PRESENTMENT DATE AND TIME: FEBRUARY 21, 2012 AT 12:00 PM
OBJECTION DEADLINE: FEBRUARY 20, 2012 AT 12:00 PM

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.
John J. Witmeyer III
Jon R. Grabowski
Stephen R. Chuk
Wall Street Plaza
New York, New York 10005
(212) 269-4900
Attorneys for Sapere

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case No. 11-15059 (MG)
MF GLOBAL HOLDINGS LTD., et al.,	:	Jointly Administered
Debtors.	:	
In re	:	Case No. 11-2790 (MG) SIPA
MF GLOBAL Inc.,	:	
Debtor.	:	

OBJECTION OF SAPERE WEALTH MANAGEMENT, GRANITE ASSET MANAGEMENT AND SAPERE CTA FUND, L.P. TO DUAL NOTICE OF PRESENTMENT OF DISCLOSURE STIPULATION AGREEMENT AND PROPOSED PROTECTIVE ORDER

Sapere Wealth Management, LLC, Granite Asset Management, and Sapere CTA Fund, L.P. (collectively, "Sapere") hereby objects to the *Disclosure Stipulation Agreement and Proposed Protective Order* between the Chapter 11 Trustee and the SIPA Liquidation Trustee, dated February 13, 2012 [docket no. 443 in Case No. 11-15059 (MG)] and states as follows:

1. Sapere agrees that any claim of privilege by the Chapter 11 Trustee should not be maintained in respect of the documents, communications or information addressed by the Stipulation and Proposed Order, especially matters relating to relating to or concerning segregated funds of MFGI. However, portions of the Stipulation and Proposed Order are inappropriate and/or legally untenable and should be changed or the Court should not "so order" them.

The 16th Whereas Clause – Rule 502, "Subject Matter" and the Court's Responsibility

2. **One**: The 16th "whereas" clause should be struck. This "whereas" clause purports to determine that "it would not be unfair under Rule 502(a) of the Federal Rules of Evidence for a party to consider the documents or information related to the Subject Matters without any documents, communications or information that may be subject to a claim of attorney-client or shared privilege and/or work product protections that (a) do not relate to the Subject Matters and/or (b) are outside of the Relevant Period."

1. The 16th "whereas" clause's language, when "so ordered," would purport to be a judicial determination that a privilege continues in yet-undisclosed documents, communications or information despite Rule 502(a)(3).[1] However, a judicial determination that Rule 502(a)(3) does not apply cannot properly be made in the abstract, about yet-undisclosed materials as to which the information necessary to make a Rule 502(a)(3) adjudication remains unknown to the

[1] Fed. R. Evid. 502 addresses the subject-matter scope of waiver and states: "(**a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

Court and persons interested in the matter. Indeed, at this juncture, "so ordering" the 16th "whereas" clause would be an impermissible advisory opinion rendered in the absence of a true controversy meriting adjudication. At a minimum, the adjudication of the applicability or inapplicability of Rule 502(a)(3) cannot be made unless, after the production of the document, communication or information that would put Rule 502(a)(3) in play has occurred and sufficient information about the yet-undisclosed material is provided to permit a 502(a)(3) adjudication on the merits of specific material to which privilege is claimed, the Court has allowed the parties interested in obtaining the yet-undisclosed material an opportunity to be heard on whether Rule 502(a)(3) applies to the yet-unproduced material and the Court has reviewed the yet-undisclosed material.

2. Accordingly, the 16th "whereas" clause is improper and should be struck. The issue of whether or not Rule 502(a)(3) applies to yet-undisclosed material should be reserved until such future time as a true controversy arises whether or not a yet "undisclosed communication or information . . . ought in fairness to be considered together" with the material about which the Chapter 11 Trustee waives privilege, which material no one else has yet seen.

The "Public Interest" Findings and the Court's Responsibility

3. **Two**: The Court's "public interest" findings – which it will make if it "so orders" the 14th "whereas" clause – should be broader than those proposed by the Stipulation's "whereas" clauses. They purport to make various public interest findings which the Court is asked to "so order." However, in the 15th "whereas clause," the Chapter 11 Trustee seeks to limit the public interest in matters relating to relating to or concerning segregated funds of MFGI only if the matters occurred between October 17, 2011, and October 31, 2011. Sapere respectfully submits that such a limited public interest determination is wrong.

