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

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In re : Chapter 11
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MF GLOBAL HOLDINGS LTD., *et al.*, : Case No. 11-15059 (MG)
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Debtors. : (Jointly Administered)
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**BRIEF IN SUPPORT OF THE RETENTION AND EMPLOYMENT OF FREEH GROUP
INTERNATIONAL SOLUTIONS, LLC AS ACCOUNTANTS TO THE TRUSTEE *NUNC
PRO TUNC TO THE APPOINTMENT DATE***

Louis J. Freeh (the “Trustee”), the duly-appointed chapter 11 trustee of MF Global Holdings Ltd., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC and MF Global Market Services LLC (the “Debtors”) respectfully submits this brief in support of the *Application of the Chapter 11 Trustee for Entry of an Order Authorizing the Trustee to Retain and Employ Freeh Group International Solutions, LLC as his Advisors Nunc Pro Tunc to the Appointment Date* (the “FGIS Retention Application”).

PRELIMINARY STATEMENT

At the February 9, 2012 omnibus hearing, the Court questioned whether the Trustee’s retention of Freeh Group International Solutions, LLC (“FGIS”) conflicted with the holdings in *United States Trustee v. Marvin J. Bloom (In re Palm Coast, Matanza Shores Limited Partnership)*, 101 F.3d 253 (2d Cir. 1996) (“*Palm Coast*”) and *In the Matter of K & L Inc* 205

B.R. 589 (Bankr. D. Neb. 1991) ("*K & L Inc.*").¹ For two distinct and independent legal reasons it does not:

(1) The Trustee, himself, will not be providing services to these estates through FGIS, which clearly distinguishes this proposed retention from the ones denied in *Palm Coast* and *K & L Inc.*, where the trustees were attempting to provide real estate brokerage and operations management services through the entity being retained. The separate Freeh Sporkin & Sullivan, LLP ("FSS") retention application specifically included that the Trustee will provide services to these estates solely as a member of FSS. Therefore, section 327(d) of the Bankruptcy Code is not implicated and the retention of FGIS is properly requested pursuant to Bankruptcy Code section 327(a); and

(2) The Trustee is seeking to retain FGIS to lead the forensic investigation and worldwide information coordination that are core components of the Trustee's duties. As the holding in *Palm Coast* states that "a bankruptcy trustee may not hire his or her own firm in a non-lawyer or non-accounting capacity," 101 F.3d at 253, there is no conflict as all of the services to be provided by FGIS fall into the category of "lawyer" or "accounting" capacity as discussed *infra*.

Additionally, there can be no dispute regarding the well documented post-filing state of these Debtors and the immediate need for the Trustee upon his appointment to commence a worldwide examination of the Debtors' businesses --- 50 corporate entities spread over 15

¹ Bankruptcy Code section 327 governs the retention of professionals in bankruptcy cases. At issue in *Palm Coast*, *K & L Inc.*, and in the case at hand are subsections (a) and (d), which state:

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title;
- (d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

countries. Since his appointment, the Trustee has put four additional MF Global entities into bankruptcy and has been dealing with Administrators in a half a dozen foreign jurisdictions. To date, there has been no ability to close the Debtors' books and records as of the initial filing date because of the reluctance of certain counterparties to perform a "global close."

With a staff of approximately 25 employees of the Debtors, down from a high of over 2,870 worldwide pre-bankruptcy, the Trustee has relied on a core group of professionals to undertake the systematic stabilization of the businesses, which feeds into the investigation of the potential assets of the estates and ultimately the maximization of assets for the ultimate distribution to the creditors of the Debtors. A key component of the Trustee's team is FGIS, which brings invaluable experience related to high-level forensic accounting and investigatory skills honed in numerous other worldwide investigations. These skills clearly fall within the "lawyer" and "accounting" capacities set forth in the case law and are absolutely required for the Trustee to perform his duties.

For the legal and factual reasons set forth herein, the Trustee's retention of FGIS should be approved.

BACKGROUND

A. History of the Case

On October 31, 2011, the Initial Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, as well as filing motions for first day relief, which included a motion for joint administration of the Initial Debtors' cases (Docket No. 2). On November 2, 2011, the Court granted the Initial Debtors' motion and ordered the joint administration of the Initial Debtors' cases. On November 7, 2011, the United States Trustee (the "U.S. Trustee")

appointed the statutory creditors' committee (the "Statutory Creditors' Committee") in the Initial Debtors' cases.

The Statutory Creditors' Committee and the Initial Debtors, on November 21, 2011, jointly moved the Court for an order directing the U.S. Trustee to appoint a chapter 11 trustee (Docket No. 131), which the Court entered on November 22, 2011 (Docket No. 156). On November 25, 2011, the U.S. Trustee filed the *Application for Order Approving Appointment of Chapter 11 Trustee* (Docket No. 169), which the Court approved by entering the *Order Approving the Appointment of Chapter 11 Trustee* (Docket No. 170), pursuant to which the Trustee was appointed.

