UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC. et al.	:	Case No. 11-15059 (MG) Case No. 11-15058 (MG) Case No. 11-02790 (MG) SIPA
	:	(Jointly Administered)
Debtors.	:	
	:	Adv. Pro No. 11-02880 (MG)
Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles, and Arton Sina, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	
v.	:	
MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,	:	
Defendants.	:	

PLAINTIFFS' OBJECTION TO MF GLOBAL INC.'S MOTION TO DISMISS THE AMENDED CLASS ACTION ADVERSARY PROCEEDING COMPLAINT

I. INTRODUCTION

This motion turns on the statutory interpretation of "employer" under the WARN Act. James W. Giddens (the "SIPA Trustee") on behalf of MF Global Inc. ("MFGI" or the "SIPA Debtor"), has moved to dismiss the underlying Complaint on grounds that the commencement of the SIPA proceeding transformed MFGI from an "employer" to a "liquidating fiduciary," and

insulated MFGI from liability for failure to provide 60 days' notice as required by the WARN Act.

However, the SIPA Debtor's motion fails for, *inter alia*, the following reasons:

1. MF Global Inc.'s motion asks this Court to invalidate the rights of 1,000 former MF Global employees who seek redress from their employer, as that term is used in WARN's statutory and regulatory "employer" definition.

2. MF Global Inc. is an employer as defined by the WARN Act. As a corporate entity, it is a "business enterprise" and thus an "employer" regardless of any changes in its activities.

3. MF Global Inc. asks this Court to overrule the plain meaning of "employer" as it is used in the WARN statute and its codified regulations, and to heed instead an agency response to a comment found in the U.S. Department of Labor's ("DOL's") preamble to its WARN rules. Relying on a passage in the DOL's preamble for this purpose is invalid. Deference to it is precluded by the DOL's own caveats in the preamble, and by the fact that the preamble and subject of the passage were never subjected to notice, a period of review, and comment.

4. Assuming *arguendo* the preamble comment is entitled to some deference, its application to this case would violate the Administrative Procedures Act. It would prompt litigation in any event, over fact-intensive issues, requiring the denial of MFGI's motion to dismiss.

5. Even if the Court determines that MFGI is not an employer under the federal WARN Act, it would remain subject to liability under the New York and Illinois WARN Acts. Unlike federal WARN, those acts provide potential personal liability for trustees or fiduciaries,

but consistent with federal WARN, they do not alter a corporation's "employer" status, regardless of its status or activities in bankruptcy.

II. PROCEDURAL HISTORY

On October 31, 2011, MFGI was placed into a SIPA proceeding. (Compl. ¶ 17).

Between November 11, 2011 and November 14, 2011, three adversary complaints seeking relief under state and federal WARN Acts were filed on behalf of employees terminated by the Defendants. (*See* Adv. Pr. No. 11-02880-mg; Adv. Pr. No. 11-02881-mg; and Adv. Pr. No. 11-02882-mg). On December 12, 2011, a consolidated Amended Complaint (hereafter the "Complaint") was filed on behalf of all plaintiffs. *See* Exhibit A, Adversary Complaint. The Complaint alleges MFGI and its parent Holdings constitute a single employer.

On March 5, 2012, the MFGI filed the instant motion to dismiss (the "Motion"), to which Plaintiffs herewith respond.

III. FACTUAL BACKGROUND

Defendant MF Global Inc. is a wholly-owned subsidiary of MF Global Holdings, Ltd. (Compl. ¶ 16). On October 31, 2011, the District Court for the Southern District of New York entered an order granting the application of the Securities Investor Protection Corporation ("SIPC"), a non-profit membership corporation, for issuance of a protective decree adjudicating that the customers of MFGI, "a registered broker-dealer … and SIPC member," were entitled to the protections afforded by SIPA. (*Id.* at ¶ 1).

On November 11, 2011, a mass layoff was conducted at the MFGI's facilities. (Compl. ¶ 82). MFGI failed to give the Plaintiffs and the Class members written notice that complied with the requirements of the WARN Act. (Compl. ¶ 45). The Plaintiffs filed an Amended Complaint alleging MFGI, along with affiliated MF Global entities, "continued to operate as a business" as a "single employer" of the MF Global employees terminated on or around that date. (Compl. ¶¶

40-80).

IV. STANDARD OF REVIEW

It is a "fundamental principle that, on a motion to dismiss, a complaint must be read most favorably to the plaintiffs." *Krys v. Sugrue (In re Refco Secs. Litig.)*, 779 F. Supp. 2d 372, 377 (S.D.N.Y. 2011). Thus, in evaluating a motion to dismiss under Fed. R. Bankr. P. Rule 7012(b)(6), a court accepts as true the facts alleged in the complaint and draws all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 154 (2d Cir. 2006).

A complaint that contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" may not be dismissed. *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The "plausibility standard is not akin to a 'probability requirement.'" *Id.* Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

It is clear that under the Rule 7012(b)(6) standard of review, Plaintiffs have set forth viable claims against the SIPA Debtor. Accordingly, the Motion should be denied in its entirety.

V. STATUTORY AND REGULATORY SOURCES INVOLVED

1. The Federal Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 USC §§2101(a)(1):

(a) Definitions
As used in this chapter--
(1) the term "employer" means any business enterprise that employs—
(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

2. Regulations of the Secretary of the Department of Labor.

a. *The "final rule," 20 C.F.R. § 639.3*:

(a) Employer.
(1) The term "employer" means any business enterprise that employs--
(i) 100 or more employees, excluding part-time employees; or
(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.
..... The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.
(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

b. *The preamble to the final rule, 54 FR 16042-01:*

Another commenter suggested that "fiduciaries" in bankruptcy proceedings should be excluded from the definition of employer. Since adequate protections for fiduciaries are available through the bankruptcy courts, the Department does not think it appropriate to change the regulations to address this situation. Further, DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

VI. MFGI WAS THE "EMPLOYER" AS DEFINED BY PROVISIONS OF WARN'S STATUTORY AND REGULATORY LANGUAGE.

A. The allegation that MFGI was Plaintiffs' WARN employer is more than plausible, it is indisputable under the plain meaning of the statute and codified regulations.

The SIPA Trustee bases his *Iqbal* motion on Plaintiffs' use of the word "employer," calling it "an unfounded legal conclusion." Memorandum of Law of James W. Giddens, SIPA Trustee In Support of Trustee's Motion to Dismiss" ("TMOL") at ¶ 10.

The SIPA Trustee does not, however, deny that he, on behalf of the MFGI estate, was the statutory "employer" of the employees within the meaning of the federal and state laws generally, *i.e.*, he had to pay the employees their wages and comply with all federal and state employment laws while they were employed by MFGI and he was Trustee. Nor does he claim he or MFGI are excluded from being the statutory "employer" by the terms of federal and state WARN statutes themselves. Nor does he claim he or MFGI are excluded from being the statutory "employer" by the codified regulations to the federal WARN Act themselves.[1]

Rather, the SIPA Trustee claims he, on behalf of the MFGI estate, is excluded from being the federal WARN "employer" based on the words never subjected to notice and comment in a preamble to the Department of Labor's regulations. Even then, he cannot claim to be excluded from being the WARN employer on a motion to dismiss due to the triable issues of fact raised by the preamble's rule. The SIPA Trustee remains the employer unless it is factually demonstrated that his "sole function" was to liquidate the estate and that he was not "operating a business enterprise in a normal commercial sense," which he had not done.

Clearly, Plaintiffs have made a more than plausible claim that MFGI was their employer under the WARN Acts. At most, the Trustee raises factual issues that require discovery. (*See*

[1] (In the case of New York's WARN law, the Trustee claims he is excluded from "employer," status by implication, based on regulations to that law. But, as explained at Point IX, the regulations include MFGI even if they may exclude the Trustee's personal liability under some circumstances).

Declaration of Jack A. Raisner Pursuant to Rule 7056 (d), dated May 14, 2012.) It cannot be said as a matter of law that the SIPA Trustee's "sole function" was liquidation. He was also given special authorizations under SIPA to carry out various aspects of the MFGI business that go beyond strict "liquidation," such as to "investigate the circumstances surrounding the failure of MFGI and report to the Court …." (*See* SIPA Statement ¶ 3 p 10). It is unclear whether he operated the broker dealer in order to sell it as a going concern. *See* Point VII (B). But, as a single employer with Holdings, the Complaint sufficiently alleges that the business plans announced by MF Global specifically indicate the business was kept operational. *See* Memorandum of Law in Support of Objection to Motion to Dismiss of MF Global Holdings Ltd *et al*., at Point VII(C). The SIPA Trustee has proffered no evidence showing what he in fact *has* done and, of course, the estate is seven months old, there is no telling what he will do. Before miring the estate in years of expensive, fact-intensive litigation over the purported liquidating fiduciary exclusion, there is a more important, threshold question. It is whether the particular words in the preamble command the force of law such that they alone can divest a WARN employer of its employer status, and thereby deprive employees of redress under the WARN Act. Upon scrutiny, the words in the preamble can have no such strength. The SIPA Trustee urges this Court to give the preamble the highest, force of law-level of deference, known as *Chevron* deference. TMOL at ¶ 12. Plaintiffs disagree and respectfully request the Court rely on their argument that the preamble, at most, may be owed lower-level, *Skidmore* deference assuming it is deemed persuasive, found at Point VI(B) in their Memorandum of Law in Support of Objection to Motion to Dismiss of MF Global Holdings Ltd, *et al*. Plaintiffs' submit that the DOL preamble is not persuasive, thus not entitled to *Skidmore* deference.

