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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

MF GLOBAL HOLDINGS LTD., et al.,

Debtors.

Chapter 11
Case No. 11-15059 (MG)
Jointly Administered

SIPA TRUSTEE STATEMENT ON CERTAIN INSURANCE ISSUES

James W. Giddens (the “SIPA Trustee”), as Trustee for the liquidation of the business of MF Global Inc. (“MFGI”) under the Securities Investor Protection Act of 1970, as amended (“SIPA”), 15 U.S.C. § 78aaa *et seq.*, by and through his undersigned counsel, submits this statement with respect to the filings before the Court concerning two sets of insurance policies.¹

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1. Specifically, the SIPA Trustee refers to (i) the Stipulation and Proposed Order between the Chapter 11 Trustee and MFG Assurance Company Limited Regarding Payment of Loss and Reimbursement of Covered Costs and Expenses (the “MFG Assurance Stipulation,” ECF No. 409) and certain objections to the Stipulation, Objection of Sapere Wealth Management, LLC, Granite Asset Management, and Sapere CTA Fund, L.P. (collectively, “Sapere”) to the Stipulation (“Sapere Objection,” ECF No. 419); Objection Certain Commodities Customers to the Stipulation (“Certain Commodities Customer Objection,” ECF No. 416); Objection of Certain Interested Parties to the Stipulation (“Certain Interested Parties Objection,” ECF No. 417). (the “Stipulation Objections”); and (ii) the Motion of U.S. Specialty Insurance Company for Relief from the Automatic Stay, to the Extent Applicable (the “U.S. Specialty Motion,” ECF No. 428, and together with the MFG Assurance Stipulation and the Stipulation Objections, the “Insurance Submissions”).

PRELIMINARY STATEMENT

The SIPA Trustee submits this statement because he believes that it may be helpful to the Court as well as relevant parties to understand the SIPA Trustee's position with respect to those policies and to comment on the question of payment for premiums for the policies. The proceeds of the policies, though subject to competing claims, may potentially provide a source of recovery for customers for any shortfall in segregated or secured customer property either as the result of litigation by the SIPA Trustee or by customers themselves and the SIPA Trustee may have a property interest in various policies issued to MFGI, including the U.S. Specialty policy under which MFGI is a named insured. The SIPA Trustee does not oppose payment of some reasonable and necessary defense costs under the policies but does support the suggestion that they be monitored and believes that monitoring should apply to both sets of policies.

BACKGROUND

1. On October 31, 2011 (the "Filing Date"), the Honorable Paul A. Engelmayer, United States District Court for the Southern District of New York, entered the Order Commencing Liquidation of MFGI (the "MFGI Liquidation Order," ECF No. 1) pursuant to the provisions of SIPA in the case captioned *Securities Investor Protection Corp. v. MF Global Inc.*, Case No. 11-CIV-7750 (PAE) (the "SIPA Proceeding").

2. The MFGI Liquidation Order provides that "the Trustee shall have immediate possession of the property of [MFGI]" (MFGI Liquidation Order ¶¶ XIII) and notifies all persons and entities that the automatic stay provisions of 11 U.S.C. § 362(a) operate as a stay of, among other things, "any act to obtain possession of property of the estate or property from the estate." (*Id.* at ¶¶ III.C.) Accordingly, under the MFGI Liquidation Order, all persons and

entities are stayed, enjoined, and restrained from, among other things, retaining or interfering with any assets or property owned or controlled by MFGI. (*Id.* at ¶ IV.)

3. Since his appointment, the SIPA Trustee has been engaged in locating property and investigating what rights he might have with respect to recovery of property or bringing causes of action to make customers whole and benefit other creditors with respect to missing funds. *See* Trustees Preliminary Report on Status of His Investigation and Interim Status Report on Claims Process and Account Transfers (Case No. 11-2790, ECF No. 896). This necessarily included evaluating any claims potentially covered by insurance policies insuring MFGI or with respect to proceeds from the same.