On December 19, 2011, the Additional Debtors filed for relief under chapter 11 of the Bankruptcy Code and the Trustee, as fiduciary of the Prior Debtors, filed a motion for an order under rule 1015(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") directing the joint administration of the Additional Debtors' chapter 11 cases with those of the Initial Debtors (the "Second Joint Administration Motion") (Docket No. 292). On the same date as the Second Joint Administration Motion, the Trustee, as fiduciary of the Prior Debtors, also filed a similar motion to this Motion for entry of an order under Bankruptcy Code section 105(a) directing that certain orders entered in the chapter 11 cases of the Initial Debtors be made applicable to the Additional Debtors (Docket No. 293). On December 21, 2011, the Court entered orders for relief with respect to each of the Additional Debtors and directed joint administration of the Additional Debtors' cases with the Initial Debtors' cases (Docket No. 298), and entered the order making previous orders applicable in the New Debtors' cases on December 23, 2011 (Docket No. 303). On December 27, 2011, the Court approved the appointment of Louis J. Freeh as chapter 11 trustee of the Additional Debtors' cases.

B. **FGIS**

The FGIS Retention Application provides the following description of FGIS:

FGIS was founded by the Trustee and is comprised of a team of internationally recognized principals from the judicial, prosecutorial, law enforcement, and corporate domains. Employees of FGIS include, without limitation, former United States Judges, Assistant United States Attorneys, and agents of the Secret Service and the Federal Bureau of Investigation. FGIS provides consulting, analysis, and investigative services in a variety of areas, including the strategic management of complex and sensitive inquiries. FGIS and its professionals are capable of assisting the Trustee in all areas of the business and operations of the Debtors, as well as any necessary investigation of the Debtors, should the Court so require. Accordingly, the Trustee believes that FGIS is well-qualified to serve as his advisors, and respectfully requests that the Court approve FGIS's retention.

FGIS Retention Application at ¶ 10.

The leader of the engagement for FGIS will be Francis A. Piantidosi ("Mr. Piantidosi").

Mr. Piantidosi has extensive experience and knowledge in all forms of accounting as he was the chairman and Chief Executive Officer of Deloitte Financial Advisory Services LLP ("Deloitte FAS"). He served on the Operating Team Committee of Deloitte & Touche USA LLP and represented Deloitte FAS in all key initiatives. Mr. Piantidosi was also the global leader of the Forensic & Dispute Services practices of the Deloitte Touche Tohmatsu member firms and their affiliates and, in that role, he built a global network of sophisticated forensic and technology service offerings.

Executives in leading corporations and top attorneys in the world's leading law firms regularly sought Mr. Piantidosi's counsel on forensic and dispute matters. For some time, he led the development of the dispute consulting and forensic investigations discipline and his experience in forensic and dispute services transcends borders. In fact, he led the engagement relating to Volcker Commission's investigation of Swiss banks on behalf of Holocaust victims, which led to a \$1.2 billion settlement and the return of hundreds of millions in assets to victims and their heirs.

Further staffing by FGIS will include professionals with similar backgrounds to Mr. Piantidosi, for the purpose of providing the following proposed services to the Trustee in these cases:

- (a) managing the facilitation and coordination of information and data exchange between the various worldwide administrations including, but not limited to, the SIPA proceeding: *SIPC v. MF Global Inc. (In re MF Global Inc.)* (Case No. 11-2790) and the United Kingdom Administration of MF Global Overseas Limited;
- (b) coordinating the workflow administration between the Trustee's professionals, the Committee and its professionals, and the various worldwide administrations including, but not limited to, the SIPA proceeding: *SIPC v. MF Global Inc. (In re MF Global Inc.)* (Case No. 11-2790) and the United Kingdom Administration of MF Global Overseas Limited;
- (c) assisting the Trustee with the day-to-day, short-term and long-term management of the bankruptcy process, including evaluation of strategic and tactical options with respect to the SIPA proceeding and various insolvency administrations throughout the world, as well as management of the wind down of the Debtors operations; and
- (d) assisting the Trustee in undertaking additional tasks that the Court may direct, to the extent those tasks are consistent with those set forth *infra*.

FGIS Retention Application at ¶ 11.

