Hearing Date: Wednesday, September 14, 2016 at 3:00 p.m. (ET)

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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) Jointly Administered

CUSTOMER COUNSEL'S OBJECTION TO THE MFG PLAINTIFFS' MOTION UNDER RULE 9019 FOR APPROVAL OF ALLOCATION AMONG PLAN ADMINISTRATOR, MFGAA AND LITIGATION TRUSTEE

Entwistle & Cappucci LLP and Berger & Montague, P.C., co-lead counsel for the former Customers of MFGI[1] ("Customer Counsel"), respectfully submit this objection to the Rule 9019 motion by the Plan Administrator, Litigation Trustee, and MFGAA (the "Motion") (ECF No. 2291).

[1] Capitalized words shall have the meaning ascribed to them in the Stipulation and Agreement of Settlement, dated July 6, 2016 (the "Settlement Agreement") (ECF No. 2271-2).

ARGUMENT

1. In an obvious end run around the Hon. Judge Victor Marrero's recent order,[2] the MFG Plaintiffs ask this Court to approve an unnecessary and artificial allocation of the Settlement Fund. The MFG Plaintiffs argue, contrary to both Judge Marrero's order and the relevant agreements,[3] that allocation is necessary to the determination of Customer Counsel's reasonable fees and expenses. The MFG Plaintiffs are wrong.

2. In this regard, the MFG Plaintiffs ignore both the fact that (i) the Settlement Agreement provides for distribution of settlement proceeds by direction of the MFG Plaintiffs without regard to whether or not any allocation has been sought from or granted by this Court,[4] and (ii) distribution to the MFG Plaintiffs occurs only ***after*** all other obligations under the Settlement Agreement are fully funded.[5]

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[2] After consulting with this Court, Judge Marrero was "persuaded that the Fee Motion is properly before the [District] Court and that allocation of settlement proceeds is not a prerequisite to determination of the Fee Motion." (MDL ECF No. 156 at 2-3).

[3] Every relevant agreement in the MDL and bankruptcy proceedings provides that Customer Counsel's motion for an award of reasonable attorneys' fees and litigation expenses (the "Fee Motion") will be determined by the District Court – including the Settlement Agreement. *See, e.g.*, Amended Continuing Cooperation and Assignment Agreement, dated September 10, 2012 ("CCAA") at ¶ 2 ("The Parties agree that all recoveries in respect to the Assigned Claims and the Class Action Claims, *net of reasonable attorneys' fees and costs approved by the District Court*, will be processed for distribution by the Trustee") (emphasis added); Settlement Agreement at ¶ 14 ("Within fourteen (14) days of the entry of the Customer Class Preliminary Approval Order . . . the Customer Class Representatives shall file with the District Court in the Customer Class Action a motion seeking Customer Class Counsel fees and/or expenses").

[4] *See, e.g.* Settlement Agreement at ¶ 6(i) (funds "shall be held . . . until the Effective Date . . . at which time such funds shall be immediately distributed to the MFG Plaintiffs in accordance with any allocation protocol established by the Bankruptcy Court or, *if no allocation protocol is established, shall be distributed directly to the MFG Plaintiffs in accordance with instructions provided by the MFG Plaintiffs*.") (emphasis added); ¶ 54 ("A plan of distribution or allocation is not a term of this Agreement, and it is not a condition of this Agreement that any particular plan of distribution or allocation be approved. Any plan of distribution or allocation is a matter separate and apart from the Settlement between the Parties and any decision by the Bankruptcy Court concerning a plan of distribution shall not affect the validity or finality of the Settlement.").

[5] *See* Settlement Agreement at ¶ 6(i) ("Funds remaining in the Settlement Fund ***after satisfaction of the foregoing SubParagraphs 6(a)-(h)*** . . .shall be held in the Settlement Fund until the Effective Date . . . at which time such funds shall be immediately distributed to the MFG Plaintiffs") (emphasis added).

3. The MFG Plaintiffs likewise blithely brush aside the relative merits of the settled claims and the insurance coverage applicable thereto – despite having previously conceded that while the D&O coverage responds to the Customer, Litigation Trustee and Securities claims, the E&O coverage responds exclusively to the Customer claims. While Customer Counsel do not purport to speak for the respective interests and constituencies that make up each of the MFG Plaintiffs – none of which are identified in the Motion or discernable from the record – there can be no question that this long-dead "agreement" cannot properly serve as a basis for the MFG Plaintiffs to disregard the Settlement Agreement, their assumed obligations under the CCAA, and the relative merits of the settled claims and the applicable insurance coverage in seeking approval of allocation before this Court that is neither necessary or appropriate.

