

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

MF GLOBAL HOLDINGS LTD ,
MF GLOBAL FINANCE USA INC and
MF GLOBAL INC.

Chapter 11

Case No. 11-15059 (mg)

Case No. 11-15058 (mg)

Case No. 11-02790 (mg) SIPA

Debtors.

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TODD THIELMANN, PIERRE-YVAN
DESPAROIS, NATALIA SIVOVA,
SANDY GLOVER-BOWLES and ARTON
SINA, on behalf of themselves and all others
similarly situated,

Plaintiffs,

ADV. PRO. 11-02880-mg

v.

MF GLOBAL HOLDINGS LTD,
MF GLOBAL HOLDINGS USA INC.,
MF GLOBAL FINANCE USA INC. and
MF GLOBAL INC,

Defendants.

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**MEMORANDUM IN OPPOSITION TO THE CROSS-MOTION OF PLAINTIFFS
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY
GLOVER-BOWLES AND ARTON SINA FOR APPOINTMENT OF INTERIM CLASS
COUNSEL AND IN FURTHER SUPPORT OF THE MOTION OF GENITRA GREENE
AND VICTOR HURTADO TO CONSOLIDATE RELATED ACTIONS AND APPOINT
LEAD COUNSEL**

[CAPTION CONTINUED ON NEXT PAGE]

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GENITRA GREENE and VICTOR
HURTADO, on behalf of
themselves and all others similarly situated,

Plaintiffs,

ADV. PRO. 11-02921-mg

v.

MF GLOBAL HOLDINGS LTD,
MF GLOBAL HOLDINGS USA INC.,
MF GLOBAL FINANCE USA INC. and
MF GLOBAL INC,

Defendants.

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INTRODUCTION

Plaintiffs Genitra Greene and Victor Hurtado (collectively, the “Original Movants”), by their undersigned attorneys, hereby respectfully submit this memorandum in opposition to the motion by Plaintiffs Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova and Sandy Glover-Bowles (collectively, the “Thielmann Plaintiffs”)¹ for appointment of interim class counsel and in further support of the Original Movants’ motion to consolidate all related litigation brought under the Worker Adjustment and Retraining Notification Act (“WARN Act”), 29 U.S.C. § 2101 *et seq.*, and the New York Worker Adjustment and Retraining Notification Act (“NY WARN Act”) New York Labor Law (“NYLL”) § 860, *et seq.* against MF Global Holdings Ltd, MF Global Holdings USA Inc., MF Global Inc., MF Global Finance USA, Inc. and its subsidiaries (collectively, “MF Global” or the “Company”) and to appoint Harwood Feffer LLP (“Harwood Feffer”) as lead counsel (the “Original Motion”).

¹ Anthony Abruzzo was included in the caption of Thielmann Plaintiffs’ Notice of Hearing but was not included in the amended complaint filed on December 12, 2011. [11-2880-mg Doc. 4.] Likewise, Arton Sina was included in the caption and body of the amended complaint but not mentioned in the Notice of Hearing.

The Thielmann Plaintiffs' motion rests solely on past experience of their counsel, notwithstanding their filings contain numerous procedural defects and their demonstrated unwillingness and inability to work with other counsel. For example, it is not clear which plaintiffs constitute the "Thielmann Plaintiffs." The caption in the Thielmann Plaintiffs' Notice of Hearing omits plaintiff Arton Sina, who is named as a plaintiff in their amended complaint, but includes Anthony Abruzzo who is not named in their amended complaint. *See* 11-2880-mg Doc. 13. The Thielmann Plaintiffs' Notice of Hearing failed to include the caption of the *Greene* case, which resulted in the motion not appearing on the docket sheet for Adv. Pro. 11-02921-mg. Further, no explanation is given as to why the Thielmann Plaintiffs' counsel unilaterally changed the caption of the Thielmann action to include plaintiffs from the Sivova action and a new plaintiff, Arton Sina instead of seeking leave of court to add plaintiffs as required by Fed. R. Civ. P. 21.

By contrast, Harwood Feffer has demonstrated that it should be appointed sole lead counsel. Harwood Feffer has an extensive record of success prosecuting complex class actions and has demonstrated initiative in this case. It was Original Movants who first filed a motion seeking to consolidate the related actions and to appoint lead counsel for their orderly prosecution. In addition, the Original Movants' amended complaint is far superior than that of the Thielmann Plaintiffs.