B. The DOL preamble is not due any deference even under the *Skidmore* standard because it is not even minimally persuasive.

This Court is free to disregard the DOL preamble completely if it finds it less than persuasive. The Supreme Court in *Wyeth v. Levine* found a FDA's 2006 preamble did "not merit deference" applying the standards set forth in *Skidmore*: "Where, as here, Congress has not authorized a federal agency to pre-empt state law directly, the weight this Court accords the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Wyeth v. Levine*, 555 U.S. 555, 556, 129 S. Ct. 1187, 1190, 173 L. Ed. 2d 51 (2009)(*emphasis added*), *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). The Court in *Wyeth* found the rule "inherently suspect because of the failure to offer interested parties notice or opportunity for comment on the pre-emption question; it is at odds with the available evidence of Congress' purposes; and it reverses the FDA's own longstanding position that state law is a complementary form of drug regulation without providing a reasoned explanation." *Wyeth*,129 S. Ct. at 1190. Applying the criteria set forth in *Skidmore* to the DOL's preamble, demonstrates that the agency response is not worthy of credence, and therefore this Court need not follow it.

1. *The DOL liquidating fiduciary response lacks the "thoroughness" required for it to be persuasive under Skidmore.*

The DOL issued its advice regarding liquidating fiduciaries in its preamble without the thoroughness to be expected of persuasive regulation. It gives no suggestion that it considered the role of a WARN employer in bankruptcy, much less a fiduciary. Its three sentence response purports to explain why it did not place a liquidating fiduciary rule in its codified regulations which might have caused it to engage in thorough consideration of the issue. The first reason is that "adequate protections" are "available in the bankruptcy courts." "Adequate protections" are a bankruptcy term used with respect to creditors, not fiduciaries. The term "fiduciaries" is not

used in the Bankruptcy Code to refer to any entities or persons. Most important, this sentence begins the confusion in the passage as to whether the DOL views the fiduciary to be an individual subject to liability apart from the entity, or whether the fiduciary and entity are to be seen as one. The passage seems to vacillate between these two views.

In the first sentence of the passage, the DOL appears to refer to the "fiduciary" as an individual acting in the capacity of a representative of the bankrupt entity, a situation in which both the individual and the entity are potentially liable. The reference to "adequate protections" seems to accept that the fiduciary is an individual, not any entity, insulated from individual liability by bankruptcy law. The second sentence, however, posits the existence of a so-called liquidating fiduciary whose "sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors."

The sentence goes on to suggest that the identity of entity disappears or merges into the individual fiduciary: "[the fiduciary] does not succeed to the notice obligations of the *former employer* because the fiduciary is not operating a 'business enterprise' in the normal commercial sense." (*Emphasis added*) It is the phrase "former employer" in particular that suggests the entity no longer exists as a legal person capable being subject to liability apart from the fiduciary.

The third and final sentence reverts to the usual understanding, however, that a fiduciary is a representative of an entity that still exists. That is the case when the "fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation." In that instance, the fiduciary's failure to give notice might make the fiduciary and the entity liable.

In short, the whole basis on which MFGI and other defendants claim they are divested of employer status rests on the DOL's conflation of the entity into the fiduciary in the second sentence of the passage. They reason, if the fiduciary is not liable, the entity is not liable. The "employer" status of the entity, appears, disappears, and reappears, depending on whether it is operating as normal or being liquidated. This "springing" employer status has no legal basis and the fact that the DOL seems to take this springing definition for granted suggests the DOL did not have a thorough understanding of bankruptcy principles. The second sentence demonstrates an inherent confusion between the "employer" and the representative of the "employer" who implements its legal obligations. *See* Laura B. Bartell, *Why Warn?-the Worker Adjustment and Retraining Notification Act in Bankruptcy*, 18 Bankr. Dev. J. 243, 264 (2002).

According to Prof. Bartell, "if the Department had properly focused on the employer rather than the bankruptcy "fiduciary" (who merely becomes the representative of the employer) and had looked at the activities of the bankrupt commercial enterprise, it would have properly concluded that the business enterprise remains an "employer" until the company ceases to engage in commercial activity, notwithstanding that the bankruptcy "fiduciary" is liquidating the company. In most cases that point will be reached when there are no more employees." *Id*. at 266-67.

The second sentence also suggests the DOL's appreciation of bankruptcy law and its realities was less than thorough. The DOL proposes the existence of a fiduciary in bankruptcy whose "sole function" is to liquidate. There is no such person or entity with powers or authority limited to that sole function. Even a chapter 7 trustee under the Bankruptcy Code has "wide-ranging management authority over the debtor," and "assumes control" not of a dead lifeless estate, but "of the business." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343,

352-53, 105 S. Ct. 1986, 1993, 85 L. Ed. 2d 372 (1985). While a chapter 7 trustee requires court approval to operate the business, what it controls in all events is a business. 11 U.S.C.A. § 721.

Nor does the DOL evince a thoroughness of consideration in applying the distinction between "operating" and "non-operating" entities to ordinary companies in bankruptcy. The DOL used that distinction in its final rule with respect to government which is *ab initio* not a business. In making an exception to bring government within the employer definition, the DOL uses a business activities test. But a business in chapter 7 is *ab initio* a business and therefore an employer. The DOL does not apply the business activities test to exclude any other entities. The DOL does not require that non-profit organizations engage in commercial activities to come within the Act, or exclude them when they do not engage in any business or commerce. The preamble does not provide any reasoning whatsoever for making distinctions between businesses in bankruptcy, hence it evidences no thoroughness of consideration.

An example of DOL materials that were found to be thorough and worthy of deference is its guidance on the narrow issue of a fiduciary's duties for making certain investments under ERISA. In *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 446 (S.D.N.Y. 2005), the court accorded some weight to the Department of Labor's bulletin that was created to guide ERISA trustees when they are instructed to make a certain investment. It did so because of the DOL Bulletin's "careful and persuasive analysis ..., including its thoughtful articulation of the policies underlying its analysis." The court found the DOL broke, "new ground by giving concrete guidance to directed trustees about their duty to inquire into the prudence of investment decisions." The court found "the opinions expressed in the Bulletin are well-reasoned and flow from a careful analysis of complex issues. The Bulletin anticipates many of the central issues facing directed trustees in deciding how to fulfill their fiduciary duties, and provides specific and

helpful example-based guidance that effectively balances important policy concerns embodied in the ERISA statute." The liquidating fiduciary pronouncement, by contrast, is a mere inscrutable fragment that comes with nothing to evince the thoroughness required under *Skidmore*.

2. *The DOL liquidating fiduciary response lacks the "validity of reasoning" required for it to be persuasive under Skidmore.*

Under *Skidmore,* deference for agency pronouncements is dependent upon the validity of its reasoning. The reasoning of the DOL's preamble, however, is both logically and practically flawed. The logic of the preamble rests entirely on its premise of the sentence which concludes that liquidation is the equivalent of "no longer operating in a normal commercial sense," thus a fiduciary whose sole function is liquidation is not an employer because it is "not operating in the normal sense." In fact, this premise is flawed. First, a fiduciary's sole function might be liquidating its plants by selling pursuant to an asset purchase agreement. But in so doing he might terminate half the workforce in a mass layoff, such that the plants are partially operating as a going concern. The fiduciary would then be liquidating even as he continues business operations.

The preamble provides no guidance for how to treat fiduciaries in such circumstances which are common. The reasoning is invalid because it creates two categories that are mutually exclusive in the hypothetical world of the liquidating fiduciary passage, but which frequently coexist in the real world of bankruptcy. According to Prof. Bartell's analysis, the DOL's "assumption, that there exists a fiduciary whose 'sole function' is liquidation, is inaccurate given the mixed roles a trustee in bankruptcy often plays. Even if there were such a person, the idea that employer status under the WARN Act should turn on whether the trustee in liquidating assets packages them as a going concern or not makes no sense."

> The multiplicity of roles of the trustee in bankruptcy under chapter 7, as well as under chapter 11, suggests that the Department inaccurately assumed that the trustee's "sole function" in bankruptcy is to liquidate the estate. Even if a sole-function fiduciary exists (the chapter 7 trustee or the liquidating chapter 11 trustee), the applicability of the WARN Act should not turn on whether the trustee chooses to liquidate the business by sale of assets or by sale of the going concern. Thus, the Department commentary makes no sense, even on its own terms.

Bartell, at 270.

With respect to the practical illogic of the DOL preamble, Professor Bartell, finds the reasoning "inherently flawed" given DOL's proposed test is "difficult to administer and therefore unpredictable, costly, and harmful to the employees of chapter 11 debtors." *Id*. at 264 This holds true for employees of chapter 7 debtors, as well.

