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Limited*

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

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In re	: Chapter 11
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MF GLOBAL HOLDINGS LTD., <i>et al.</i> ,	: Case No. 11-15059 (MG)
	:
Debtors.	: (Jointly Administered)
	:
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**REPLY MEMORANDUM OF LAW OF MFG ASSURANCE COMPANY  
LIMITED IN SUPPORT OF PROPOSED STIPULATION AND ORDER  
BETWEEN THE CHAPTER 11 TRUSTEE AND MFG ASSURANCE COMPANY  
LIMITED REGARDING PAYMENT OF LOSS AND REIMBURSEMENT  
OF COVERED COSTS AND EXPENSES**

MFG Assurance Company Limited ("Assurance"), by its undersigned counsel, respectfully submits this Reply Memorandum in response to the *Response of Sapere Wealth Management, LLC, Granite Asset Management and Sapere CTA Fund, L.P. to the Chapter 11 Trustee and MFG Assurance Company Limited's Memoranda of Law in Support of Proposed Stipulation and Order between the Chapter 11 Trustee and MFG Assurance Company Limited Regarding Payment of Loss and Reimbursement of Covered Expenses* dated March 19, 2012 [Docket No. 574] (the "Sapere Response" of

"*Sapere*"), and the *Reply Memorandum in Further Support of the MFGI Commodity Customers' Objection to Proposed Stipulation and Order between the Chapter 11 Trustee and MFG Assurance Company Limited Regarding Payment of Loss and Reimbursement of Covered Expenses* dated March 19, 2012 [Docket No. 573] (the "**MFGI Customers' Response**" of the "**MFGI Customers**" and, together with *Sapere*, the "**Objectors**").

## **INTRODUCTION**

1. Assurance seeks entry of the Stipulation<sup>1</sup> to confirm that it may fulfill its obligations under the Policies.<sup>2</sup> This Court has already approved Assurance's payment of defense costs under the Policies for the 2009/2010 and 2010/2011 policy years, with the consent of *Sapere* and those of the MFGI Customers that originally objected to the proposed Stipulation. See Consent Order [Docket No. 535]. Entry of the Stipulation would further authorize payments for all covered loss under the Policies for the prior two years plus the current 2011/2012 policy year.

2. The MFGI Customers have clarified that their objection is limited to the Policies and proceeds for 2011/2012. MFGI Customers' Response at n. 1 [Docket No. 573]. *Sapere* has elected not to clarify, but the *Sapere* Response deals solely with the Policies for 2010/2011 period and sets forth no basis for objecting to payments under the

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<sup>1</sup> The stipulation was originally filed at Docket No. 409. As described in our *Memorandum of Law of MFG Assurance Company Limited in Support of Proposed Stipulation and Order Between the Chapter 11 Trustee and MFG Assurance Company Limited Regarding Payment of Loss and Reimbursement of Covered Costs and Expenses* dated March 5, 2012 [Docket No. 518] (the "**Assurance Memo of Law**"), it was agreed with the duly appointed trustee of the above-captioned debtors that the stipulation should include Policies for the 2009/2010 policy year. With the consent of the trustee, a revised stipulation is attached as Exhibit A (the "**Stipulation**") reflecting this change. The Stipulation also reflects agreement that the Policies are property of the estate.

<sup>2</sup> "**Policies**" refers to those certain professional liability insurance policies issued by Assurance to MF Global Holdings Limited, true copies of which are annexed as Exhibit B to the Declaration of John Oliver Heyliger Declaration dated March 5, 2012. [Docket No. 519].

earlier Policies. [Docket No. 574]. Accordingly, this Reply Memorandum will only address the Policies for the current policy year.

