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

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In re :
: Case No. 11-15059 (MG)
MF GLOBAL HOLDINGS, LTD., *et al.*, :
: Chapter 11
Debtors. :
: Jointly Administered
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In re :
: Case No. 11-2790 (MG) SIPA
MF GLOBAL, Inc., :
: Debtors. :
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STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

Sapere Wealth Management LLC, Granite Asset Management, and Sapere CTA Fund, L.P. (collectively, “Sapere”), pursuant to Federal Rule of Bankruptcy Procedure 8006, hereby states the issues to be presented on appeal from the Memorandum Opinion Lifting Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies [Docket. No. 619 in Case No. 11-15059 (MG)] entered by the Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) on April 10, 2012 and the Orders Lifting Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies, dated and entered April 25, 2012 [Docket. No. 652 in Case No. Case No. 11-15059 (MG) and Docket No. 1436 in Case No. 11-2790 (MG) (SIPA)]:

On October 31, 2011, MF Global collapsed in the largest scandal in the history of the American commodities business. As a result of this scandal, commodities customers, including Sapere, were left with an aggregate shortfall in their segregated-account money of \$1+ Billion as of October 28, 2011. Federal law and the common law required that MF Global, at all times, segregate and keep secure the commodities customers' funds, as the customers' property.¹ Among the various MF Global companies were MF Global Holdings, Ltd. ("MFGH")—which was the ultimate parent of registered commodities broker MF Global Inc. ("MFGI")—and MFG Assurance Company, Ltd. ("MFGA") a "captive" insurance company in Bermuda, wholly-owned by MFGH. For the policy year May 31, 2011 to May 30, 2012, MFGA issued to MFGH \$120 Million of professional liability insurance, sometimes also called E&O or errors-and-omissions insurance (the "MFGA Policies") under which, MFGI was an insured. No genuine dispute exists that as of October 28, 2011, an unlawful shortfall had occurred of at least \$1 Billion in commodities customers' funds that were deposited with MFGI. The shortfall in commodities customers' funds, in violation of law, exceeds the \$120 Million coverage of the MFGA Policies. Insolvent, MFGI entered liquidation on October 31, 2011, in a proceeding under the Securities Investor Protection Act ("SIPA").

1. Do the MFGA Policies cover the liability of MFGA's insured MFGI to its commodities customers for damages from MFGI's violation of the Commodities Exchange Act ("CEA"), the regulations of the Commodities Futures Trading Commission ("CFTC") and/or the common law from MFGI's having unlawfully released commodities customers' funds other than to or for the benefit of those customers, for which damages the commodities customers made

¹ We include MFGI commodities customers' customer funds sometimes called "4d" funds and those sometimes called "30.7" funds.

written claims in the liquidation proceeding pending against MFGI under SIPA on and after October 31, 2011?

2. Does MFGI have strict liability to its commodities customers (including Sapere) for damages they sustained when MFGI violated the CEA and/or the CFTC regulations and/or at common law for breach of trust and/or other tort when MFGI released to persons other than to or for the benefit of those customers funds that they had deposited with MFGI that the law required be segregated and secured for the customers who made the deposits?

3. Because, as of and prior to October 31, 2011, MFGI, had violated its legal obligation to maintain commodities customers' funds segregated and secured and had an unlawful shortfall in such customers' funds in excess of \$1 Billion, which exceeded the MFGA Policies' combined limits of \$120 Million, and MFGI was insolvent and entered liquidation under SIPA on October 31, 2011, do the commodities customers have vested rights to the policies' proceeds under NY Ins. Law § 3420?

4. Because MFGI's aggregate, insured liability to its 25,000+ commodities customers exceeds the MFGA Policies' combined limits, are the policies' proceeds property of the SIPA liquidation estate that is to be distributed to the commodities customers in the SIPA liquidation proceeding?

5. The MFGA Policies are wasting policies and payment of defense costs erodes the limits available to pay MFGI's injured victims. Former directors and officers of MFGI and others are covered by hundreds of millions of dollars of directors and officers (D&O) insurance coverage which provides defense costs for tort claims brought against them subsequent to the commencement of the SIPA liquidation case in which MFGI is being liquidated. No former director or officer or other person named as a defendant in those tort actions filed a declaration in

the bankruptcy court claiming hardship would result to him or her if the proceeds of the MFGA Policies were not used to pay such defense costs, much less tendered any proof of his or her available resources and inability to pay costs without the MFGA Policies. As per questions 1 through 3 above, the MFGA Policies cover MFGI's liability to its commodities customers. If the stay was not lifted, however, these funds would otherwise be preserved for Sapere and other commodities customers, whose rights vested under the policies no later than October 28, 2011. Accordingly, the fundamental issue on appeal is whether the Bankruptcy Court erred in lifting the automatic stay to permit MFGA to use the MFGA Policies' proceeds to pay the defense costs of former directors and officers of MFGI and others for tort claims brought against them subsequent to the commencement of the SIPA liquidation case in which MFGI is being liquidated, when commodity customers have a vested right in such proceeds and significant other sources (including D&O insurance) exist to fund defense costs?

6. Did the bankruptcy court err in ruling that individual insureds and MFGH faced undue hardship if the MFGA Policies' proceeds were not used to pay individual insureds' defense costs in the later tort litigations, including:

a. Whether the Bankruptcy Court erred in ruling that "disruption of the MFGA Policies would pose immediate hardships for the Individual Insureds with open claims for defense costs," in light of such facts as that the putative individual insureds tendered no proof to that effect and hundreds of millions of dollars of other insurance (such as D&O insurance) exists that provides defense costs coverage for them?

b. Whether the Bankruptcy Court erred in ruling that the "balance of harms weighs in favor of permitting MFG Assurance to advance defense costs on behalf of the Individual Insureds pursuant to the MFGA Policies" instead of commodities customers

who suffered harms no later than October 28, 2011, and in light of such facts as that no individual insured proffered proof of such hardship and hundreds of millions of dollars of other insurance (such as D&O insurance) exists that provides defense costs coverage for them?

c. Whether the Bankruptcy Court erred in ruling that Sapere and other commodities customers did not have “vested rights” in the MFGA Policies because Sapere did not “conclusively establish” that the Debtors or the Individual Insureds are liable for any wrongdoing that would be covered by the Policies even though the SIPA Trustee’s admissions of facts established that MFGI’s wrongdoing caused the shortfall in commodities customers’ funds for which they made claims for damages they had incurred and MFGI has strict liability to the commodities customers?

d. Whether the Bankruptcy Court erred in ruling that the MFGH estate would be harmed if MFGA did not pay defense costs to the individual insureds, when an adjudication of individual tort liability against an individual insured would not diminish MFGH’s estate property but, at most, might increase the risk to other general creditors of MFGH that such creditors might recover lesser fractions of MFGH estate assets that might ultimately be distributed to creditors because the number of general creditors’ claims might be higher than they would like to see?

7. Whether the equity powers of the Bankruptcy Court provide a fair and just remedy for commodities customers under these circumstances which includes maintaining the automatic stay so as to continue to prohibit the payment of the putative individual insureds’ defense costs out of the MFGA Policies’ proceeds?

Dated: New York, New York
May 9, 2012

Respectfully submitted,

**FORD MARRIN ESPOSITO WITMEYER &
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