> Without statutory or regulatory guidance on when a fiduciary becomes a liquidating fiduciary, bankrupt employers, their creditors, and employees will be unable to determine whether and when notice must be given. Uncertainty invariably leads to increased cost and delay, two commodities a bankrupt case can ill-afford. The parties most hurt by that uncertainty tend to be the very parties the WARN Act was intended to protect, the terminated employees, because when their right to notice (and payment) is uncertain, they must pursue their claims through judicial process. The Department regulation necessarily requires these fact-sensitive determinations and is, therefore, inherently flawed.

Id. at 274-75 (*citations omitted*).

3. *The DOL liquidating fiduciary response lacks the "consistency" required for it to be persuasive under Skidmore.*

Under *Skidmore* deference, the DOL's opinion's influence is dependent upon "consistency with earlier and later pronouncements." *Kellogg v. Wyeth*, 612 F. Supp. 2d 421, 433 (D. Vt. 2008). The DOL's preamble is unworthy of *Skidmore* deference because it was the DOL's sole foray into WARN, thus no consistency can be demonstrated. Tellingly, *Skidmore* assumes that the agency issuing interpretive material will have some earlier or later experience with the subject matter that would show consistency. The DOL had no prior experience with WARN nor any similar statute prior to issuing the preamble, and has not made any

pronouncements since 1989. Its only other pronouncement was the final rule it issued simultaneously with the preamble, and with that, the preamble is inconsistent.

The liquidating fiduciary rule cuts against the DOL's final rule which gives companies no means to shed their employer status based on their level of activity. As mentioned above, the final rule specifies that the only entity whose employer status is dependent on its commercial activity is a governmental entity. At the same time, the DOL's final rule accepts that any "non-profit organization" is an employer without regard to whether or not it engages in activities of a commercial nature that bear a resemblance to business. 20 C.F.R. § 639.3 The DOL preamble confusedly applies to bankrupt businesses the criterion that it applied to governmental entities, as if the liquidating fiduciary were an arm of government. But a bankrupt fiduciary, if that is taken to mean a debtor in possession or a chapter 7 trustee, is not a government or its representative. As Prof. Bartell points out:

> Although the trustee may be appointed by the United States Trustee (an official of the U.S. Justice Department), appointed by the bankruptcy judge, or elected by the creditors pursuant to the Code, the trustee is a private "disinterested person," not a government official. The trustee is a fiduciary for creditors (which may include the government, but need not) and for shareholders. Except in that capacity, the trustee does not represent the government and, in fact, is often in the position of pursuing actions against the government.

Bartell, at 285 (*citations omitted*).

In the case of the SIPA Trustee, Mr. Giddens, a partner of a private law firm, was designated by a private non-profit corporation, the SIPC. If anything, he represents that private corporation or the private, non-profit corporation MFGI, not the government. Moreover, the preamble's purported release of chapter 7 and 11 fiduciaries from their employer duties under WARN contradicts the general rule of employment law, and all other federal and state laws - that bankruptcy trustees must comply with them as any business owner would. *In re Friarton*

Estates Corp., 65 B.R. 586, 588 (Bankr. S.D.N.Y. 1986). According to the *Friarton* Court, the "resolution of competing state and federal law must begin with 28 U.S.C. § 959(b). Section 959(b) provides that:

> [e]xcept as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor-in-possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

In re Friarton Estates Corp., 65 B.R. 586, 588 (Bankr. S.D.N.Y. 1986).

Finally, the interpretation of the preamble that the SIPA Trustee and Holdings espouse defeats and contradicts the plain language of WARN and its regulations. See *Bd. of Ed. of City Sch. Dist. of City of New York v. Harris*, 622 F.2d 599, 613-14 (2d Cir. 1979). Congress did not leave the important issue of WARN's application in bankruptcy, with potentially disastrous impact on U.S. workers, to a cryptic comment in an unvetted preamble. Congress was aware of the likelihood that WARN would apply in the bankruptcy context. The proponents of WARN in Congress specifically used examples of layoffs in bankruptcy when calling on the members to enact WARN. *See* Bartell, at 243, fn. 245, *citing* 131 Cong. Rec. H9994-5 (daily ed. Nov. 12, 1985) (statement of Rep. Conte) (discussing X-Tyal International Corp.); 131 Cong. Rec. H10, 468 (daily ed. Nov. 21, 1985) (statement of Rep. Lundine) (discussing Art Metal-USA, Inc.) The DOL did not understand that it was ruling on the applicability of WARN in the bankruptcy context in the preamble such that it would negate the very purpose of the law.

VII. THIS COURT SHOULD NOT DEFER TO THE DOL PREAMBLE BECAUSE, EVEN IF MFGI'S MOTION IS DENIED, IT WOULD LEAD TO AN UNTENABLE RESULT.

A. Applying the preamble to dismiss the complaint would amount to legislation without an opportunity for participation.

Even assuming arguendo that the preamble's fiduciary comment was due a level of deference, the Defendant's application of it far exceeds the DOL's intended use. The comment was not meant to be an interpretive rule or a statement of agency policy or practice. It was rather mere "advice" about the new WARN Act for employers. Congress trained "considerable focus on companies that were financially troubled" when passing the WARN Act. Bartell at 290 (citations omitted). A piece of advice should not be allowed to anull the statutory rights of millions of U.S. workers whom Congress chose to protect in a statute whose terms, on their face, protect them whether or not they work in bankrupt companies. Congress provided no indication that one terminated employee should be entitled to less protection than the other. *Id*. at 290. It is unfair to disenfranchise employees who "did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon [them] by operation of law." *Reading Co. v. Brown*, 391 U.S. 471 478 ((1968). Nor does it make good policy, for as Prof. Bartell notes:

> there is no reason to distinguish between an employer who is in bankruptcy and one who is not; the aggrieved employees are still being terminated and have the same need for notice in order to give them time to seek new jobs and adjust to their changed circumstances, and the local authorities still have the same concerns about the loss of jobs in their communities. … If providing prenotification outside of bankruptcy is likely to reduce the time of unemployment for those affected employees, (citations omitted) thereby saving tax dollars in the form of unemployment compensation, food stamps, welfare payments, and lost income taxes, and increasing productivity, those results are equally likely to be true for prenotification by bankrupt employers. A terminated employee is equally out of a job whether the employer doing the firing is in bankruptcy or not. Congress provided no indication that one terminated employee should be entitled to less protection than the other.

A chapter 7 is a business employer especially when it receives court authorization to operate in the sense of hiring, paying, supervising, and firing employees albeit through its authorized representative, here the SIPA Trustee. The estate of the debtor employer should bear the burden of liabilities imposed by compliance with federal law under WARN in taking those actions just as it must under every other employment law. *Id*. at 287.

Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. Had the DOL wished to create a "springing" employer status for entities in bankruptcy – akin to that of government entities – it could have framed a proposed rule defining "employer" status as disappearing and reappearing depending on the entities' level of commercial activities. It would have had to take the definition out of the realm of unenforceable "advice" by subjecting it to notice, a period of review, and comment, as it did the government employer definition, so that the public could question, and if necessary, object to it. But it did not do that with respect to liquidating fiduciaries.

Absent APA compliance, no court should pay obeisance to this concept by nullifying the protections of the WARN Act. MFGI asks this Court to bind the Plaintiffs and putative class to "a proposition" that they, and the American workforce, had "no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them." *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 57-58 (1990). The DOL itself is not bound to its own comment given it lacks enforcement powers. "To give any deference" to the liquidating fiduciary defense here "would visit a particularly "odious frustration ... upon the affected private parties." *Id*.

This Court need not, and should not, bind itself to a piece of agency advice that "boils down to saying that once a business shuts down, it is not subject to the WARN Act. In other words, the precise action that triggers liability--closing abruptly without compensation--also serves to eliminate that liability." Karen Cordry, *Missing the Forest for the Trees*, 19 Am. Bankr. Inst. J. 8, *8 (June 2000).

B. Applying the preamble would mire the estate in protracted, costly litigation.

The SIPA Trustee seeks a judgment that it was not the employer of the Plaintiffs as a liquidating fiduciary without offering any evidence in support of that proposition except for the MFGI Liquidation Order and a reference to the SIPA statute. The SIPA Trustee does not deny that MFGI was the employees' WARN employer until the Order was entered. Nor does he dispute that thereafter, MFGI continued to run the broker dealer in the sense of paying, supervising, and firing employees albeit through the SIPA Trustee, and therefore was their statutory employer for all non-WARN purposes. Nor does the SIPA Trustee deny that the Order authorized him not solely to liquidate but to operate the business during those 11 days - with the aim of liquidation perhaps – but in ways that are consistent with running a going concern. According to the SIPA Trustee, SIPA provided him the authority to "sell or transfer offices and other productive units of the business of the debtor … and to liquidate the business of the debtor." TMOL at 5, *quoting* 15 U.S.C. § 78 fff(a). MFGI thus may have been engaged in selling parts of the broker deal as a going concern.

As Prof. Bartell has explained in detail, "the duties of trustees in bankruptcy, even in a liquidating case, extend far beyond mere liquidation":

> A chapter 7 trustee, whose first duty is to "collect and reduce to money the property of the estate for which such trustee serves," (citations omitted) has various other administrative responsibilities in connection with the case.[136] Those duties may, in themselves, constitute doing "business" (citations omitted) and render the supposed exclusion for bankruptcy fiduciaries inapplicable. Indeed, the Supreme Court has

> indicated "the Bankruptcy Code gives the [chapter 7] trustee wide-ranging management authority over the debtor," and the trustee "assumes control of the business."[138]

Bartell, at 267-68 (2002), *citing Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 105 S. Ct. 1986, 1993, 85 L. Ed. 2d 372 (1985)("he may use, sell, or lease property of the estate.)