3. There appear to be a few other areas of consensus. The MFGI Customers' Response and the Sapere Response concur with Assurance's position that § 3420(a)(1) of the New York Insurance Law applies in these cases. They also indicate that § 3420(a)(1) should be this Court's touchstone in considering the proper operation of the Policies. Relatedly, neither party disputes that the McCarran-Ferguson Act causes § 3420(a)(1) to reverse preempt the Bankruptcy Code. The MFGI Customers and Sapere also do not rebut Assurance's statements that covered loss is being incurred on open claims and that the delay of policy benefits will in some cases be indistinguishable from their denial. Granted, the Objectors' position is that payments owing on current claims should be *permanently* denied. They ask for the Policies to be disabled for all purposes other than paying MF Global Inc.'s commodity customers, notwithstanding the lack of any precedent for such an outcome.

4. The Objectors disregard that an orderly process of claims adjudication is provided, and required, by the Policies and applicable insurance law. Sapere in particular exhibits a misconception that the Policies function like a cash machine activated by the mere notice of a claim, a notion contradicted by a basic understanding of the Policies (or any insurance policy) and unsupported by legal authority. Assurance seeks to clarify that the Policies should operate as intended, and in accordance with usual insurance practices. This would include the payment of defense costs that are owed immediately—and, in the future, potentially include payments to commodities customers in the event of covered claims that merit indemnification. The

Objectors insist that all defense costs be denied for the sake of potential indemnification, on the basis of conclusory statements and unsupported assertions. But this result would (i) contravene the purpose of the Policies to address loss as defined therein, (ii) disregard the legal rights and reasonable expectations of the individual insureds, (iii) award the commodities customers rights to insurance proceeds that do not exist under nonbankruptcy law, and (iv) violate the intended purpose of § 3420(a)(1) of the New York Insurance Law. In contrast, recommencement of Assurance's normal practices—which have not been impugned by anyone—following entry of the Stipulation would ensure that policy benefits flow in the manner intended by the Policies and required by § 3420(a)(1) and the McCarran-Ferguson Act.

## **ARGUMENT**

### **A. THE OBJECTORS IGNORE THE INTENDED OPERATION OF THE POLICIES.**

5. The treatment that would apply to a claim regarding the financial injuries of MF Global Inc.'s former commodity customers, or any other new claim, would be as follows. Upon notice of the claim or circumstance, Assurance would undertake the various components of the claim resolution process.<sup>3</sup> Such components, which will likely occur along a timeline with varying degrees of overlap, include: (i) consideration of whether notice was proper; (ii) investigation of coverage; (iii) analysis of the claim's merits; (iv) consideration of the need for defense counsel; (v) consideration of whether to associate in any defense; (vi) payment of interim losses and expenses; (vii) review of

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<sup>3</sup> This type of process is similar to the process for all primary insurers. See Unigard Security Ins. Co., Inc. v. North River Ins. Co., 79 N.Y.2d 576, 581-82 (Ct. App. N.Y. 1992).

settlement opportunities and payment of settlements where appropriate; and (viii) upon judgment or award, payment for covered losses. Such process is subject to regulation; for example, the law requires Assurance to pay defense costs expediently and exposes Assurance directly to claim judgments.<sup>4</sup> This process is also defined by the terms of the Policy and is subject to, *inter alia*, the requirements of the New York Insurance Law and the oversight of the Bermuda Monetary Authority (the "BMA").

6. As regards current open claims under the Policies, they are at different stages of this process, consistent with the facts that they arose at different times and, equally, that claims proceed at varying rates according to their size, complexity, and other individual characteristics. Heyliger Decl. ¶ 13 [Docket No. 519]. Chronology of loss occurrence is not determinative of rights to proceeds, under either the Policies, New York insurance law, or other applicable law. As a matter of public policy, it is fully expected that some "wasting" policies may be exhausted, to the detriment of future claimants or current claimants whose claims have not crystallized. Nevertheless, claims are not subject to a queue. Insurers face no duty or expectation to delay payments and avoid settlements out of concern for other claims, even if they arose concurrently. See, e.g., Gerdes v. Travelers Ins. Co., 440 N.Y.S.2d 976, 978 (1981).<sup>5</sup> Rather, absent specific statutory requirements<sup>6</sup> or contract provisions, an insurer retains discretion to

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<sup>4</sup> N.Y. Ins. Law § 2601 and § 3420(a)(2) (McKinney 2009) .