THE INSURANCE SUBMISSIONS

I. The MFG Assurance Stipulation and Objections

A. The Sapere Objection and information regarding the payment of premiums

4. Citing to the SIPA Trustee's *Preliminary Report on the Status of his Investigation and Interim Status Report on Claims Process and Account Transfers*, dated February 6, 2012 (the "SIPA Trustee Report," Case No. 11-2790, ECF No. 896), the Sapere Objection alleges that commodities customer's segregated accounts may have been used to pay insurance premiums for Professional Liability Insurance Policies issued by MFG Assurance Company Limited, a Bermuda insurance company wholly owned by MF Global Holdings, Ltd. (*See* Sapere Objection ¶¶ 8-10; Stipulation p. 2, Schedule 1.)

5. The Sapere Objection asserts, "[t]he Chapter 11 Trustee has not established that none of the \$50 million purloined each day on an ongoing, revolving basis from the segregated-accounts was used toward payment of the premiums for the MFG Assurance in issue and/or to finance the operations of MFG Assurance." (Sapere Objection ¶ 10).

6. Based on this, the SIPA Trustee looked in to the payment of premiums on those policies. That investigation yielded no information that any payments were made in October 2011, let alone after October 26, 2011, the date on which the SIPA Trustee “preliminarily determined that MFGI had a shortfall in commodities customer segregated funds beginning on Wednesday, October 26, 2011 . . .” (SIPA Trustee Report ¶ 4). Therefore, the Trustee knows of no basis on which to conclude at this time that any customer segregated funds were used to pay insurance premiums to MFG Assurance.²

B. Certain Commodities Customers and Certain Interested Parties Objections

7. The Certain Interested Parties Objection states that they:

are not opposed to an Order allowing MFG Assurance to continue to pay for the defense of legitimate ‘individual insureds’ who were subjected to legitimate pre-petition claims covered under the MFG Assurance policies, but only if the nature of such claims is fully disclosed, the identities and employment status of the parties seeking coverage is revealed, and the MFG Assurance policies under which they are seeking such coverage are filed with the Court. Under no circumstances should MFG Assurance be granted unchecked discretion to pay the significant benefits available under its Policies to whomever it wishes whenever it wishes as the Trustee’s Proposed Order would allow.

(Certain Interested Parties Objection ¶ 13.)

8. The Certain Interested Parties go on to suggest monitoring of any payments made pursuant to the Stipulation. (Certain Commodities Customers Objection ¶ 29).

2. The SIPA Trustee also investigated whether any premiums on the U.S. Specialty policies might have been made using customer segregated funds. Based on that investigation, the SIPA Trustee learned that the insurance premiums for the U.S. Specialty policies were paid on an annual basis, and in this case, May 2011, well before any shortfall in customer segregated funds occurred on October 26, 2011.

The SIPA Trustee, who may look to the proceeds of the policy on behalf of customers in any suit that he may file against insureds, supports this relief.

II. The U.S. Specialty Motion

9. The U.S. Specialty Motion seeks relief from the Automatic Stay (to the extent necessary) in order to make payments under a certain Directors Officers and Corporate Liability Insurance Policy, No. 14-MGU-11-A23947 with a policy period of May 31, 2011 to May 31, 2012 (the “D&O Policy”).³

10. MFGI has an interest in the D&O Policy as an Insured due to its status as a subsidiary of MFGH; the D&O Policy defines “Insured” to include the “Company” (See U.S. Specialty Motion Ex. B, p. 5), and defines “Company” to include the “‘Named Corporation’ and any ‘Subsidiary’ thereof.” (*Id.* at Ex. B, p. 4). Therefore, although the U.S. Specialty Motion has only been filed in this proceeding, and as to MFGH, because MFGI is an Insured under the D&O Policy, the SIPA Trustee believes that it may be necessary for U.S. Specialty to seek relief from the Automatic Stay in the SIPA Proceeding as well.