Prof. Bartell points out that the chapter 7 trustee may engage in fairly conventional business activities in performing the orderly liquidation of the business. "Although the original purpose behind this provision [chapter 7 must be given court permission to operate the business] was to permit the trustee to convert raw materials and components into finished inventory to increase the value obtainable upon their sale, it is also used when the value obtainable upon sale of the business as a going concern exceeds the liquidation value of the assets." Bartell, 18 Bankr. Dev. J. at 295. Thus, "even what is traditionally considered a chapter 7 liquidation may involve the trustee operating the business, rendering the bankrupt business a 'business enterprise' that should, under the Department preamble, be subject to the WARN Act requirements. *Id.*

The SIPA Trustee provides no evidence that it was not authorized to operate the broker-dealer MFGI for the purpose of operating the business. To the contrary, the Order appointing the SIPA Trustee authorized him to conduct business in the ordinary course:

> X. ORDERED that pursuant to 11 U.S.C. §721, the SIPA Trustee, as appointed herein, is authorized to operate the business of MF Global Inc. to: (a) conduct business in the ordinary course until 6:00 p.m. on November 3, 2011, including without limitation, the purchase and sale of securities, commodities futures and option transactions, swaps and securities-based swaps and obtaining credit and incurring debt in relation thereto; (b) complete settlements of pending transactions, and to take other necessary and appropriate actions to implement the foregoing, in such accounts until 6:00 p.m. on November 7, 2011; and (c) take other action as necessary and appropriate for the orderly transfer of customer accounts and related property.

Order, dated Oct. 31, 2011, *SIPC v. MF Global Inc*., 11 civ 7750 (Engelmayer, J.) (Dkt #1) (cited in TMOL as "MFGI Liquidation Order" at 2)

The SIPA Trustee also has been ordered to "investigate the circumstances surrounding the failure of MFGI and report to the Court…" (SIPA Trustee's Statement with Respect to Expedited Motion By Sapere Wealth Management et al., ¶ 3, Dkt #358, *cited* in Exhibit B to Holdings' Motion to Dismiss at page 10), which goes beyond what is strictly necessary to liquidate an estate.

To "protect customers of the brokerage" and "satisfy their claims" are also consistent with the activities of a going concern brokerage that is not liquidating. The SIPA Trustee, at bottom, is asking this Court to rule that chapter 7 trustees are immune from the WARN Act regardless of what they actually do, but the authority it cites does not go that far. TMOL at 6.

The authority on which the SIPA Trustee principally relies, *In re Century City Doctors Hosp., LLC,* is inapposite. 2010 WL 6452903 (B.A.P. 9th Cir. Oct. 29, 2010). First, neither the bankruptcy court nor the Ninth Circuit BAP considered whether the DOL liquidating fiduciary comment should be entitled to deference. The BAP held that even if the plain meaning of WARN suggests a chapter 7 trustee is an "employer," that "plain meaning definition could not trump the Ninth Circuit's construction of that term; we are bound by the Ninth Circuit's interpretation." *In re Century City Doctors Hosp*., LLC, 2010 WL 6452903 (B.A.P. 9th Cir. Oct. 29, 2010).

The Ninth Circuit in its *Century City* opinion (which is marked "not for publication") avoided inquiry into the level of deference warranted by the preamble by relying on an inapposite, prior decision of that Court. *Id*. at *7 *citing Chauffeurs, Sales Drivers, Warehousemen & Helpers Union v. Weslock Corp.*, 66 F.3d 241, 244 (9th Cir.1995). In *Weslock*, the Ninth Circuit panel used the liquidating fiduciary comment "[f]or the purpose of determining when a defendant becomes an employer under WARN." 2010 WL 6452903 at *7.

Of course, this usage of the DOL passage flips it on its head, turning it from an exit door from employer status, as MFGI contends it is, into an entrance way. In *Weslock*, the Ninth Circuit was asked whether a non-employer, a secured creditor bank, could be deemed an employer under the single employer theory. *Weslock*, 66 F.3d at 244 ("Accordingly, we rely on the statute's definition and the agency's commentary to conclude that WARN's obligations indeed can apply to a secured creditor, but only where the creditor operates the debtor's asset as a "business enterprise" in the "normal commercial sense.") The Ninth Circuit confused the fiduciary passage with the rules that do pertain to whether an independent contractor can be deemed an employer – which are framed in the codified regulations in the "single employer" provision. The Ninth Circuit in *Weslock* was clearly not concerned with whether a chapter 7 fiduciary, who is an employer *ab initio,* could lose its employer status.

The Ninth Circuit's application of the preamble is irrelevant in the Second Circuit. The Second Circuit, in ruling on the issue of whether a secured creditor could be an "employer," considered the correct "single employer" regulations, as well as the *Weslock* opinion, but appeared to steer clear of the liquidating fiduciary comment. *Coppola v. Bear Stearns & Co., Inc.*, 499 F.3d 144, 150 (2d Cir. 2007) As it happens, in *Coppola*, the Second Circuit set a high bar for secured creditors to become employers. But it did so based on the appropriate DOL codified regulations setting forth the single-employer test, not on the preamble. *Id.*

The Ninth Circuit in *Weslock* erred in confusing the single-employer rules with the liquidating fiduciary "rule." Neither the Ninth Circuit's application of the liquidating fiduciary comment, nor the reliance it placed on the preamble, should be binding on this Court. *Century City* is therefore not persuasive authority in that it relies on *Weslock* for the proposition that the preamble is authoritative law.

Century City is also inapposite on its facts. First, the *Century City* plaintiffs did not claim that anyone was responsible for their terminations other than the Trustee. Thus, the BAP held that "because only the Trustee had the authority post petition to terminate the Plaintiffs, the sole person responsible for the Plaintiffs' terminations had to be the Trustee." 2010 WL 6452903 at *11.

Here, by contrast, the Amended Complaint has alleged MFGI was a single-employer with its parent MF Global Holdings, Ltd. The allegations which must be taken as true are that the decisions to employ and terminate the MF Global employees were not solely controlled by MFGI as opposed to its parent. There is nothing in the MFGI's motion to dismiss that speaks to its authority for dealing with the Plaintiffs and similarly situated employees. Its own Statement of Facts is carefully worded, admitting only that "the Trustee, on behalf of MFGI, informed MFGI's employees … that they were terminated, effective immediately." MTD of SIPA Trustee at 3 (*citing* Amended Complaint ¶ 16, which appears to be amiss). The Trustee does not claim it made the decision to terminate the employees, only that it "informed them." Here, the Plaintiffs' alleged MFGI "continued to operate as a business" with MF Global Holdings, Ltd. in more than 40 paragraphs of facts that would make MFGI liable as the WARN employer even if the termination decision was controlled by MF Global Holdings and regardless of whether the SIPA Trustee operated the entity in the "normal commercial sense." (Compl. ¶¶ 40-80).

Second, *Century City* is inapposite in that the plaintiffs' admitted the liquidation had taken place. 2010 WL 6452903 at *13. In denying leave to amend the complaint, the BAP held there were "no allegations that Plaintiffs could have added to the complaint that would have made the Trustee anything other than a liquidating fiduciary." *Id.* Here, the Plaintiffs have not conceded the liquidation has taken place. The number of years and millions of dollars it will

take to liquidate the SIPA estate is unknown. Given the single-employer allegations and the "evidence" referenced in the Plaintiffs' Objection to the Motion to Dismiss of the MF Global Holdings, regarding its declaration to operate as an ongoing concern, the Court should permit Plaintiffs' leave to amend the complaint if it finds it is currently insufficient. Unlike *Century City*, the Amended Complaint is hardly "beyond cure." *Id.*

VIII. NEW YORK'S WARN ACT DOES NOT EXEMPT LIQUIDATING FIDUCIARIES

The New York WARN Act became effective on February 1, 2009, after the WARN Act, and although it is based on the WARN Act, New York WARN is more expansive than its federal counterpart.[2] The New York WARN Act's definition of "employer" is also more specific than its federal counterpart providing:

> "Employer" means any business enterprise that employs fifty or more employees, excluding part-time employees, or fifty or more employees that work in the aggregate at least two thousand hours per week. **"Employer" shall not include the federal or state government or any of their political subdivisions, including any unit of local government or any school district**.

NY CLS Labor § 860-a (*emphasis added*). Specifically, unlike its federal counterpart, the New York definition contains an explicit exception within the statutory text itself. *Compare id.* with 29 U.S.C. § 2101.[3] Under the canon *expressio unius est exclusion alterius* where the legislature expresses or includes one thing there is an implied exclusion of another or of alternatives. *See* TRW. Inc. v. Andrews, 534 U.S. 19, 28, 122 S. Ct. 441, 448, 151 L. Ed. 2d 339 (2001) ("Where

[2] *See* NY CLS Labor § 860-a (provides the NY WARN Act applies to an employer of only 50 employees where as the Federal WARN Act is only applicable to employers of 100 or more employers); NY CLS Labor § 860-b, it is more easily triggered since it requires notice of relocations which are not required to be noticed under the federal WARN Act, and this section of the New York WARN Act requires 90 days notice of the layoff as opposed to 60 days notice required by the federal WARN Act.