4. MF Global collapsed on October 31, 2011, in the largest scandal in the history of the American commodities business. For the first time in American history, commodities customers' supposedly-tightly-controlled segregated-account funds that belong to the customers putatively vanished – in the words of the *Wall Street Journal* "vaporized" – and the commodities customers were left without their money. The magnitude of the "missing" segregated-account funds, originally estimated at $600 Million, has now grown to an estimated $1.6 Billion. The massive loss of segregated-account funds adversely affected tens of thousands of people across the country, from America's farmers to investors. The scandal rocked the commodities futures markets to their foundations. The misdeeds at MF Global destroyed confidence in the integrity of market regulation, both governmental and industry self-regulation. The public interest does not limit itself to the last two weeks of MF Global's life but encompasses how it handled segregated-accounts, especially under Jon Corzine's administration.

5. The public interest requires disclosure of *all* documents, communications and information relating to or concerning segregated funds of MFGI, certainly at least back to the genesis of Jon Corzine's tenure as CEO. Any public interest adjudication via "so ordering" should not be limited to the period between October 17, 2011 and October 31, 2011.

6. If, despite the breadth of the public interest, the Chapter 11 Trustee wants to withhold documents, communications and information relating to relating to or concerning segregated funds of MFGI, then his decision to do so should be made clear to all interested parties, not concealed as if the Court made a determination that the public interest had but a two week span in time.

7. Thus, the 14th "whereas" clause should be amended by inserting the following underlined text: "…and the Court has determined that it is in the public interest for the above-

referenced documents, communications and information related to the foregoing Subject Matters, including without limitation *all* documents, communications and information relating to relating to or concerning segregated funds of MFGI, dating at least back to the time when MF Global Holdings, Ltd. began considering Jon Corzine for the position of CEO, also to be made available to the Governmental Authorities; …."

Paragraph 2 of the Stipulation and the Court's Responsibility

11. **Three**: Paragraph 2 of the "so ordered" Stipulation purports to preserve claims of privilege by persons other than the Chapter 11 Trustee. One can fairly presume, for example, that the Chapter 11 Trustee seeks to allow former directors and officers of MF Global to be able to assert personal claims of privilege to communications with in-house and/or outside corporate counsel.

12. A "so ordered" Paragraph 2 should be neutral and even-handed. Notwithstanding a putative claim to privilege, a privilege may not exist and/or may have been waived for a variety of reasons. A few examples include that an attorney-client relationship need not exist between corporate counsel and directors or officers personally, internal communications with in-house counsel may be business communications, the other persons to whom disclosure was made may have resulted in waiver, the safeguarding necessary to protect privilege may not exist and (especially pertinent here) putatively legal communications are not be privileged when the tort-crime rule applies to them.

13. If Paragraph 2 is retained in the Stipulation, then, in fairness, the following sentence should be added to Paragraph 2 of the Stipulation if the Court will "so order" Paragraph 2:

> "This Disclosure and Protective Order does not constitute a determination that any document, communication or information to which privilege is claimed by the

> Chapter 11 Trustee or any other person is or is not privileged and does not affect any claim of any other person that such material is not privileged or that a privilege was waived."

Paragraph 1 of the Stipulation and Rule 502

14. **Four**: To begin with, as explained in point "One," above, whether or not the Chapter 11 Trustee has waived a privilege as dictated by Rule 502(a) – and in particular with respect to yet-undisclosed material falling within subsection (3) – cannot now be determined. Paragraph 1 should therefore at a minimum be amended by adding the following text:

> "; notwithstanding the foregoing, the issue of waiver with respect to undisclosed communications within the purview of Fed. R. Evid. 502(a) has not been decided by the Court."

15. However, Paragraph 1 of the Stipulation also presents an even more fundamental issue. Because of that issue, Paragraph 1 of the Stipulation should not be "so ordered" by the Court.

16. When the Chapter 11 Trustee and the SIPA Liquidation Trustee have a shared privilege, they can share material with one another without waiver occurring. The two trustees neither need a "so ordered" stipulation under Rule 502 to do that, nor can a "so ordered" Rule 502 stipulation be used to adjudicate the existence of a shared privilege or whether a privilege was waived because it was not shared, but one trustee transferred the material to another for his use.