Harwood Feffer is well-known in the Southern District of New York through its successful track record in serving as Lead or Liaison Counsel in matters on countless, diverse, complex actions. As described in the Original Motion and the accompanying Declaration of Robert I. Harwood, among its broad and deep experience, Harwood Feffer has significant experience prosecuting class actions on behalf of employees against employers. In their motion,

Thielmann Plaintiffs make much of the fact that their counsel's practices focus exclusively on employment matters. Notwithstanding Harwood Feffer's experience litigating a wide variety of class actions, including its experience in successfully prosecuting securities and shareholder class actions, the Thielmann Plaintiffs suggest that Harwood Feffer is unsuitable to represent the putative classes in these related actions. This implication could not be more incorrect. In fact, because the MF Global bankruptcy was caused by imprudent overexposure to volatile and financially dangerous European debt securities, Harwood Feffer's extensive securities experience will inure to the benefit of the classes. The successful prosecution of this case will necessarily require counsel that is well-versed in investment, valuation, corporate governance and financial industry regulatory issues. Harwood Feffer possesses such expertise, while Thielmann Counsel's resumes suggest they do not possess significant experience in these areas. Thus, Harwood Feffer is the counsel best-suited to protecting the interests of the putative classes and should serve as lead counsel in the related actions. Accordingly, Original Movants respectfully request that this Court deny the Thielmann Plaintiffs' Motion and grant the Original Motion.

ARGUMENT

1. Thielmann Plaintiffs' Motion To Have Their Counsel Appointed Interim Lead Counsel Should Be Denied

As an initial matter, it is not possible to discern on whose behalf their motion was brought or upon whose behalf the proposed interim counsel is acting.² On December 12, 2011, the Thielmann Plaintiffs filed an amended complaint that, among other things, sought to place some or all of the plaintiffs from three of the original WARN Act complaints into one caption. The amended complaint includes the following five individuals as plaintiffs in both the caption

² The Thielmann Plaintiffs' counsel includes: Outten & Golden LLP, Klehr Harrison, Harvey, Branzburg LLP, Lankenau & Miller LLP and the Gardner Firm, P.C. (collectively, "Thielmann Counsel").

and in the body thereof: Thielmann, Desparois, Sivova, Glover-Bowles and Sina.³ See 11-2880-mg Doc. 4. As discussed above, Sina is not listed as a plaintiff in the caption to its Notice of Motion, and instead lists Abruzzo, whose claims were voluntarily dismissed by notice dated December 20, 2011. See 11-2882-mg Doc. 5. Thielmann Counsel should not be allowed to argue that they should be appointed interim lead counsel for all plaintiffs when they have failed to properly identify their own clients in court filings. In addition, the Notice of Hearing does not properly identify all the captions and parties that are the subject of their motion. Significantly, Original Movants' caption was omitted from the Notice depriving the court, the public at large and the Original Movants of the proper information as to whom the motion was directed.⁴

Thielmann Counsel should also not be appointed because they have already demonstrated their inability to cooperate with other counsel, namely Harwood Feffer. Any firm that is appointed lead counsel must be able to work together with others on behalf of the class. The Thielmann Plaintiffs' counsel has expressly taken the position that it is unwilling to discuss cooperation between the firms or work toward a resolution in which there would be shared responsibilities on behalf of the putative classes. See Declaration of Peter W. Overs, Jr. in Opposition to Thielmann Plaintiffs' Motion, dated January 12, 2012, at ¶3. To the contrary, in

³ Leave of court should have been sought to add additional plaintiffs pursuant to Fed. R. Bankr. P. 7021 which incorporates Fed. R. Civ. P. 21 by reference. Fed. R. Civ. P. 21 requires permission of the Court for the addition of parties. “[T]he specific provisions of Rule 21 govern over the general provisions of Rule 15, and [...] an amendment changing parties requires leave of Court even though made at a time when under Rule 15 amendment may be made as of course.” *Kaminsky v. Abrams*, 41 F.R.D. 168, 170 (S.D.N.Y. 1966); see also *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 248 F.R.D. 408, 412 (S.D.N.Y. 2008) (“While motions to amend are generally governed by Rule 15(a), Rule 21 controls if the proposed amendment adds new parties.”); *Rafter v. Fleet Boston Fin. Corp.*, No. 04 Civ. 3341 (JSR)(KNF), 2006 U.S. Dist. LEXIS 22531, at *5-6 (S.D.N.Y. Apr. 20, 2006)(“There are sound reasons why Rule 21 should govern the addition and elimination of parties. Whether parties should be dropped from or added to an action presents problems of judicial administration over which the court, rather than the parties and their counsel, should maintain control *at every stage of the action.*”)(emphasis added)(citation omitted).