C. **The February 9, 2012 Omnibus Hearing**

On February 9, 2012, the Court held a hearing to consider, among other things, the Trustee's various retention applications. Among those was the FGIS Retention Application. At the hearing, the Court *sua sponte* raised an issue to be briefed by the Office of the United States Trustee and the Trustee: "whether the trustee may retain a business with whom the trustee is affiliated, other than as an attorney or accountant". The Court further said "I require briefing that addresses the issues raised by the Second Circuit's decision in *In re Palm Coast, Matanza Shores Limited Partnership*, 101 F.3d 253 (2d Cir. 1996). Additionally, in the matter of *K & L Incorporated*, 205 B.R. 589 (Bankr. D. Neb. 1991)." (Transcript page 21, lines 19 – 21)

D. ***Palm Coast***

In *Palm Coast*, the Second Circuit examined whether a chapter 11 trustee could employ himself and his real estate firm in a capacity other than in an accounting or legal capacity. The Second Circuit held “[i]n this case, Bloom, as trustee, seeks authorization to hire his real estate firm to assist him in his duties. Because we hold that a bankruptcy trustee may not hire his or her firm in a *non-lawyer* or *non-accounting capacity*, Bloom’s application for such action should have been disapproved.” *Palm Coast* at 253 (*emphasis added*).

Marvin Bloom, the chapter 11 trustee, sought to retain Keen Realty, of which he was an officer, to assist in the marketing and sale of the debtor’s property. The United States Trustee opposed the retention on the basis that section 327(d) did not permit the trustee to provide services to the estate other than as an attorney or accountant. Both the Bankruptcy Court and the District Court disagreed with the United States Trustee and held that the chapter 11 trustee could retain Keen.

The Second Circuit disagreed with the courts below, reasoning that based on the common law of trusts, when a chapter 11 trustee looks to retain himself under section 327, he can only retain himself as an accountant or an attorney. The court believed that section 327 was susceptible to multiple dissimilar interpretations, and therefore looked to the common law of trusts, instead of other sections of the Bankruptcy Code, to find that “the law of trusts requires that the trustee, *in his role as trustee*, be disinterested and prohibits him from obtaining interests adverse to the estate.” *Palm Coast*, at 258 (*emphasis in original*).

For reasons set forth herein, the holding in *Palm Coast* does not conflict with the retention of FGIS by the Trustee in these cases.

E. ***K & L Inc.***

In *K & L Inc.*, the court denied a chapter 11 trustee's request for payment of fees sought for services provided to the estate as an operator/manager of the debtor's business and as a real estate broker. The chapter 11 trustee argued that the services provided a substantial benefit to the estate and, therefore, he should be compensated with an administrative expense claim in excess of the 11 U.S.C. § 326(a) percentage fee to which he was entitled as the chapter 11 trustee. The chapter 11 trustee argued that he could have retained outside individuals to perform these services at rates which exceed the statutory percentage cap and he concluded that he should be entitled to the same fees to which outsiders were entitled.

The court held that section 327(d) specifically limits a chapter 11 trustee's "non-trustee" duties to accounting or legal duties.² According to the court, pursuant to section 327(d), such non-trustee duties performed by a chapter 11 trustee are limited to accounting and legal duties. The court stated,

[s]ection 327(d) would be devoid of meaning if a trustee could, as a general proposition, retain *himself* as a professional to be compensated at hourly rates. For § 327(d) to have meaning, it must be viewed as a statutory exception to the general proposition that a trustee may not retain himself as a professional. Hence, 11 U.S.C. § 327(d) is an express limitation on when a trustee may employ *himself* as a professional, and, as a matter of law, a bankruptcy trustee may not be authorized to employ *himself* to act in a capacity other than as an attorney or accountant.

K & L Inc. at 591 (*emphasis added*). The court then determined that the chapter 11 trustee could not have retained himself as operator, manager or appraiser of the business and, therefore, could not receive hourly compensation for such services. *Id.*

The *K & L Inc.* decision is inapposite for multiple reasons. First, the facts are entirely distinguishable as the case was decided in the context of a fee request, not the retention of a

² A chapter 11 trustee's statutory duties are prescribed in 11 U.S.C. § 1106 and 11 U.S.C. § 704

professional. Further, it related to the tasks undertaken by the trustee, not a professional other than the trustee. Finally, even if this decision were to be expanded to stand for the proposition that the duties of a trustee's firm must be in the capacity of a "lawyer" or "accountant," the duties of FGIS squarely fall within this meaning.

ARGUMENT

A. The Trustee will not Retain Himself Through FGIS

Unlike in *Palm Coast* and *K & L Inc*, the Trustee will not provide any non-statutory services to the estate as an employee of FGIS. The FSS retention application specifically retained the Trustee to provide services to the estate as a member of FSS. His declaration of disinterestedness in support of that application stated that

I represent that my firms, FGIS and FSS, do not share revenue and although the two firms share professionals, those shared professionals draw separate salaries from each firm for the services they provide to each individual firm. To avoid any inference of impropriety in these cases, those shared professionals will only provide services from either FGIS or FSS, not both, for purposes of these chapter 11 cases.