<sup>5</sup> Citing the "first in time, first in right" principle, the Gerdes court found that "an insurer who settles with some parties injured in a collision is liable only for the remainder of the policy limits even though it may have been aware that the total claims would probably exceed the policy limits." Id. Contrary to the Saper Response, n. 7 [Docket No. 574], "first in time, first in right" is a principle that protects insurers' discretion; it does not create affirmative rights to payment.

<sup>6</sup> Section 370 of the New York Vehicle and Traffic Law provides for ratable distribution to multiple claimants injured in an automobile accident in the specific case of vehicles for hire. N.Y. Vehicle and Traffic Law § 370 (McKinney's 2011). Similar rules do not apply to the Policies.

adjudicate and settle claims, without ratable distribution or withholding for other claims that might be disadvantaged, so long as it acts in "good faith."<sup>7</sup> This rule is well established in courts of general jurisdiction. It also applies in bankruptcy. See In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493 (Bankr. S.D.N.Y. 1991) ("to impose a duty upon an insurer to ascertain all claims under a policy before settling any claims, and to require the insurer to settle individual claims at its peril is contrary to the policy of encouraging compromise and speedy settlement and turns legal common sense on its head" (citations omitted)).<sup>8</sup> In short, courts do not interfere with an insurance company's good faith adjudication of claims, regardless of whether a policy appears likely to reach its limit before all claims are resolved.

**B. UNDER A PLAIN READING OF § 3420(a)(1), A DEFENSE COST IS A LOSS UNDER THE POLICIES.**

7. The MFGI Customers acknowledge that § 3420(a)(1) requires Assurance to make *some* payments for covered loss, but they interpret the statutory terms "damages for injury sustained or *loss* occasioned during the life of and *within the coverage of such policy or contract*" to exclude defense costs (emphasis added). Yet § 3420(a)(1) points directly to the terms of a policy. Coleman v. New Amersterdam Cas.

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<sup>7</sup> See, e.g., In re September 11 Litigation, 723 F. Supp. 2d 534, 542 (S.D.N.Y. 2010) (holding insurer can settle one or more claims even if doing so jeopardizes collection by later recovering or settling plaintiffs, so long as insurer does so in good faith and such settlements not prohibited by statute); Allstate Insurance Co. v. Russell, 788 N.Y.S.2d 401, 402 (N.Y. App. Div. 2004) (same); STV Group, Inc. v. Am. Cont'l Props., Inc., 650 N.Y.S. 2d 204, 205 (N.Y. App. Div. 1996) (same).

<sup>8</sup> To the extent that bankruptcy courts wish to avoid settlements, or other diminishment of insurance coverage available to a debtor that is posed by the same policy's coverage of non-debtors, the remedy is a third-party injunction. See, e.g., In re Adelphia Comm. Corp., 302 B.R. 439 (Bankr. S.D.N.Y. 2003) (enjoining under § 105(a) of the Bankruptcy Code civil litigation between insurer and co-insured non-debtors that threatened rescission of policies covering the debtors too). This approach avoids the occurrence of loss rather than causing loss to be unmet.

Co., 247 N.Y. 271 (1928) underscores the point: § 3420(a) operates strictly in accordance with policy terms. Id. (denying injured party's right of direct action pursuant to predecessor to § 3420(a)(2) when insured breached policy terms, relieving insurer of obligations). The statute does not specify who must have suffered the loss; the only factor is what a policy says is covered.

8. Here, there no question that the Policies define "loss" to include "defense costs," and Assurance is obligated to pay for covered loss under Clause 1 (*Professional Liabilities*).<sup>9</sup> See Heyliger Decl. Ex. B [Docket No. 519]. A plain reading of § 3420(a)(1), therefore, leaves no room for doubt. Defense costs are a type of loss within the coverage of the Policies. Section 3420(a)(1) addresses loss covered by a policy. Accordingly, defense costs fall within the scope of § 3420(a)(1).