[3] The WARN Act defines employer as:

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied …." (*quoting Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S. Ct. 1905, 64 L. Ed. 2d 548 (1980)). Accordingly, under that doctrine, the specific inclusion of the sole exception to the NY WARN Act precludes this court from statutorily recognizing another one.

In addition to the text itself suggesting the non-existence of an additional exception to the definition of employer, the regulations enacted by the New York Department of Labor, specifically provide that those who represent bankrupt employer entities are *themselves* intended to be encompassed within the scope of the definition of employer:

> (e) Employer…
> (3) A receiver trustee, **debtor-in-possession,** or other fiduciary, where those terms are applicable under the provisions of the U.S. Bankruptcy Code (title 11 of the United States Code), or any other provision of Federal or State law where such party is responsible for continuing operations of the business entity, **is considered an employer under this Part.**

N.Y. Comp. Codes R. & Regs. Tit. 12 § 921-1.1(e)(3). Nothing in the regulations, nor New York WARN suggests the bankrupt entity ceases to be an employer by virtue of a cessation of operations. Whether or not they ceases those operations does not affect their status as employers under New York's WARN Act. In sum, because New York's WARN Act does not recognize an exception for liquidating fiduciaries, this Court should not recognize such an exception, and should deny the Motion to Dismiss, at least as to the Plaintiffs' claims arising under the New York WARN Act.

IX. ILLINOIS' WARN ACT DOES NOT EXEMPT LIQUIDATING FIDUCIARIES.

The Illinois WARN Act became effective on January 1, 2005, after the enactment of the federal WARN Act, and it, too, is more expansive than its federal counterpart.[4] Additionally, like the New York WARN Act, the Illinois WARN Act has a more specific definition of "employer" than the federal WARN Act, and defines employer in two different places. Section 2 of Illinois WARN act defines an employer to:

> include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.

820 ILCS 115/2. Section 13 of the Illinois WARN Act further states that "any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation." 820 ILCS 115/13. Clearly, had the Illinois legislature intended to exempt liquidating fiduciaries from liability under the Illinois WARN Act it clearly could have carved out an exception for these fiduciaries under either of these two sections. The legislature's failure to carve out such an exception is evidence that no such exception exists. Accordingly, even if the Court finds the liquidating fiduciary exception exists under the federal WARN Act, it should not presume that such an exception exists under the Illinois WARN Act and should therefore let the counts arising under the Illinois WARN Act proceed.

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[4] *See* 820 ILCS 65/5(c)(defining employer to include anyone who employees only 75 or more employees, as opposed to the federal WARN Act that requires employment of at least 100 employees); 820 ILCS 65/5(d) (defining mass layoff to include the termination of only 25 employees if that constitutes 33% of the employees employed at a single site); 820 ILCS 65/10 (the notice required by the Illinois WARN act is broader than the notice required by the WARN Act).

X. CONCLUSION

For any and/or all of these reasons, the Plaintiffs respectfully request the court deny the relief requested in the Motion.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC. et al.	:	Case No. 11-15059 (MG)
	:	Case No. 11-15058 (MG)
	:	Case No. 11-02790 (MG) SIPA
Debtors.	:	(Jointly Administered)
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, and ARTON SINA, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	Adv. Pro No. 11-02880 (MG)
v.	:	
MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,	:	
Defendants.	:	

DECLARATION OF JACK A. RAISNER PURSUANT TO RULE 7056(d) IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

I, Jack A. Raisner hereby declare the following under penalty of perjury:

1. I am a Partner at Outten & Golden LLP, attorneys for Plaintiffs herein, and an attorney in good standing admitted to practice before this Court.

2. I make this declaration in connection with Plaintiffs' Opposition to Defendants MF Global Holdings Ltd. *et al*.and MF Global Inc.'s Motions to Dismiss the Complaint.

3. I am fully familiar with the facts and circumstances of this matter, and I make the representations herein based upon my personal knowledge or upon the documents that are of record in this matter.

4. On December 12, 2011, the Plaintiffs filed a consolidated Amended Complaint (hereafter the "Complaint") asserting WARN claims against Defendants on behalf of themselves and a class of all other similarly situated former employees (the "Class") arising from Defendants' termination of its employees without 60 days prior written notice on or about November 11, 2011.

5. Plaintiffs granted Defendants' requests to extend the due date for filing answers.

6. The parties have not engaged in any discovery in this case.

7. Defendants filed Motions to Dismiss in lieu of answering on March 5, 2012 (MF Global Inc.) and March 7, 2012 (MF Global Holdings Ltd.)

8. Both motions refer to documents beyond the Amended Complaint. The Motion to Dismiss of MG Global Holdings Ltd. is accompanied by several Declarations of its Counsel Laurie R. Ferber, dated, December 19, 2011, and March 2, 2012, as well as a decision of this Court Denying Motion to Direct the Debtors' Estate to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 CFR §190, dated March 3, 2012. The SIPA cites to various items in the ECF Docket.

9. The Defendants' reference to these documents goes beyond the Amended Complaint. Defendant MF Global acknowledges that citations to "matters outside the pleadings" generally invite the court to treat the motion as one for summary judgment. (Motion to Dismiss

of MF Global Holdings Ltd. *et al*., at 3 fn.4). MF Global Holdings Ltd. claims, however, that it is "well-settled" that "court documents in the underlying bankruptcy case [i.e., its attachments] are subject to judicial notice in related adversary proceedings and can be relied upon without converting the motion into one for summary judgment." MF Global Holdings Ltd articulates a broad proposition that it is "appropriate to take judicial notice of filings in bankruptcy proceedings" citing the opinion in *In re Old CarCo LLC*, 454 B.R. 38, 54 (Bankr. S.D.N.Y. 2011) *aff'd*, 11 CIV. 5039 DLC, 2011 WL 5865193 (S.D.N.Y. Nov. 22, 2011). Neither this decision, however, nor any of the authorities MF Global Ltd. cites, in fact support such a generous judicial notice rule. In *Old Carco*, for example, notice was taken of a receivable the debtor filed its own bankruptcy filings, the issue of its legitimacy based on whether it listed it as an asset or liability. The limited use of judicial notice to look at a party's own adverse filings is one thing. Citing portions of a court opinion in an unrelated proceeding or defendant's counsel's own self-serving declarations, as MF Global Holdings Ltd. does here, to establish "evidence" in its favor, is another.

10. In the event this Court decides to consider these materials at all, but finds them beyond the proper scope of Rule 7012(b)(6) and thereby converts Defendants' motion to dismiss to motions for summary judgment under Fed. R. Bankr. P. 7056, Plaintiffs would respectfully request that the Court deny Defendants' Motions for Summary Judgment pursuant to Fed. R. Civ. P. 56(d), or order a continuance so that Plaintiffs may engage in discovery before the Court rules on Defendants contention that it was not an "employer" as defined by the WARN Act.

11. In such discovery, Plaintiffs' would seek to develop evidence demonstrating that Defendants' were not solely functioning as liquidators from Oct. 31, 2011 to November 11,

2011, and they carried on activities consistent with employer status under the WARN Acts, to the extent the Court rules that issue is germane.

12. Alternatively, Plaintiffs would respectfully request that the Court grant Plaintiffs leave to amend the Amended Complaint without prejudice.

Dated: May 14, 2012
New York, New York

Respectfully submitted,

OUTTEN & GOLDEN LLP

By:

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC. et al.	:	Case No. 11-15059 (MG) Case No. 11-15058 (MG) Case No. 11-02790 (MG) SIPA
	:	(Jointly Administered)
Debtors.	:	
Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles, and Arton Sina, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	
v.	:	
MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,	:	
Defendants.	:	

AMENDED CLASS ACTION ADVERSARY PROCEEDING COMPLAINT FOR (1) VIOLATION OF THE WARN ACT 29 U.S.C. § 2101, *et seq.*; (2) VIOLATION OF NEW YORK WARN ACT, LABOR LAW § 860 *et seq.*(3) VIOLATION OF THE NEW YORK WAGE PAYMENT LAW, LABOR LAW § 190 *et seq.*; and (4) VIOLATION OF THE ILLINOIS WAGE PAYMENT AND COLLECTION ACT, IL ST CH 820 § 115/1 *et seq.*

Plaintiffs Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles, and Arton Sina ("Plaintiffs") allege on behalf of themselves and the class of those similarly situated as follows:

NATURE OF THE ACTION

1. Defendants were one of the world's leading brokers and broker-dealers for commodities, listed derivatives, fixed income services, equities and foreign exchange. Defendant MF Global Holdings employs more than 2800 employees internationally. Plaintiffs worked for Defendants until their termination on or about November 11, 2011. More than 1,000 employees were laid off on November 11, without any advance notice.

2. The Plaintiffs bring this action on behalf of themselves, and other similarly situated former employees who worked for Defendants and who were terminated without cause, as part of, or as the result of, a mass layoff or plant closings ordered by Defendants on or about November 11, 2011, and within thirty (30) days of that date, and who were not provided 60 days advance written notice of their terminations by Defendants, as required by 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*.