11. The SIPA Trustee has not yet asserted any claims against any of the directors or officers, but he may file claims in the future for which the D&O Policy would

3. The U.S. Specialty Motion also request the Court to lift the Automatic Stay to allow U.S. Specialty to make payments under a Fiduciary Liability policy, also issued to MFGI. (U.S. Specialty Motion ¶¶ 14-19.) The SIPA Trustee does not specifically address that policy here, but asserts that it would be appropriate for the Court to limit any Order addressing that policy according to the monitoring conditions the SIPA Trustee requests the Court apply to its Order addressing the D&O Policy.

provide coverage, providing the SIPA Trustee an interest in the proceeds of the D&O Policy to the extent he does not already possess such an interest.⁴

12. While the SIPA Trustee believes that there is authority to support a finding that he has a current interest in the proceeds of the D&O Policy, he, likewise, does not seek a determination on that issue at this time.

13. U.S. Specialty does not ask the Court to make a determination as to whether the proceeds of the D&O Policy are part of the Debtors' estates, and explicitly does not take a position on that issue.⁵ (Motion ¶ 21.) U.S. Specialty acknowledges that substantial authority exists to support a finding that D&O insurance policy proceeds may be property of a debtor's estate once the debtor has demonstrated an interest in those proceeds. (*Id.* at ¶¶ 21-23.)

14. The SIPA Trustee requests that the Court reserve judgment on whether proceeds of the D&O Policy are part of the MFGH or MFGI estate until such time as the SIPA Trustee asserts claims against the D&O Policy. *See In re Adelpia Commc'ns Corp.*, 298 B.R.

4. The SIPA Trustee is also aware of the Response with Reservation of Rights of the Virginia Retirement System and Her Majesty the Queen in Right of Alberta, Individually and on Behalf of All Others Similarly Situated, to the U.S. Specialty Motion ("Virginia Retirement Objection," ECF No. 472). The Virginia Retirement Objection notes that the Court has determined that one of MFGH's insurance policies is not a part of the Debtors' estate and asserts that the Court should treat this policy similarly. (*See Virginia Retirement Objection* ¶1.) The SIPA Trustee respectfully submits that the Court's prior Order dated January 19, 2011 (ECF No. 380) should not apply to the motions currently before the Court. Specifically, the SIPA Trustee notes that the insurance policy at issue referenced by the prior Order was a claims-made professional liability policy with a policy period of April 2007 through April 2008, where the policies currently before the Court have policy periods of May 2011 through May 2012. The SIPA Trustee understands that a claims-made policy for the 2007-2008 time period would not likely provide the estate with recovery for claims asserted by creditors in the Chapter 11 or SIPA proceedings currently before the Court. Moreover, the U.S. Specialty Motion relates to the D&O Policy, which specifically provides the SIPA Trustee with a right to recover proceeds of the D&O Policy for (i) certain claims asserted against MFGI, and (ii) certain claims asserted by the SIPA Trustee against MFGI's directors, officers, or employees. Finally, there is abundant authority that insurance policies are part of a debtor's estate, even if, *arguendo*, the proceeds may not be. *See, e.g., Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.)*, 40 B.R. 219, 230-31 (S.D.N.Y. 1984).

5. Similarly, U.S. Specialty highlights a clause in the D&O Policy, which it describes as a "priority of payment" clause, but does not ask the Court to make any findings as to the meaning of, or rights pursuant to, that clause. (U.S. Specialty Motion ¶ 13.)

49, 53-54 (S.D.N.Y. 2003) (acknowledging that insurance policy proceeds may be part of a debtor's estate). Because the SIPA Trustee may assert future claims against the D&O Policy, providing him an undeniable interest in the proceeds of that policy, any determination on the rights of the debtors and creditors, including MFGI's customers, would be premature.⁶

15. Again, however, the Trustee believes that it would be appropriate to require monitoring of payments under the D&O Policy including: (i) the nature of such claims, (ii) the identities of the parties seeking coverage, (iii) the amounts paid, and (iv) the basis on which such U.S. Specialty considers those payments appropriate (*e.g.*, defense costs, settlement, investigation costs, etc.).