⁴ Other defects include that the Notice of Hearing shortened the response time afforded to non-movants under this Court's local rules. The document provided a hearing date of January 19, 2012 at 11:00 a.m., but inexplicably, a return date sixteen days earlier on January 3, 2012. Pursuant to amended local rule 9006-1(b), answering papers to a motion such as this must be served on the movant no later than seven days prior to the hearing date.

an unsolicited telephone call soon after Original Movants filed their initial complaint, counsel for the Thielmann Plaintiffs expressed a proprietary interest in cases alleging claims brought under the WARN Act and refused to acknowledge that a firm with expertise in complex securities and ERISA cases could add anything to the mix. *Id.* at 4.

2. Harwood Feffer's Amended Complaint is Superior and Demonstrates That Harwood Feffer Should be Named Lead Counsel

With respect to the original complaints filed in the Actions, Thielmann Counsel argues that Harwood Feffer's first complaint on behalf of Original Movants was a "copy-cat" complaint. In making this assertion, Thielmann counsel neglects to mention that all of the complaints filed in the original four putative WARN Act class actions were substantially similar.

The three WARN Act complaints filed against MF Global in connection with the bankruptcy by the firms now comprising Thielmann Counsel were: i) Adv. Pro. 11-02880-mg, on behalf of plaintiffs Thielmann and Desparois filed by Klehr Harrison; ii) Adv. Pro. 11-02881-mg, on behalf of Sivova filed by Outten & Golden; and iii) Adv. Pro. 11-02882-mg, on behalf of Abruzzo filed by Lankenau & Miller. Thielmann Counsel state that they did not coordinate their efforts until after the complaints were filed. *Thielmann Br.* at 4. Nevertheless, all three complaints were nearly identical. Now that the three firms have formed their own self-styled group, in a motion signed by members of all three firms, they have compunction to make a petty allegation regarding only Harwood Feffer's original complaint.

What is significant here is that Harwood Feffer filed the only accurate and intelligible amended complaint. The Thielmann Plaintiffs' amended complaint contains inaccuracies and is inartfully drafted. For example, the "single employer" allegations are haphazard and the amended complaint lacks sufficient citation to public filings. *See* 11-2880-mg Doc. 4, ¶¶ 43-44, 47-49, 53, 58-61, 63, 66-68, 70, 73-74, 76-81. By contrast, the amended complaint filed on

behalf of Original Movants organizes each of its allegations by the “single employer” factor they support. *See* 11-2921-mg Doc. 8, ¶¶ 41-83. Documents of public record noted in Original Movants’ amended complaint are cited so that no one is left to speculate from what source the allegations derive. *See* 11-2921-mg Doc. 8, ¶¶ 41-42, 45, 46, 49-56, 58, 61, 63, 68-70.

In addition, Thielmann Plaintiffs incorrectly assert that MF Global Finance was 75% owned by MF Global Holdings Ltd. *See* 11-2880-mg Doc. 4, at ¶ 42(d). This allegation is clearly contradicted both by filings in this court and MF Global Ltd.’s public filings: MF Global Finance was a *wholly owned* subsidiary of MF Global Holdings USA, Inc., which was a wholly owned subsidiary of MF Global Holdings Ltd. *See e.g.* Ex. 21.1 filed to Form 10-K filed with the Securities and Exchange Commission by MF Global Holdings Ltd. on May 20, 2011. The issue of whether the MF Global entities are a “single employer” for the purposes of the WARN Act will be an important issue in this litigation, and the inability to state factually accurate and logically organized allegations relating to the “single employer” issue could prove fatal to the claims of the putative class.