3. Plaintiffs and all similarly situated employees seek to recover 60 days wages and benefits, pursuant to 29 U.S.C. § 2104, from Defendants. The New York Plaintiffs and similarly situated employees in New York seek to recover 60 days wages and benefits. NYLL § 860 *et seq.* Plaintiffs' WARN Act claims, as well as the claims of all similarly situated employees, is entitled to first priority administrative expense status pursuant to the United States Bankruptcy Code § 503(b)(1)(A).

4. Defendants also willfully refused to compensate Plaintiffs and other similarly situated former employees for accrued vacation time, in violation of the New York Wage Payment Law, Labor Law § 190 *et seq.* ("Wage Payment Law"), and the Illinois Wage Payment

and Collection Act, IL ST CH 820 § 115/1 *et seq.* ("Wage Payment Act"), together the "Wage Laws."

5. Plaintiffs also seek to recover unpaid wages and benefits pursuant to the state laws of New York and Illinois, for themselves and all similarly situated employees, and seek wage priority treatment for those claims under United States Bankruptcy Code § 507(a)(4)-(5).

JURISDICTION AND VENUE

3. This Court has jurisdiction over this adversary pursuant to 28 U.S.C. §§ 157, 1331, 1334, 1367 and 29 U.S.C. § 2104(a)(5).

4. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B) and (O).

5. The violation of the WARN Act alleged herein occurred in this district.

6. Venue in this Court is proper pursuant to 29 U.S.C. § 2104(a)(5) and NYLL § 860-G(7).

THE PARTIES

Plaintiffs

7. Plaintiff Pierre-Yvan Desparois was an employee of Defendants and worked as a Vice President in Credit Risk Management at the Defendants' office located at 717 Fifth Avenue, New York, New York (the "Headquarters Facility"), which employed approximately 450 employees until his termination on or about November 11, 2011.

8. Plaintiff Todd Thielmann was an employee of Defendants and worked as a Floor Broker at the Defendants' offices located in Chicago, Illinois which employed approximately 600 employees until his termination on or about November 11, 2011.

9. Plaintiff, Sandy Glover-Bowles, was employed by Defendants and worked at Defendants' office located at 440 South LaSalle Street, 20th Floor, Chicago Illinois (the "LaSalle Facility") until his termination on or about November 11, 2011.

10. Plaintiff, Natalia Sivova, was employed by Defendants and worked at the Headquarters Facility until her termination on or about November 11, 2011.

11. Plaintiff Arton Sina was employed by Defendants and worked at the Headquarters Facility until his termination on or about November 11, 2011.

Defendants

12. Debtor MF Global Holdings Ltd ("Holdings Ltd."), a Delaware company, is the ultimate parent of wholly-owned subsidiaries that combined with itself, it refers to collectively as the "Company" or "MF Global Group," and in that corporate structure appears as the direct parent of non-debtor MF Global Holdings USA Inc. ("Holdings USA"), a New York corporation.

13. Non-debtor MF Global Holdings USA Inc. appears in the Company structure as the intermediate parent between Holdings Ltd. and other wholly owned subsidiaries of Holdings Ltd., including, non-debtor MF Global Inc. ("Global Inc."), a Delaware company, and Debtor MF Global Finance USA Inc. ("Global Finance"), a New York corporation.

14. MF Global Holdings Ltd. maintained and operated its corporate headquarters at the Headquarters Facility and maintained and operated additional sites and facilities, as that term is defined by the WARN Act and NY WARN Act, including the LaSalle Facility, 55 East 52nd Street, 40th Floor, New York, New York (the "52nd Street Facility"), and the West Jackson Facility (collectively the "Facilities").

15. Holdings USA, Global Finance and Global Inc. gave as the location of their corporate headquarters the Headquarters Facility.

16. Until on or about November 11, 2011, the Plaintiffs and the other similarly situated former employees were employed by Defendants and worked at or reported to one of the Facilities.

17. On October 31, 2011, Defendants Holdings Ltd. and Global Finance filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code, while Holdings USA and Global Inc. were placed into a Securities Investor Protection Act ("SIPA") proceeding that same day.

WARN CLASS ALLEGATIONS

18. Plaintiffs bring the First Claim for Relief for violation of 29 U.S.C. § 2101 *et seq.*, on her own behalf and on behalf of all other similarly situated former employees, pursuant to 29 U.S.C. § 2104(a)(5) and Federal Rules of Civil Procedure, Rule 23(a) and (b), who worked at or reported to one of Defendants' Facilities and were terminated without cause on or about November 11, 2011, and within 30 days of that date, or were terminated without cause as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered by Defendants on or about November 11, 2011, and who are affected employees, within the meaning of 29 U.S.C. § 2101(a)(5) (the "WARN Class").

19. The persons in the WARN Class identified above ("WARN Class Members") are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, the facts on which the calculation of that number can be based are presently within the sole control of Defendants.

20. On information and belief, the identity of the members of the class and the recent residential address of each of the WARN Class Members is contained in the books and records of Defendants.

21. On information and belief, the rate of pay and benefits that were being paid by Defendants to each WARN Class Member at the time of his/her termination is contained in the books and records of the Defendants.

22. Common questions of law and fact exist as to members of the WARN Class, including, but not limited to, the following:

(a) whether the members of the WARN Class were employees of the Defendants who worked at or reported to Defendants' Facilities;

(b) whether Defendants, as a single employer, unlawfully terminated the employment of the members of the WARN Class without cause on their part and without giving them 60 days advance written notice in violation of the WARN Act; and

(c) whether Defendants unlawfully failed to pay the WARN Class members 60 days wages and benefits as required by the WARN Act.

23. The Plaintiffs' claims are typical of those of the WARN Class. The Plaintiffs, like other WARN Class members, worked at or reported to one of Defendants' Facilities and was terminated without cause on or about November 11, 2011, due to the mass layoffs and/or plant closings ordered by Defendants.

24. The Plaintiffs will fairly and adequately protect the interests of the WARN Class. The Plaintiffs have retained counsel competent and experienced in complex class actions, including the WARN Act and employment litigation.

25. Class certification of these claims is appropriate under Fed.R. Civ.P. 23(b)(3) because questions of law and fact common to the WARN Class predominate over any questions affecting only individual members of the WARN Class, and because a class action is superior to

other available methods for the fair and efficient adjudication of this litigation – particularly in the context of WARN Act litigation, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant, and damages suffered by individual WARN Class members are small compared to the expense and burden of individual prosecution of this litigation.

26. Concentrating all the potential litigation concerning the WARN Act rights of the members of the Class in this Court will obviate the need for unduly duplicative litigation that might result in inconsistent judgments, will conserve the judicial resources and the resources of the parties and is the most efficient means of resolving the WARN Act rights of all the members of the Class.

27. Plaintiffs intend to send notice to all members of the WARN Class to the extent required by Rule 23.

NEW YORK WARN ACT CLASS ALLEGATIONS

28. Plaintiffs Natalia Sivova, Pierre-Yvan Desparois, and Arton Sina (the "NY Plaintiffs") bring the Second Claim for Relief for violation of NYLL § 860 *et seq.*, on behalf of themselves and a class of similarly situated persons pursuant to NYLL § 860-G (7) and Federal Rules of Civil Procedure, Rule 23(a) and (b), who worked at or reported to one of Defendants' Facilities and were terminated without cause on or about November 11, 2011, and within 30 days of that date, or were terminated without cause as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered by Defendants on or about November 11, 2011, and who are affected employees, within the meaning of NYLL § 860-A (1),(4) and(6) (the "NY WARN Class")

29. The persons in the NY WARN Class identified above ("NY WARN Class Members") are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, the facts on which the calculation of that number can be based are presently within the sole control of Defendants.

30. On information and belief, the identity of the members of the class and the recent residential address of each of the NY WARN Class Members is contained in the books and records of Defendants.

31. On information and belief, the rate of pay and benefits that were being paid by Defendants to each NY WARN Class Member at the time of his/her termination is contained in the books and records of the Defendants.

32. Common questions of law and fact exist as to members of the NY WARN Class, including, but not limited to, the following:

(a) whether the members of the NY WARN Class were employees of the Defendants who worked in a covered site of employment of Defendants;

(b) whether Defendants, as a single employer, unlawfully terminated the employment of the members of the NY WARN Class without cause on their part and without giving them 90 days advance written notice in violation of the WARN Act; and

(c) whether Defendants unlawfully failed to pay the NY WARN Class members 60 days wages and benefits as required by the WARN Act.

33. The NY Plaintiffs' claims are typical of those of the NY WARN Class. The NY Plaintiffs, like other NY WARN Class members, worked at or reported to one of Defendants' Facilities and were terminated on or about November 1, 2011, due to the termination of the Facilities ordered by Defendants.

34. The NY Plaintiffs will fairly and adequately protect the interests of the NY WARN Class. The NY Plaintiffs have retained counsel competent and experienced in complex class actions on behalf of employees, including the WARN Act, state laws similar to WARN, and employment litigation.

35. Class certification of these Claims is appropriate under Fed.R. Civ.P. 23(b)(3) because questions of law and fact common to the NY WARN Class predominate over any questions affecting only individual members of the NY WARN Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of NY WARN Class Act litigation, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant, and damages suffered by individual NY WARN Class members are small compared to the expense and burden of individual prosecution of this litigation.