**C. § 3420 REQUIRES THAT POLICIES WORK IN BANKRUPTCY AS THEY DID OUTSIDE IT; IT DOES NOT CREATE A FAVORED CATEGORY OF LOSS IN BANKRUPTCY.**

9. Plain meaning aside, the Objectors cite no supporting authority for the notion that insurance proceeds should be denied for one type of covered loss in favor of another. The MFGI Customers fixate on references in the case law to injuries caused by the insured debtor, but such references merely reflect the facts and circumstances of those cases (none of which involved defense costs, other competing forms of loss, or non-debtor insureds).<sup>10</sup> What the cases demonstrate is that courts interpret § 3420(a)(1) to

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<sup>9</sup> The Policies further provide that defense costs should be paid *in advance* in Clause 5.8 (*Advancement of Costs*). Id.

<sup>10</sup> See MERCHANTS' MUT. AUTOMOBILE LIABILITY INS. CO. V. SMART, 267 U.S. 126 (1925); Coleman, 247 N.Y. 271; In re F.O. Baroff Co., 555 F.2d 38 (2d Cir. 1977); Baez v. Medical Liability Mutual Insurance Co., 136 B.R. 65 (Bankr. S.D.N.Y. 1992). The MFGI Customers cite Coleman as evidence that policy proceeds are to be preserved for the exclusive benefit of injured parties. ¶ 23. But Coleman was focused on the

mitigate the disruption of bankruptcy on insurance. Baroff and Baez, for example, involved third-party losses that were established as crystalized claims payable under insurance policies; since proceeds in those cases passed through the debtors, the courts referred to insurance amounts "vesting" or being held on constructive trust as one way of articulating that parties with covered loss had priority claims over general creditors.<sup>11</sup> The bottom line was that paying policy proceeds to those who would have received it outside bankruptcy trumps principles of ratable distribution. Here, at least for now, the only parties with a nonbankruptcy right to payment under the Policies are the individual insureds seeking defense costs. In contrast, the Objectors and other commodity customers are putative creditors of the estates.

10. The cases also demonstrate that § 3420(a)(1) does not enhance existing policy terms for any injured party's benefit.<sup>12</sup> Accordingly, the Objectors' claims to exclusive rights to the proceeds of the Policies are just as unjustified under § 3420(a)(1) as they are incorrect as a matter of contract. First, there are various open claims in the current policy year, some of which do not relate to the losses of the Objectors and other commodity customers. Heyliger Decl. Ex. C [Docket No. 519]. Second, no case law suggests that where a policy is intended, in part, to protect defendants—a purpose embodied in defense cost coverage even for defendants found

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<sup>11</sup> See Baez, 136 B.R. at 68; Baroff, 555 F.2d at 42. Contrary to the Objectors' claims to have "vested" rights, none of the case law describes such rights for claims that have not been adjudicated.

<sup>12</sup> In Coleman, a case relied on by the MFGI Customers, Chief Justice Benjamin Cardozo allowed an insurer to rebut direct claims for payment by an injured third-party on the basis that the insured debtor breached terms of the policy. Coleman, 247 N.Y. 271. As a result, the injured party did *not* recover from the insurer in bankruptcy in the same manner they would *not* have recovered outside it.

liable to others—defendants are subordinated to plaintiffs. To the contrary, the cases show that pre-bankruptcy entitlements under an insurance policy persist in bankruptcy—no more, no less.

11. This rule is confirmed by the legislative history and policy purpose surrounding § 3420(a)(1) and its predecessors. Quite contrary to the MFGI Customers' conclusory characterization of legislative intent, the goal of § 3420(a)(1) was determined in Baroff to be to *mitigate* the effects of a bankruptcy case: to avoid windfalls for insurance companies (or an estate's general creditors) and to ensure that losses continued to be addressed. See Assurance Memo of Law ¶ 25 [Docket No. 518]. The Objectors' desired outcome would invert § 3420(a)(1) to *exacerbate* the effects of bankruptcy by disabling the Policies with respect to all but their own purportedly covered loss. This outcome would pose the possibility of insurance company windfalls, defeating a specific purpose of § 3420(a)(1).<sup>13</sup> In these cases, more importantly, it would unquestionably harm those who would be receiving payments for loss at this time if not for the bankruptcy cases, thus defeating the other specific aim of the New York Legislature. The Objectors' demands, therefore, would turn § 3420(a)(1) on its head.