CONCLUSION

The SIPA Trustee makes this statement pursuant to his a statutory duty to protect the assets of the MFGI estate and as an advocate for customer interests and creditors. The coverage under the D&O Policy is a valuable asset which should be protected and preserved by this Court for the benefit of MFGI customers, should the SIPA Trustee determine that he has claims against any of the D&O Policy's insureds, or otherwise asserts an interest in the D&O Policy proceeds.

6. The court in *In re Lehman Brothers Holdings Inc., et al.*, Case No. 08-13555 (JMP)(Jointly Administered) granted a similar motion for an order modifying the automatic stay to allow advancement under directors and officers and fiduciary liability insurance policies (Case No. 08-13555, ECF No. 3220, ("Exhibit A")). The court was not asked to, and in fact did not, "determine whether or not in fact the proceeds of these policies would or would not be property of the estate." *See* Transcript regarding Hearing Held on 3/25/09, Case No. 08-13555, ECF No. 3240 at 12:15-21. The court also was not asked to, and did not, determine "what claims, obligations there may be by parties. . ." *Id.* at 12:8-14. *See also id.* at 14:19-22 ("I confirm that I'm not deciding any of the things that [the Debtors] believe I'm not deciding . . .").

Dated: New York, New York
February 28, 2012

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Attorneys for James W. Giddens, Trustee for
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Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

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In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

-----x

United States Bankruptcy Court
One Bowling Green
New York, New York

March 25, 2009

10:02 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1 P R O C E E D I N G S

2 THE COURT: Good morning. Be seated, please. Please
3 proceed.

4 MR. KRASNOW: Good morning, Your Honor. Richard
5 Krasnow, Weil Gotshal & Manges LLP on behalf of the Chapter 11
6 debtors.

7 THE COURT: Good morning.

8 MR. KRASNOW: Good morning. Your Honor, last night
9 the debtors filed an amended agenda letter. It's at docket
10 number 3215. And, with the Court's permission, I would propose
11 that we just go down the agenda, if we may.

12 THE COURT: It sounds most efficient.

13 MR. KRASNOW: Your Honor, the first matter on the
14 agenda is the debtors' motion for an order modifying the
15 automatic stay with respect to the debtors' primary D&O and
16 fiduciary policies. That is at docket number 2949.

17 Your Honor, this is a motion that was filed at the
18 request of the respective insurers with respect to those
19 policies who wanted to ensure that if they made payments under
20 those policies and, in particular, the context was advancing
21 monies with respect to defense costs, that it wasn't
22 subsequently asserted that in making those payments, they
23 violated the automatic stay to the extent that the stay was
24 applicable. And therefore, we are before the Court today
25 seeking that relief.

1 Your Honor, I think having described the rather
2 narrow relief that we are seeking here, in light of various
3 pleadings that were filed, correspondence that we received,
4 discussions we have had with certain parties, I'd like to
5 emphasize what we are not seeking and what we believe the Court
6 would not be determining should Your Honor grant the relief
7 requested.

8 We are not seeking and we don't believe the Court
9 would be determining what claims, obligations there may be by
10 parties including the insurers, the beneficiaries, those who
11 are covered by the policies, anybody who has an interest in
12 those policies. There would be no determination as to what
13 those obligations and claims would be. It is merely a lifting
14 of the stay.

15 Secondly, Your Honor, the Court, we do not believe,
16 and we have not requested that the Court do this, determine
17 whether or not in fact the proceeds of these policies would or
18 would not be property of the estate. We are only seeking a
19 modification of the stay to the extent it is applicable. We
20 are not asking this Court to determine whether or not it is
21 applicable.