17. There probably are materials in which shared privilege exists here. However, the question of whether anything in particular partakes of a shared privileged is not ripe for adjudication. No one has disputed whether a shared privileged exists in any particular material. Also, no facts exist from which to adjudicate the existence of shared privilege or the waiver

thereof if material is transferred to another person who does not share the privilege for that person's use.

18. The Chapter 11 Trustee is trying to do an end run and use Rule 502(d) to create adjudication when Rule 502(d) has no application here.

19. As the Explanatory Notes to Rule 502 state: "the rule does not purport to supplant applicable waiver doctrine generally." Rather, "[Rule 502] responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney–client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information."

20. The Explanatory Notes further explain: "*Subdivision (d).* Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation."

21. In plain English, Rule 502(d) allows the Court as part of the discovery process in a case with massive documentation (especially e-discovery) to approve a mechanism whereby materials are produced in massive quantity, with little or no pre-production review, with privilege questions decided after the review and selection of the pertinent documents. Rule 502(d) is not a device to authorize one person to transfer documents to another person for the latter's use immune from the law of waiver and outside a reasonable structure for adjudicating

privilege at a more practical point in time, so as to lower costs and reduce time spent on privilege issues that may be irrelevant.

22. However, that is not the situation here. Paragraph 1 of the Stipulation does not address a situation in which the Chapter 11 Trustee produces material that may or may not include privileged material, which the SIPA Trustee then reviews to identify the portions that are relevant, so that this Court can then adjudicate whether the relevant material that the Chapter 11 Trustee produced is or is not privileged, with the privileged material then being returned to the Chapter 11 Trustee and expunged from the files and future use by the SIPA trustee.

23. Paragraph 1 of the Stipulation does not deal with inadvertence, quick peeks and claw backs of privileged material that, although intentionally produced, would not have been disclosed but for practical reasons of discovery exigencies and burden.

24. Instead, the Chapter 11 Trustee proposes that he can, under the aegis of a court-approved non-waiver "protective" order, deliver to the SIPA trustee, for the latter's unfettered and indefinite use, information that is not actually "shared privileged" material and as to which the Court will not be asked to adjudicate the issue of privilege

25. Instead, the Chapter 11 Trustee, through Paragraph 1, purports to detach Rule 502 from its moorings and use it to allow the transfer of information between two select parties, for their actual use in a complex matter, to occur immune from the law of waiver.

26. Sapere respectfully submits that Rule 502 cannot be used, as the Chapter 11 Trustee uses it here, to the extent that the Court has discretion to enter Rule 502 orders, the proper exercise of that discretion does not extend to create an arrangement for select litigants to share information for *use* by them on an indefinite basis under circumstances that substantively

comprise a waiver of privilege. If the Rule were deemed to allow such an outcome, then doing so here would be abusive and improper.

27. Paragraph 1 of the Stipulation should not be "so ordered."

CONCLUSION

These are not merely technical or trifling issues. Privilege cannot be manipulated to bar the truth from being brought to light. The public interest requires that the truth of this scandal not be hidden through unfounded manipulations of Rule 502.

For the foregoing reasons, the Court should "so order" the Stipulation only after the aforesaid revisions have been made to it, the Court should not "so order" Paragraph 1 of the Stipulation and the Court should grant such other and further relief as may be just and proper.

Dated: February 20, 2012
New York, New York

Respectfully submitted,

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.

By: */s/ John J. Witmeyer III*
John J. Witmeyer III (JW 7442)
Jon R. Grabowski (JG 9845)
Stephen R. Chuk (SC 8109)
Ford Marrin Esposito Witmeyer & Gleser, L.L.P.
Wall Street Plaza
New York, New York 10005
Tel: (212) 269-4900
Fax: (212) 344-4294
Email: jjwitmeyer@fmew.com
jrgrabowski@fmew.com
srchuk@fmew.com

-and-

HOWARD, STALLINGS, FROM & HUTSON, P.A.

Joseph H. Stallings (JS 5065)

5410 Trinity Road, Suite 210 (27607)
P.O. Box 12347
Raleigh, North Carolina 27605
Tel: 919-821-7700
Fax: 919-821-7703
Email: jstallings@hsfh.com

Attorneys for Sapere Wealth Management, LLC, Granite Asset Management, and Sapere CTA Fund L.P.