3. Harwood Feffer Should be Appointed Lead Counsel

As asserted in the Original Motion, Original Movants’ choice for lead counsel should be approved by the Court. The criteria for selecting lead counsel include its experience and prior success record, the number, size, and extent of involvement of represented litigants, the stage of the proceedings in a particular suit, and the nature of the causes of action alleged.⁵ Harwood

⁵ A significant portion of the Thielmann Plaintiffs’ motion is devoted to arguing that Harwood Feffer improperly moved to consolidate and be appointed lead counsel under Fed R. Civ. P. 42 and Fed. R. Bankr. P. 7042 as opposed to moving to be appointed interim class counsel under Fed. R. Civ. P. 23(g) and Fed. R. Bankr. P. 7023. This argument elevates form over substance. Rule 42 has long been used by courts in this district and this circuit both to consolidate related actions and appoint lead counsel for the consolidated actions. *See, e.g., Walker v. Deutsche Bank, AG*, 2005 U.S. Dist. LEXIS 19776, at *8 (S.D.N.Y. Sept. 6, 2005) (consolidating and appointing lead counsel in related putative class actions pursuant to Rule 42 and noting “[a] court which has consolidated actions may also, at its discretion, ‘appoint one or more attorneys as liaison counsel, lead counsel, or trial counsel for the consolidated cases’”) (citations omitted).

Feffer is particularly suited to serve the proposed classes in these related actions due to the nature of the facts that forced MF Global into bankruptcy and gave rise to the mass lay-offs at issue. *See* Declaration of Robert I. Harwood, dated December 7, 2012. (“Harwood Dec.”)[11-2921-mg Doc. 4.] Harwood Feffer is well known and accomplished in the fields of securities, shareholder rights and employee rights class actions. As a result of its knowledge in these areas, the firm is uniquely qualified to understand and analyze the circumstances of MF Global’s demise. Mere experience in WARN Act litigation not involving underlying securities and investment issues, and “wage and hour” and employment discrimination cases will not adequately serve the putative class here.

In any event, in addition to its securities practice, Harwood Feffer has litigated and continues to litigate class actions on behalf of employees under Employee Retirement Income Security Act (“ERISA”) which center on the issue of when an ERISA fiduciary should have known that a company’s financial health was in dire straits. Harwood Feffer also has significant knowledge in analyzing corporate valuation and enterprise risk issues from its experience in transaction related shareholder class actions, and the firm has extensive experience in ferreting out liability issues arising from complex corporate structures. In these related actions, factual issues will arise relating to MF Global’s awareness of its exposure to dangerous European debt securities and whether the related MF Global entities are a “single employer” for purposes of liability under the WARN Act. The litigation of these issues falls squarely within Harwood Feffer’s demonstrated expertise.

Specifically, Harwood Feffer has served as lead counsel in numerous successful class actions brought on behalf of employees whose retirement benefits were wrongfully reduced through fiduciary malfeasance as proscribed by ERISA. In *In re Royal Dutch/Shell Transport*

ERISA Litig. (D.N.J.), Harwood Feffer recovered over \$90 million dollars on behalf of employees. *See* Harwood Dec. filed with the Original Motion for a recitation of other successful ERISA prosecutions by Harwood Feffer.

Harwood Feffer is prepared to commit substantial resources to this litigation as demonstrated by the firm's role in other litigation similar to this, such as co-lead counsel in *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, MDL No. 1700, a multi-district proceeding consolidating 43 purported class, individual and collective actions from 37 states concerning the employment status of FedEx Ground delivery drivers. The *Fedex* litigation has been on going since 2004 and Harwood Feffer has expended hundreds of thousands of dollars in advancing the costs of the litigation and thousands of hours of its attorneys' valuable time. *See* Overs Dec. at 6. The Firm is simultaneously prosecuting an employment misclassification purported class action under state law and collective action under the Fair Labor Standards Act against an operator of airport shuttle van services in *Reid, et al. vs. SuperShuttle Int'l, Inc., et al.* Civ. No. 1:08-cv-04854-JG-VVP (E.D.N.Y.). *See id.* at 7. The prosecution of the SuperShuttle case has engendered expenses of over \$100,000.00 paid by the firm and attorney time nearing \$1 million. *See id.* at 8. Any suggestion that Harwood Feffer is not prepared to commit sufficient resources to see this litigation to a successful conclusion is demonstrably unfounded. Harwood Feffer is devoted almost entirely to the prosecution of class actions on a contingent basis and, as a result, is accustomed to litigating complicated, high-cost cases that continue for years.

CONCLUSION

Harwood Feffer's commitment to prosecuting labor and employment matters, and the firm's extensive experience prosecuting class actions involving complex commercial, corporate

governance and shareholder rights, clearly demonstrates Harwood Feffer's superior ability to serve as lead counsel in these Actions. Accordingly, the Thielmann Plaintiff's motion should be denied and the Original Motion to appoint Harwood Feffer as lead counsel should be granted.

Dated: January 12, 2012

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