**D. WHETHER COVERAGE APPLIES TO THE FINANCIAL INJURIES SUFFERED BY COMMODITIES CUSTOMERS WILL BE DETERMINED IN DUE COURSE.**

12. Both Objectors claim that the Stipulation would allow payments to individual insureds who "caused" their financial losses, but this assertion is false in several respects. First, certain defense costs owing under the Policies for the 2011/2012

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<sup>13</sup> The extent of windfall depends on the "leakage" caused by unfunded defense costs and assumes that policy limits are not reached.

policy year relate to claims that arose prior to the insolvency of MF Global Holdings Inc. and its affiliates. Heyliger Decl. Ex. C [Docket No. 519]. The MFGI Customers state no basis for denying defense costs or potential indemnification for other crystalized claims in those cases.

13. Second, the "cause" of losses among commodities customers is the subject of active investigations in various forums—as the MFGI Customers and Sapere are well aware. It is premature to conclude that any of the individual insureds named in the claims based on the Objectors' lawsuits, let alone all insureds named in open claims, (i) committed acts subject to coverage (ii) under the Policies (and not other insurance) (iii) that relate to losses among commodity customers. While Sapere seeks to litigate its civil action against individual insureds to conclusion and payment in the instant application, there are critical determinations that must be made in the claim adjudication process described above. In the meantime, those individual insureds and others named in open claims have a contractual rights to defense costs. Under the Policies, their right to payment applies regardless of whether they ultimately owe nothing to third-party claimants, face covered liabilities, or are exposed to uncovered liabilities.<sup>14</sup>

14. Third, if and when it is established that commodity customers (or any other party) were injured by covered acts by individual insureds, those insureds' rights to defense costs would be undiminished. No feature of the Policies or insurance

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<sup>14</sup>A longstanding tenet of liability insurance is that "the duty to defend is broader than the duty to indemnify." See, e.g., Town of Massena v. Healthcare Underwriters Mut. Ins., 98 N.Y.2d 435, 443 (2002) (citing Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61, 65 (1991); Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 154 (1948); Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 310 (1984) (citing International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 326; Lionel Freedman, Inc. v. Glens Falls Ins. Co., 27 N.Y.2d 364, 368).

law allows a different outcome, reflecting the fact that insurance that includes coverage for defense costs exists in part to protect defendants.

**PROCEDURAL MATTERS**

15. Assurance reserves the right, depending on the outcome in these cases, to pursue relief in the liquidation of MF Global Inc. under the Securities Investor Protection Act. In the meantime, Assurance recognizes and expects that matters before this Court in the above-captioned cases will concern the chapter 11 debtors and not MF Global Inc., notwithstanding much of the contents of the Sapere Response.

**CONCLUSION**

Assurance respectfully requests that the Court approve the Stipulation and grant such other relief as may be just and proper.

Dated: March 23, 2012  
New York, New York

ALLEN & OVERY LLP

/s/ Ken Coleman

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*Attorneys for MFG Assurance Company  
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## **EXHIBIT A**

### **AMENDED STIPULATION AND ORDER BETWEEN THE CHAPTER 11 TRUSTEE AND MFG ASSURANCE COMPANY LIMITED REGARDING PAYMENT OF LOSS AND REIMBURSEMENT OF COVERED COSTS AND EXPENSES**

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

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In re : Chapter 11  
MF GLOBAL HOLDINGS LTD., et al. : Case No. 11-15059 (MG)  
Debtors. : (Jointly Administered)  
-----**x**-----

**AMENDED STIPULATION AND ORDER BETWEEN THE CHAPTER 11  
TRUSTEE AND MFG ASSURANCE COMPANY LIMITED REGARDING  
PAYMENT OF LOSS AND REIMBURSEMENT OF COVERED COSTS AND  
EXPENSES**

This amended stipulation and order (the “**Amended Stipulation**”) is made and entered into on the date hereof, by and between Louis J. Freeh (the “**Trustee**”), as chapter 11 trustee, and MFG Assurance Company Limited (“**MFG Assurance**” and, together with the Trustee, the “**Parties**”).