36. Concentrating all the potential litigation concerning the NY WARN Act rights of the members of the Class in this Court will obviate the need for unduly duplicative litigation that might result in inconsistent judgments, will conserve the judicial resources and the resources of the parties and is the most efficient means of resolving the NY WARN Act rights of all the members of the Class.

37. The NY Plaintiffs intend to send notice to all members of the NY WARN Class to the extent required by Rule 23.

CLAIM FOR RELIEF

WARN ACT Cause of Action

38. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

39. At all relevant times, Defendants employed more than 100 employees who in the aggregate worked at least 4,000 hours per week, exclusive of hours of overtime, within the United States.

40. At all relevant times, Defendants were an "employer," as that term is defined in 29 U.S.C. § 2101 (a)(1) and 20 C.F.R. § 639(a) and continued to operate as a business until it decided to order a mass layoff or plant closing at the Facilities.

41. The Defendants constituted a "single employer" of the Plaintiffs and the Class Members under the WARN Act.

42. Holdings Ltd. asks that it be considered as "one enterprise" with its subsidies when filing SEC Form 8-K reports and specifically in its Underwriting Agreements.

(a) In its financial statements, Holdings Ltd. states that it (together with its consolidated subsidiaries), operates and manages its business on an "integrated basis as a single operating segment."

(b) In its consolidated financial statements, Holdings Ltd refers to itself and its principal subsidiaries (including the Defendants) as the "Company."

(c) Holdings Ltd. in its 2011 financing prospectus uses defined terms "we," "our" or "us", throughout, to mean "MF Global Holdings Ltd., … and its consolidated subsidiaries."

(d) Holdings Ltd. and its subsidiaries share a common ownership, in that Holdings Ltd. wholly owns Holdings USA and Global Inc., and owns 75% of Global Finance.

(e) Although Holdings Ltd. and Global Inc. were nominally separated by intermediary parent Holdings USA on its organizational chart filed with this

bankruptcy court in its first day motions, Holdings Ltd. referred in its prospectus offering of February 2010 to Global Inc., as a "wholly-owned subsidiary of Holdings Ltd."

43. Holdings Ltd. has used its financial statement to report the performance of itself and all the Defendants as well as non-defendant subsidiaries on one consolidated basis.

44. Global Inc. filed consolidated income tax returns with Holdings USA.

45. The Defendants shared common directors, in that Holdings Ltd.'s Board of Directors was the sole board of directors among the Defendants and it managed and operated all the Defendants. Its chairman was Jon S. Corzine.

46. The Defendants shared common officers in that Chairman of the Board Corzine was CEO of Holdings Ltd. and of the other Defendants(except Global Finance), Bradley I. Abelow was President and COO of Holdings Ltd. and of the other Defendants (except Global Inc.), Henri Steenkamp, was CFO of Holdings Ltd. and of the other Defendants (except Holdings USA.), and David Dunne was the Treasurer of Holdings Ltd. and of the other Defendants (except Holdings USA).

47. The Company's human resources function was centralized and physically located at the Headquarters Facility although some managers served the Chicago offices. Other departments located at the Headquarters Facility that served the Company as a whole included finance/accounting, marketing, compliance, credit, internal audit, general counsel and treasury.

48. The Company maintained one set of unified personnel policies and applied across the entire spectrum of employees covering pay, benefits, and conduct.

49. The Company's human resources managers conducted recruiting and training for functional departments but did so on behalf of the Company as a whole, without making any distinction made as between the Defendants' separate corporate names and identifies.

50. Human resources was centralized and served Holdings Ltd. and its subsidiaries interchangeably and routinely ignored their separate corporate structures, for example Plaintiff Desparois' paycheck and termination letter identify the employer as "MF Global Holdings USA Inc." while his business card identifies is employer as "MF Global Inc."

51. The employment agreements of senior management identify their employer as MF Global Holdings Ltd., and refer to it and its subsidiaries and affiliates collectively as "MF Global Group."

52. Senior executives' employee benefits, vacation, and business expenses, according to their employment agreements, were governed by the plans, policies and normal practices of the MF Global Group. These senior executives include, Jon S. Corzine (CEO), Bradley Abelow (COO), Henri Steenkamp (CFO), Laurence F. O'Connell (Global Head - Human Resources) and Laurie R. Ferber (General Counsel of Holdings Ltd.) The agreements states the terms of their "employment with MF Global and its subsidiaries and affiliates (together, the 'MF Global Group')."

53. These senior executives' salary, earned bonus, accrued bonus and severance were obligations of Holdings Ltd.

54. The non-competition and non-solicitation restrictions of these senior executives' employment agreements ran in favor of the MF Global Group, as did the non-disclosure of proprietary information restrictions.

55. The CEO Jon Corzine's contract states he was employed by Holdings Ltd. but states that: "'*MF Global Group*' refers to [Holdings Ltd.] and its subsidiaries that are consolidated on [Holdings Ltd.'s] audited financial statements."

56. The "for cause" dismissal clauses of these senior executives' employment agreements referred to conflicts of interest they might have with the MF Global Group and potential breaches of the MF Global Group's written code of conduct and business ethics.

57. Senior executives were subject to termination by Holdings Ltd. and except for the CEO, reported to the CEO of Holdings Ltd.

58. Senior executives were to send notices to Holdings Ltd. or "any other member of the MF Global Group" to the General Counsel of Holdings Ltd.

59. The Board of Directors of Holdings Ltd. itself or through its committees actively participated in the management of the broker-dealer such as by setting credit limit exceptions for particular customer accounts.

60. Holdings Ltd. charged Global Inc. a fee for the services of the Holdings Ltd.'s executive management which managed Global Inc.

61. Human resources managers applied Company policies and carried out their functions without distinguishing between the nominal members of the MF Global Group.

62. The Company's as self-insured health coverage was paid for and offered by parent Holdings Ltd.

63. Company employees participated in Holdings Ltd.'s Long-Term Incentive Plan for their stock-based compensation. Company employees' compensation for services were determined by Compensation Committee of the Board of Directors of Holdings Ltd., and they were paid in Holdings Ltd. own stock.

64. Holdings Ltd. had an Employee Stock Purchase Plan ("ESPP") to provide subsidiary employees with an opportunity to purchase shares of Holdings Ltd.

65. Holdings Ltd. exercised de facto control over the labor practices governing the Company and Class Members, including the decision to order the mass layoff or plant closing at the Facilities.

66. The senior management of Holdings Ltd. in the fourth financial quarter of fiscal year 2011 introduced a new strategic plan that restructured the consolidated company and began by "realigning resources" and "further reduced its workforce" after prior workforce reductions in fiscal 2011. Senior management concentrated layoffs in North America.

67. The Holding Ltd. with its subsidiaries on a consolidated basis recorded restructuring expenses for severance and other employee compensation due to the layoffs and employee contract terminations carried out by its senior management.

68. The Board of Directors of Holdings Ltd. convened on the morning of October 31, 2011 and authorized the filing of the bankruptcy petition.

69. On information and belief, the Board of Directors of Holdings Ltd. on the morning of October 31, 2011 authorized, or acceded to the placing of Holdings USA and Global Inc. in a SIPA proceeding.

70. Between October 31, 2011 and November 11, 2011, the senior executives of Holdings Ltd. including Laurence F. O'Connell, with the authorization of the Board of Directors of Holdings Ltd., reviewed lists of employees in order to determine which employees of the Company would be terminated and when, set terms for the payment of their final wages, and gave instructions to Company human resources managers to carry out the termination of most of the Defendants' employees.

71. Laurence F. O'Connell himself delivered the news to corporate employees on the 9th floor of 717 Fifth Avenue that they were terminated.

72. There was a dependency of operations between Defendants.

73. The substantial majority Holdings Ltd.'s income was derived from operations of its subsidiaries, which generated its operating income and cash flow. Holdings Ltd.'s ability to service its debt was "dependent to a significant extent" on cash from its subsidiaries, according to its prospectus offering of February 2010.

74. Holdings Ltd. and Global Finance served as intermediaries between the overall Company's operating non-Debtor subsidiaries as a conduit to creditors.

75. Global Finance functioned as the central depository for the Company's funds. Holdings Ltd. funded substantially all of the combined company's disbursements after receiving funds from Global Finance, except for payroll.

76. Holdings Ltd together with Global Inc., and Global Finance entered into the June 29, 2011 Revolving Credit Facility with lenders.

77. Under that Facility, Debtors Holdings Ltd. and Global Finance guaranteed a $300 million loan for Global Inc., secured by collateral owned by Holdings Ltd.

78. Global Inc. entered into operating lease agreements with Global Finance, whereby it made monthly payments to Global Finance or use of furniture and equipment.

79. Holdings Ltd. provided non-property insurance coverage to Global Inc.

80. Holdings Ltd. charged Global Inc. a royalty for the use of MF Global trade name.

81. Holdings Ltd and Holdings USA incurred various costs, including insurance that are allocated to, and reimbursed by Global Inc.

82. At all relevant times, Plaintiffs and the other similarly situated former employees were employees of Defendants as that term is defined by 29 U.S.C. §2101.

83. On or about November 11, 2011, the Defendants ordered a mass layoff or plant closing at the Facilities, as that term is defined by 29 U.S.C. § 210l(a)(2).

