billion shortfall in Customer Segregated Funds and it is plausible, at this stage in the proceedings, to suggest that the missing funds were used to pay down the very Liquidity Facility that the Debtors seek to use under the Motion. Accordingly, it seems impossible—given the current record before the Court—that the Debtors can prove they have a sufficient interest in the Cash Collateral Fund to allow them to use it now.

At best, the Debtors only have a legal interest in the Cash Collateral Fund, which alone is insufficient to maintain an action for cash collateral. Under Section 541(d), "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." (emphasis added.) To the extent that the Fund consists of customer property that was converted, the Debtor holds only bare legal title and this interest is not considered to be property of the estate. *See Begier v. IRS*, 486 U.S. 53, 59 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'"). Thus, the Debtors' interest in the Cash Collateral Funds is insufficient to satisfy Section 363(a)'s requirement that the funds at issue be property of the estate. As such, the Cash Collateral Funds cannot be subject to Debtors' requested usage under Section 363 and it is improper for the Debtors to use these funds for their own benefit.

Given the Customers' interest in the Cash Collateral Fund, Debtors are required to obtain the Customers' consent, pursuant to 11 U.S.C. § 363(c), or provide the Customers with adequate protection, pursuant to 11 U.S.C. § 363(e), prior to using the Cash Collateral Fund. To date, the Debtors have not asked, let alone received, consent from the Customers, nor have the Debtors proposed any method of adequate protection for the Customers. Instead, the Debtors propose giving adequate protection to Chase that is potentially senior to the Customers. Given the Customers' interest in the Cash Collateral Fund, the Debtor's failure to comply with Section 363 should result in the denial of the Motion.

In short, because the Debtors cannot, on the current record, prove that they have an unequivocal legal and equitable interest in the Cash Collateral Fund, and the Debtors have not consulted with, or promised adequate security to, the Customers, the Debtors have not met their burden of showing their right to use the Cash Collateral Fund, much less to grant a lien to Chase (or anyone else other than the Customers, for that matter) in return for using the Cash Collateral Fund.

The So-Called Cash Collateral Ought To Be Held In Trust For Customers

Any converted Customer property held as a part of the Cash Collateral Fund should be held in a constructive trust by the Debtor for the benefit of the MFGI estate and its customers. "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee." *See Cassirer v. Sterling Nat'l Bank & Trust Co. (In re Schick)*, 246 B.R. 41, 45 (Bankr. S.D. N.Y. 2000). Here, if there Customer Segregated Funds have been commingled with the Debtors' assets, the Customer Segregated Funds are customer property. *See* 17 C.F.R. § 1.20 ("All money received directly or indirectly by, and all money and equities accruing to, a futures commission merchant from any clearing organization or from any clearing member or from any member of a contract market incident to or resulting from any trade, contract or commodity option made by or through such futures commission merchant on behalf of any commodity or option customer shall be considered as accruing to such commodity or option customer . . . [and s]uch money and equities shall be treated and dealt with as belonging to such commodity or

option customer. . .") (emphasis added); *see also* 11 U.S.C. 761(10)(A)(viii) (defining customer property as including "property that was converted from and that is the lawful property of the" broker-dealer estate).

In *Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.)*, 874 F.2d 88, 93 (2d Cir. 1989), the Second Circuit held that a constructive trust imposed upon property held by the debtor at the time of the filing of a bankruptcy petition confers on the true owner an equitable interest in the property that is superior to the debtor. "Indeed, the Supreme Court has declared that, while the outer boundaries of the bankruptcy estate may be uncertain, 'Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition.'" *Id.* (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983)); *see also Connecticut General Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 618 (1st Cir. 1988) ("When a debtor is in possession of property impressed by a trust – express or constructive – the bankrupt estate holds the property subject to the outstanding interest of the beneficiaries."). Allowing the Debtor to use any of the Customers' converted funds within the Cash Collateral Fund for its own benefit would unjustly enrich the Debtor at the expense both the MFGI estate and the Customers. The Debtors should not be allowed to benefit from holding converted Customer Segregated Funds and should instead be required to hold these funds as a constructive trustee for the benefit of the Customers and the MFGI estate.

CONCLUSION

Because the Debtors cannot, on the record before the Court, meet their burden of proving that the Cash Collateral Fund is property of the Debtors' estate, rather than property that should be deemed in trust for the Customers, the Motion should be denied. To the extent that the Court may be inclined to allow the Debtors to continue using any of the Cash Collateral Funds, any such Order of this Court should expressly (a) recognize the primacy of the rights, claims and other interests of customers of MF Global, Inc., if and to the extent their funds or property may have been improperly transferred to or converted by one or more of the Debtors, and (b) provide that any adequate protection rights, claims, liens or other interests of Chase in the funds or property of the Debtors shall be subordinate to such rights, claims and other interests of customers of MF Global, Inc.

WHEREFORE, the Commodity Customer Coalition requests that the Court deny the Motion as premature, at this time, or, in the alternative, that the Court should expressly (a) recognize the primacy of the rights, claims and other interests of customers of MF Global, Inc., if and to the extent their funds or property may have been improperly transferred to or converted by one or more of the Debtors, and (b) provide that any adequate protection rights, claims, liens or other interests of Chase in the funds or property of the Debtors shall be subordinate to such rights, claims and other interests of customers of MF Global, Inc.

Dated: December 5, 2011

By: */s/ James L. Koutoulas*

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On Behalf of The Commodity Customer Coalition