**WHEREAS**, on October 31, 2011 (the “**Commencement Date**”), MF Global Holdings Ltd. (“**MFGH**”) and MF Global Finance USA, Inc. (collectively, the “**Initial Debtors**”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”), in the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”), which initiated these chapter 11 cases (the “**Chapter 11 Cases**”);

**WHEREAS**, on November 7, 2011, the United States Trustee appointed the official committee of unsecured creditors (the “**Committee**”) in the Chapter 11 Cases;

**WHEREAS**, on November 25, 2011, the United States Trustee filed the *Application for Order Approving Appointment of Chapter 11 Trustee* (Docket No. 169);

**WHEREAS**, on November 28, 2011, the Bankruptcy Court entered the *Order Approving the Appointment of Chapter 11 Trustee* (Docket No. 170), approving the appointment of the Trustee as chapter 11 trustee of the Initial Debtors' cases;

**WHEREAS**, on December 19, 2011, MF Global Capital LLC, MF Global FX Clear LLC, and MF Global Market Services LLC (collectively, the "New Debtors") filed for relief under chapter 11 of the Bankruptcy Code, and on December 21, 2011 the Bankruptcy Court entered orders for relief with respect to each of the New Debtors and directed joint administration of the New Debtors' cases with the Initial Debtors' cases (Docket No. 298);

**WHEREAS**, on December 27, 2011, the Bankruptcy Court entered the *Order Approving the Appointment of Chapter 11 Trustee* (Docket No. 306), approving the appointment of the Trustee as chapter 11 trustee of the New Debtors' cases;

**WHEREAS**, prior to the Commencement Date, non-debtor MFG Assurance, a 100% owned subsidiary of MFGH, issued the professional liability policies listed on Schedule 1 hereto (each a "Policy" and collectively, the "Policies") to MFGH;

**WHEREAS**, the Policies are intended to provide coverage up to USD47,500,000 in the policy period of May 31, 2009 to May 31, 2010, USD70,000,000 in the policy period of May 31, 2010 to May 31, 2011 and USD120,000,000 in the policy period of May 31, 2011 to May 31, 2012, in each period after the exhaustion of a USD25,000 retention (i.e., deductible), per *single claim*;<sup>1</sup>

**WHEREAS**, the Policies provide that *insurer* (i.e., MFG Assurance) shall pay (subject to each of the Policies' terms, conditions, endorsements and exclusions) on

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<sup>1</sup> Words in italics indicate defined terms in the Policies.

behalf of the *insured* for all *loss* arising out of a *wrongful act* which gives rise to a *claim* first made against an *insured* by a third party during the *policy period* (or discovery period, if applicable) and reported in writing to MFG Assurance pursuant to the terms of the applicable Policy.<sup>2</sup> The definition of *insured* includes not only MFGH but its *subsidiaries* and a number of *individual insureds* (i.e., past, present or future natural persons employed, compensated and directed by MFGH in the *insured entity's* business).

**WHEREAS**, because *loss* is defined in the Policies as including, *inter alia*, costs and expenses of *claimants* and *co-defendants*, *defense costs*, certain damages awards, and settlements negotiated with the *insurer's* consent, MFG Assurance is obligated to make a variety of payments on behalf of *insureds* other than MFGH;

**WHEREAS**, in particular, the Policies provide that “[e]xcept to the extent that the *insurer* has denied a *loss*, and subject to the *limit of liability* and *retention*, the *insurer* shall advance *defense costs* incurred to the *insured* in respect of any *claim* prior to the final resolution of the *claim*;”

**WHEREAS**, each Policy provides that the *limit of liability* under the Policy is the “total aggregate limit of the *insurer's* liability for all *losses* arising out of all *claims* made against all *insureds* under [the applicable Policy] combined, reported or discovered during the *policy period*,” and that *defense costs* are part of *loss* and subject to the total aggregate *limit of liability* for *loss*.