22 As to that last point, Your Honor, there were two
23 pleadings that were filed with the Court, one of which is
24 styled as a limited objection by the "lead plaintiffs" who have
25 requested that the proposed order that was attached to our

1 motion being modified so as to explicitly provide that the
2 Court would not be making any determination as to whether or
3 not the proceeds are property of the estate and that the rights
4 and claims of all parties in interest in respect of that issue
5 would be reserved. We have advised the lead plaintiffs that
6 there language with some very minor nonsubstantive tweaks which
7 we have shared with them is acceptable. They have advised us
8 that our suggestive revisions are acceptable. New Jersey had
9 filed a limited response in which they had indicated that they
10 had no objection to the motion or the proposed order but if the
11 proposed order were modified, they were reserving their rights.
12 We have provided them with the revised order in a blacklined
13 form. They have informed us that they have no objection to the
14 entry of that order.

15 Your Honor, I have a copy of the blacklined order and
16 I'd be prepared to share it with the Court if the Court wants.

17 THE COURT: Fine. Please approach with that.

18 MR. KRASNOW: Excuse me, Your Honor?

19 THE COURT: Please approach.

20 MR. KRASNOW: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. KRASNOW: On that note, Your Honor, we would
23 request, for the reasons set forth in our motion and the
24 reasons I've stated on the record that the Court grant us the
25 relief and enter the order as it has been revised.

1 THE COURT: I'm prepared to do that. I'm just going
2 to ask if there's anyone either from the state of New Jersey or
3 on behalf of the lead plaintiffs who has any comment. If the
4 answer is no, I'll enter the order as modified. I see the
5 committee is rising to perhaps say something.

6 MR. O'DONNELL: Yeah. Your Honor, Dennis O'Donnell,
7 Milbank Tweed Hadley & McCloy on behalf of the committee. We
8 have had discussions with the debtors about the subject of
9 insurance and general insurance coverage in general and this
10 motion specifically. The changes reflected in the order
11 address our concerns at this point. We are reserving our
12 rights, specifically, with respect to this determination down
13 the road as it relates to excess coverage here. There are
14 numerous excess policies and we expect this issue to arise
15 again and again in the case. And as to the relief sought in
16 this motion, we are not objecting. But as to any future relief
17 on this subject, we're reserving our rights.

18 THE COURT: Fine. Well, Mr. Krasnow has made a very
19 full record with respect to what I'm not deciding. And I
20 confirm that I'm not deciding any of the things that he
21 believes I'm not deciding and that the order is narrowly
22 drafted and acceptable to the parties. And I will enter it as
23 modified.

24 MR. KRASNOW: Thank you, Your Honor. And I believe
25 the next item on the agenda is being handled by Mr. Lucas.

1 MR. LUCAS: Good morning, Your Honor. John Lucas for
2 the Chapter 11 debtors. Your Honor, the second item on the
3 agenda is the motion of TPG-Austin Portfolio Holdings to compel
4 assumption or rejection of a credit agreement that was entered
5 into by the debtors. And I don't know if movant's counsel is
6 here today.

7 Your Honor, I don't know if you recall but previously
8 this motion was on in December -- was on before December --

9 THE COURT: Mr. Kessler was here in connection with
10 that, I believe.

11 MR. LUCAS: Correct. And at the first hearing on
12 this, we had informed the Court that we would assume or reject
13 by date certain; I believe it was mid-December. However, since
14 that time, the parties have gotten together and we've revised
15 the credit agreement. And, Your Honor, in short, the
16 stipulation that we intend to hand up to the Court today
17 provides that the parties will enter into a transaction
18 amending the credit agreement and the supporting documents
19 pursuant to a term sheet that's attached to the stipulation.
20 And in short, there will be new funding provided in place of
21 the revolver that was alleged to have never been funded where
22 LCPI will provide thirty million dollars and Revere Holdings
23 will provide fifteen million and TPG-Austin, an affiliate of
24 TPG, will also provide fifteen million dollars under this revolver.
25 And it's all set forth clearly in the stipulation.