Therefore, the Trustee, by his own declaration, has prevented himself from acting as an employee of FGIS. As the Trustee, himself, will not be retained by this application, the reliance on section 327(d) in the cases in question is instantly distinguishable.³

B. The Services to be Provided by FGIS

The Trustee seeks to retain FGIS in a capacity that clearly falls within what was deemed permissible in *Palm Coast*, where the Second Circuit held:

In this case, Bloom, as trustee, seeks authorization to hire his real estate firm to assist him in his duties. Because we hold that a bankruptcy trustee may not hire his or her firm in a

³ Further, in both *Palm Coast* and *K & L Inc*, the courts were focused on the trustee's retention of their firms for duties such as a real estate broker or manager/operator of a property. Here to the extent relevant, FGIS is not seeking retention as a real estate broker or manager/operator of a property.

non-lawyer or non-accounting capacity, Bloom's application for such action should have been disapproved.

Palm Coast at 253 (*emphasis added*). The Trustee's retention of FGIS is fundamentally different than the situation examined by the Second Circuit in *Palm Coast*. The Second Circuit focused on the relationship between, and conflicts created by, a chapter 11 trustee and his firm because the role for which Bloom sought to retain his real estate firm was not one that he, as trustee, could perform. The Trustee only seeks to retain personnel from FGIS, which fit under the acceptable category of "lawyer" or "accountant,"⁴ whereas Bloom sought to retain himself and his real estate firm to act as brokers. To that end, FGIS has, or will, provide the following services to the Trustee that serve as exemplars of the accounting and legal capacity of the retention:

1. Provide forensic accounting support and leadership of the 11 U.S.C. § 1106(a)(3) investigation, and as required in any subsequent litigation.
2. Assist in the development of tax-friendly strategies with the Trustee's professionals to recapture funds from foreign subsidiaries in liquidation proceedings.
3. Formulate for the Trustee strategies for the cost-effective utilization of existing company personnel and the integration of the company's staff with the financial advisory team, and other professionals retained in these cases.
4. Participate in the negotiation, reconciliation and resolution of claims asserted by the Debtors against MF Global foreign affiliates and assess the distributable value that will flow from those entities to the chapter 11 estates.
5. Participate in strategy calls and negotiations with the administrators for the various MF Global foreign affiliates, primarily KPMG and Deloitte & Touche LLP, the advisors for those affiliates, to aid the Trustee in maximizing recovery for these estates.
6. Serve as a member of the creditors' committees of (i) MF Global Overseas Limited and (ii) MF Global Holdings UK Limited, foreign non-debtor

⁴ Although the Trustee was unable to locate a case that defined "accounting capacity" or the specific duties of an accountant in a chapter 11 case, the Trustee points the Court's attention to the American Institute of CPA's website (www.aicpa.org), which lists publication areas such as Accounting and Auditing, Business Valuation, Financial Management and Reporting, Fraud and Forensics, Internal Control, and Tax. These are types of services are squarely implicated in the services to be performed by FGIS is retained.

subsidiaries in wind-down proceedings, on behalf of the Debtors in order to monitor the financial positions of those debtor entities and report to the Trustee.

7. Conduct meetings with the SIPA Trustee in order to:

- (i) Close the Debtors' books and records;
- (ii) Coordinate the sharing of information necessary to respond to the audits and complete the tax returns of the various Debtors;
- (iii) Develop strategies to assess the movement of funds between the Debtors and MFGI; and
- (iv) Oversee the calculation of inter-company claims related to trading and borrowing under the bank facility.

8. The development and drafting, calculation and formulation of the customer claims filed on behalf of the chapter 11 estates and their subsidiaries in the SIPA case.

9. Determine appropriate employee and professional retention levels, including review of professional's billing, and provide high-level cost-benefit analysis on such matters, for the purpose of maximizing efficient use of the estates' resources.

10. Communicate with the Statutory Creditors' Committee and the bank group regarding efforts to maximize value to the estate.

Therefore, solely based on the services to be provided by FGIS, *Palm Coast* is inapplicable to the case at hand and the Trustee should be able to retain FGIS.

CONCLUSION

Palm Coast and *K & L Inc.* are distinguishable from the case at hand for multiple reasons, and, in actuality, the retention proposed here complies with the inverse of the holding in *Palm Coast* as the trustee will hire his firm in such "lawyer" and "accounting" capacities. Therefore, the retention of FGIS does not run afoul of these cases or 11 U.S.C. § 327. For the foregoing reasons, the Court should approve the retention of FGIS and grant any other relief the Court deems just and proper.

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