**WHEREAS**, prior to the Commencement Date, MFG Assurance advanced *defense costs* to MFGH on behalf of certain *individual insureds* in respect of

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<sup>2</sup> Although there are some variations in the Policies, they are substantively similar for the purpose of determining claim coverage, and such variations do not affect the basis for this Amended Stipulation.

certain unresolved *claims* against *individual insureds*, and after the Commencement Date, certain *individual insureds* have sought continued payment of *defense costs* by MFG Assurance under the Policies;

**WHEREAS**, the Parties believe that *individual insureds* under the Policies may continue to seek payment of *defense costs* and/or other types of *loss* from MFG Assurance under the Policies in accordance with the terms of such Policies after the date hereof;

**WHEREAS**, the Parties believe that (i) the Policies are property of MFGH's estate; (ii) MFG Assurance is entitled to make payments, in accordance with the terms of the Policies, on behalf of any *insured* for *loss* as it deems appropriate; (iii) to the extent applicable, the automatic stay imposed by 11 U.S.C. § 362(a) should be lifted so as to permit MFG Assurance to make payments, in accordance with the terms of the Policies, on behalf of any *insured* for *loss* as it deems appropriate; and (iv) any such payment of *loss* by MFG Assurance shall reduce the aggregate *limit of liability* under the applicable Policy in a like amount;

**WHEREAS**, the Parties have fully reserved all of their rights and defenses at law, in equity and under the Policies;

**NOW, THEREFORE**, in consideration of the mutual covenants and obligations set forth below and for other valuable consideration which the Parties hereby acknowledge, and subject to Bankruptcy Court approval of this Amended Stipulation, it is agreed by and between the Trustee and MFG Assurance that:

1. The recitals set forth above form an integral part of this Amended Stipulation and are fully incorporated herein.

2. The Policies are property of MFGH's estate.

3. MFG Assurance is entitled to make payments, in accordance with the terms of the Policies, on behalf of any *insured* for *loss* as it deems appropriate.

4. To the extent applicable, the automatic stay imposed by 11 U.S.C. § 362(a) should be lifted so as to permit MFG Assurance to make payments, in accordance with the terms of the Policies, on behalf of any *insured* for *loss* as it deems appropriate.

5. Any such payment of *loss* by MFG Assurance shall reduce the aggregate *limit of liability* under the applicable Policy in a like amount;

6. Nothing in this Amended Stipulation shall constitute (i) a waiver, modification or limitation of MFG Assurance's reservation of all rights, remedies and defenses under the Policies, or (ii) a finding that sums are due and owing, or in what amount, under any Policy.

7. This Amended Stipulation shall take effect immediately upon approval by the Bankruptcy Court.

8. Each party hereto represents and warrants that as of the date of execution of this Amended Stipulation, the execution and delivery of this Amended Stipulation has been duly authorized, that all necessary approvals have been granted, save only for the approval of the Bankruptcy Court, that any and all necessary actions have been taken, and that the undersigned has full and complete authority to enter into this Amended Stipulation on behalf of its respective client and to bind such client.

9. This Amended Stipulation, and all of its terms and provisions, shall be binding upon and inure to the benefit of the Parties, and their respective successors, assigns, and administrators.

10. Each party hereto warrants, represents, and agrees that in executing this Amended Stipulation, it does so with the full knowledge of any and all rights that it may have with respect to the controversies herein and it has received independent legal advice from its attorneys with respect thereto.

11. This Amended Stipulation may be executed in counterparts, each of which shall constitute an original, but all of which when taken together shall constitute one and the same instrument. A duly authorized electronic signature shall be as binding as an original signature.

12. No amendment, waiver of modification of any provision of this Amended Stipulation shall be effective unless the same shall be in writing and signed by the Trustee and MFG Assurance.