4. The MFG Plaintiffs' gratuitous invocation of Rule 9019 under the above circumstances is by itself grounds to deny the Motion,[6] but the Motion is objectionable for at least three other reasons:

- *First*, the Motion purports to resurrect an oral "agreement in principle" claimed to have been reached between the SIPA Trustee and the Litigation Trustee in November 2014 without notice to the Court or anyone else – and without the involvement of Customer Counsel in violation of the CCAA.[7] Tellingly, the agreement was never reduced to writing or otherwise formalized, never submitted to this Court for approval (ironically, given the instant Motion), and was ostensibly made when MFGH was by far the largest claimant in the MFGI estate. Whatever the circumstances in November 2014, they are plainly different now and the prior failure to disclose or seek approval of the putative allocation agreement prevents its

[6] *See, e.g.*, *In re Yellowstone Mountain Club, LLC*, 460 B.R. 254, 263 (Bankr. D. Mont. 2011) (denying Rule 9019 motion as moot where it was "technically irrelevant and unnecessary").

[7] *See* CCAA at ¶ 3(e) ("If the Customer Representatives commence or prosecute any Assigned Claims or Class Action Claim . . . the Customer Representatives shall consult with the Trustee, at the Trustee's request, on an ongoing basis regarding any Assigned Claim; provided that the Customer Representatives *shall have the right to determine all aspects of the prosecution of any Assigned Claim*") (emphasis added). While not particularly relevant, we note here that the Litigation Trustee is mistaken in his assumption (reflected in footnote 15 on page 7 of his declaration) that Customer Counsel were aware of the putative agreement in principle between him and the SIPA Trustee. Customer Counsel were excluded from discussions between and among the MFG Plaintiffs and the SIPA Trustee's counsel, Mr. Kobak, during the November 2014 meetings and have no knowledge of those discussions beyond that gained from reading the affidavits submitted in connection with the instant Motion.

resurrection and ratification, just as it underscores the fact that this long-dead "agreement" does not bind Customer Counsel or the District Court and is irrelevant to determination of the Fee Motion.

- *Second*, the putative agreement in principle was not disclosed to this Court at the time the Plan Administrator, Litigation Trustee and the SIPA Trustee sought this Court's approval of the Sale and Assumption Agreement in July 2015 (some eight months after the understanding was purportedly reached in November 2014). Had any party believed the putative agreement was material in any way to the Sale and Assumption Agreement or somehow survived the transfer of the claims – which now seems to be the MFG Plaintiffs' contention – it should have been addressed in the Sale and Assumption Agreement and/or otherwise have been brought to the attention of the Court. This point is of special note now because the Motion makes the argument that MFGAA assumed the putative allocation agreement when it "stepped into MFGI's shoes" (Motion at ¶ 3), despite the fact no mention of it is made in the Sale and Assumption Agreement and/or papers submitted to this Court for approval. If anything, the transfer of the claims pursuant to the Sale and Assumption Agreement effectively rendered the putative "agreement in principle' a nullity – to the extent it ever had any force and effect absent Court approval.

- *Third*, the attempt by the Plan Administrator and Litigation Trustee to resurrect the putative "agreement in principle" should be seen for what it is – a litigation tactic to retroactively place limits on the fee obligations assumed by MFGAA and the Plan Administrator in connection with the Sale and Assumption Agreement. Had there been any intent at the time of the Sale and Assumption Agreement to limit the assumption of the fee obligation in any way – including by some long-dead agreement on allocation that did not involve Customer Counsel – it should have been written into the agreement and made part of the submissions and Orders submitted to this Court at the time of approval. The failure to take those obvious and necessary steps at the time of the approval of the transfer, particularly after Customer Counsel readied the transferred claims for trial at the request and direction of the MFG Plaintiffs, clearly prevents the MFG Plaintiffs from attempting to fabricate such a limitation now.

CONCLUSION

The MFG Plaintiffs' attempt to legitimize a wholly artificial allocation by asking this Court to disregard the realities of the settled claims and the applicable insurance coverage in favor of resurrecting a long-dead "agreement in principle" is objectionable and should be rejected by this Court out of hand. This is particularly true where, as here, the motion is a blatant attempt to end

run the District Court's recent order.

If the Court is nevertheless inclined to enter an allocation order on the limited record here, we ask that any such order make clear that it is limited to allocation of the Settlement Fund only ***after*** all obligations under the Settlement Agreement (including Customer Counsels' fees and expenses) are fully funded and that the allocation among the MFG Plaintiffs is otherwise irrelevant to a determination of fees and expenses, final approval of the Settlement, or any other matter before the District Court.

Respectfully submitted,

Dated: August 29, 2016
New York, New York

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