84. The mass layoff or plant closing at the Facilities resulted in "employment losses," as that term is defined by 29 U.S.C. §2101(a)(2) for at least fifty of Defendants' employees as well as 33% of Defendants' workforce at the Facilities, excluding "part-time employees," as that term is defined by 29 U.S.C. § 2101(a)(8).

85. The Plaintiffs and the Class Members were terminated by Defendants without cause on their part, as part of or as the reasonably foreseeable consequence of the mass layoff or plant closing ordered by Defendants at the Facilities.

86. The Plaintiffs and the Class Members are "affected employees" of Defendants, within the meaning of 29 U.S.C. § 210l(a)(5).

87. Defendants were required by the WARN Act to give the Plaintiffs and the Class Members at least 60 days advance written notice of their terminations.

88. Defendants failed to give the Plaintiffs and the Class members written notice that complied with the requirements of the WARN Act.

89. The Plaintiffs are, and each of the Class Members are, "aggrieved employees" of the Defendants as that term is defined in 29 U.S.C. § 2104 (a)(7).

90. Defendants failed to pay the Plaintiffs and each of the Class Members their respective wages, salary, commissions, bonuses, accrued holiday pay and accrued vacation for 60 days following their respective terminations, and failed to make the pension and 401(k)

contributions and provide employee benefits under ERISA, other than health insurance, for 60 days from and after the dates of their respective terminations.

91. Since the Plaintiffs and each of the Class Members seek back-pay attributable to a period of time after the filing of the Debtors' bankruptcy petitions and which arose as the result of the Debtors' violation of federal laws, Plaintiffs' and the Class Members' claims against Defendants are entitled to first priority administrative expense status pursuant to 11 U.S.C. § 503(b)(l)(A).

92. The relief sought in this proceeding is equitable in nature.

New York WARN Act Cause of Action

93. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

94. At all relevant times, Defendants were individuals or private business entities defined as "employers" under the NY WARN Act and continued to operate as a business until they decided to order a mass layoff or plant closing at the Facilities as defined by § 860-A(3),(4).

95. On or about November 11, 2011, the Defendants ordered a mass layoff and/or plant closing at its Facilities as defined by § 860-A(3),(4).

96. The New York Plaintiffs and the Class Members suffered a termination of employment as defined by § 860-A(2)(C) having been terminated by Defendants without cause on their part.

97. Defendants were required by the NY WARN Act to give the New York Plaintiffs and the Class Members at least 90 days advance written notice of their terminations pursuant to § 860-B.

98. Defendants failed to give the NY Plaintiffs and the NY Class Members written notice that complied with the requirements of the NY WARN Act.

99. Defendants failed to pay the NY Plaintiffs and each of the NY Class Members their respective wages, salary, commissions, bonuses, accrued holiday pay and accrued vacation for 60 days following their respective terminations, and failed to make the pension and 401(k) contributions and provide employee benefits under ERISA, other than health insurance, for 60 days from and after the dates of their respective terminations.

100. Since the NY Plaintiffs and each of the NY Class Members seek severance attributable to a period of time after the filing of the Debtors' bankruptcy petitions and which arose as the result of the Debtors' violation of New York law and the NY Class Members' claims against Defendants are entitled to first priority administrative expense status pursuant to 11 U.S.C. § 503(b)(l)(A).

101. The relief sought in this proceeding is equitable in nature.

Violation of the New York Wage Payment Law, Labor Law §190 *et seq.*

102. Plaintiffs reallege and incorporate by reference all allegations in all proceeding paragraphs.

103. Plaintiffs and similarly situated employees who worked at or reported to Defendants' Offices in New York were "employees" of Defendants as defined in § 190 of the New York Wage Payment Law ("Wage Payment Law").

104. Defendants terminated the employment of New York Plaintiffs and other similarly situated employees on or about November 11, 2011 or thereafter.

105. On information and belief, Defendants maintained a policy whereby those employees whose employment is terminated are entitled to pay for unused vacation time accrued

to the effective date of the termination of their employment, irrespective of whether the termination was voluntary or non-voluntary.

106. Defendants were therefore obligated to pay Plaintiffs for their accrued but unused vacation time, within 30 days of their termination, pursuant to the Wage Payment Law, § 198-C.

107. By failing to provide the compensation due to Plaintiffs and other similarly situated New York Plaintiffs for accrued vacation time, Defendants have violated the Wage Payment Law.

108. Defendants' violation of the Wage Payment Law was willful.

109. As a result of Defendants' violations of the Wage Payment Law, Plaintiffs and the other similarly situated New York employees are entitled to payments for accrued vacation time, statutory interest, and liquidated damages.

110. The New York Plaintiffs have incurred, and the other similarly situated employees will incur, attorneys' fees in prosecuting this claim and are therefore entitled to an award of attorneys' fees and costs pursuant to § 198.

Violation of the Illinois Wage Payment and Collection Act, IL ST CH 820 § 115/1 *et seq.*

111. Plaintiffs reallege and incorporate by reference all allegations in all proceeding paragraphs.

112. The Plaintiffs Thielmann and Glover-Bowles (the "Illinois Plaintiffs") and and similarly situated employees who worked at or reported to Defendants' Offices in Illinois were "employees" of Defendants as defined in § 115/2 of the Illinois Wage Payment and Collection Act ("Wage Payment Act").

113. Defendants terminated the employment of the Illinois Plaintiffs and other similarly situated employees on or about November 11, 2011 or thereafter.

114. On information and belief, Defendants maintain a policy whereby those employees whose employment is terminated are entitled to pay for unused vacation time accrued to the effective date of the termination of their employment, irrespective of whether the termination was voluntary or non-voluntary.

115. Defendants were therefore obligated to pay Plaintiffs in full for their accrued but unused vacation time, "at the time of separation, but no later than the next regularly scheduled payday" pursuant to the Wage Payment Act, § 115/5.

116. By failing to provide the compensation due to the Illlinois Plaintiffs and other similarly situated Illinois Plaintiffs for accrued vacation time, Defendants have violated the Wage Payment Act.

117. Defendants' violation of the Wage Payment Act was willful.

118. The Illinois Plaintiffs are therefore entitled to payments for accrued vacation time and statutory interest.

119. The Illinois Plaintiffs have incurred, and the other similarly situated employees will incur, attorneys' fees in prosecuting this claim and are therefore entitled to an award of attorneys' fees and costs pursuant to § 115/14.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, individually and on behalf of all other similarly situated persons, pray for the following relief as against Defendants:

A. Certification of this action as a class action;

B. Designation of the Plaintiffs as Class Representatives;

C. Appointment of the undersigned attorneys as Class Counsel;

D. A first priority administrative expense claim pursuant to 11 U.S.C. § 503(b)(1)(A) in favor of the Plaintiffs and the other similarly situated former employees equal to the sum of: their unpaid wages, salary, commissions, bonuses, accrued holiday pay, accrued vacation pay, pension and 401(k) contributions and other ERISA benefits, for 60 days, that would have been covered and paid under the then-applicable employee benefit plans had that coverage continued for that period, or, alternatively, determining that the first $11,725 of the WARN Act and NY WARN Act claims of the Plaintiffs and each of the other similarly situated former employees is entitled to priority status, under 11 U.S.C. § 507(a)(4), and the remainder is a general unsecured claim;

E. An allowed administrative-expense priority claim under 11 U.S.C. § 503 for the reasonable attorneys' fees and the costs and disbursements that the Plaintiffs incur in prosecuting this action, as authorized by the WARN Act, 29 U.S.C. § 2104(a)(6);

F. A priority expense claim against the Debtor pursuant to 11 U.S.C. § 507(a)(4) in favor of the Plaintiffs and the other similarly situated former employees for payment of accrued vacation time, interest, applicable liquidated damages, and attorneys' fees and costs pursuant to the New York Wage Payment Law, Labor Law §190 *et seq.* and the Illinois Wage Payment Act, 820 § 115/1 *et seq.*; and

G. Such other and further relief as this Court may deem just and proper.

Respectfully submitted,

DATED: December 12, 2011

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CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2011, I caused the foregoing to be served via ECF to all parties who are listed on the Court's Electronic Mail Notice List.

/s/ Diana E. Lipschutz
Diana E. Lipschutz

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC. et al.	:	Case No. 11-15059 (MG) Case No. 11-15058 (MG) Case No. 11-02790 (MG) SIPA
	:	(Jointly Administered)
Debtors.	:	
	:	Adv. Pro No. 11-02880 (MG)
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, and ARTON SINA, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	
v.	:	
MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Jenny Hoxha, under penalties of perjury, certify the following as true and correct: I am not a party to this action and I am over 18 years of age. On the 14th day of May, 2012, I electronically filed the following documents:

1. *Plaintiffs' Objection to MF Global Inc.'s Motion to Dismiss the Amended Class Action Adversary Proceeding Complaint*
2. *Exhibit A to Plaintiffs' Objection to MF Global Inc.'s Motion to Dismiss the Amended Class Action Adversary Proceeding Complaint*

3. *Declaration of Jack A. Raisner Pursuant to Rule 7056(D) in Opposition to Defendants' Motions to Dismiss*

I also served a copy via electronic mail on the following:

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