13. Nothing in this Amended Stipulation is or shall be construed to be a waiver of any rights, claims, actions, counterclaims, defenses or other legal and equitable rights of all kinds of either Party or an election of remedies with respect to such rights, claims, actions or counterclaims against either Party, all of which are preserved and are supplemental to the provisions of this Amended Stipulation.

14. This Amended Stipulation shall be construed and governed under the laws of the State of New York.

15. This Amended Stipulation has been fully negotiated by the Parties. Each party acknowledges and agrees that this Amended Stipulation has been drafted

jointly, and any ambiguities in this Amended Stipulation cannot and will not be construed against the drafter in the construction or interpretation of this Amended Stipulation.

*[Remainder of page intentionally left blank]*

Dated: March 23, 2012

New York, New York

ALLEN & OVERY LLP

/s/ Stephen Doody

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*Proposed Attorneys for the chapter 11  
trustee Louis J. Freeh*

So Ordered this \_\_\_\_ day of \_\_\_\_\_, 2012 in New York

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MARTIN GLENN  
UNITED STATES BANKRUPTCY JUDGE

## SCHEDULE 1

### POLICIES

Policy No.	Period	Limits
1-18001-00-09	5/31/2009 - 5/31/2010	\$7,475,000 xs \$25,000
1-18001-00-09	5/31/2009 - 5/31/2010	\$15,000,000 xs \$7,500,000
1-18001-00-09	5/31/2009 - 5/31/2010	\$15,000,000 xs \$22,500,000
1-18001-00-09	5/31/2009 - 5/31/2010	\$10,000,000 xs \$37,500,000
1-18001-00-10	5/31/2010 - 5/31/2011	\$7,475,000 xs \$25,000
1-18002-00-10	5/31/2010 - 5/31/2011	\$15,000,000 xs \$7,500,000
1-18003-00-10	5/31/2010 - 5/31/2011	\$15,000,000 xs \$15,000,000
1-18004-00-10	5/31/2010 - 5/31/2011	\$10,000,000 xs \$30,000,000
1-18005-00-10	5/31/2010 - 5/31/2011	\$5,000,000 p/o \$10,000,000 xs \$40,000,000
1-18005-01-10	5/31/2010 - 5/31/2011	\$5,000,000 p/o \$10,000,000 xs \$40,000,000
1-18006-00-10	5/31/2010 - 5/31/2011	\$10,000,000 xs \$50,000,000
1-18007-00-10	5/31/2010 - 5/31/2011	\$10,000,000 xs \$60,000,000
1-18001-00-11	5/31/2011 - 5/31/2012	\$7,475,000 xs \$25,000
1-18002-00-11	5/31/2011 - 5/31/2012	\$15,000,000 xs \$7,500,000
1-18003-00-11	5/31/2011 - 5/31/2012	\$15,000,000 xs \$15,000,000
1-18004-00-11	5/31/2011 - 5/31/2012	\$10,000,000 xs \$30,000,000
1-18005-00-11	5/31/2011 - 5/31/2012	\$5,000,000 p/o \$10,000,000 xs \$40,000,000
1-18005-01-11	5/31/2011 - 5/31/2012	\$5,000,000 p/o \$10,000,000 xs \$40,000,000
1-18006-00-11	5/31/2011 - 5/31/2012	\$10,000,000 xs \$50,000,000
1-18007-00-11	5/31/2011 - 5/31/2012	\$10,000,000 xs \$60,000,000
1-18009-00-11	5/31/2011 - 5/31/2012	\$10,000,000 xs \$70,000,000
1-18010-00-11	5/31/2011 - 5/31/2012	\$5,000,000 xs \$80,000,000
1-18011-00-11	5/31/2011 - 5/31/2012	\$10,000,000 p/o \$25,000,000 xs \$85,000,000
1-18011-01-11	5/31/2011 - 5/31/2012	\$15,000,000 p/o \$25,000,000 xs \$85,000,000
1-18012-00-11	5/31/2011 - 5/31/2012	\$10,000,000 xs \$110,000,000