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

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In re:	)	
	)	
MF GLOBAL INC.,	)	Case No. 11-2790 (MG) (SIPA)
	)	
Debtor.	)	
	)	
	)	
_____	)	

**MOTION FOR ORDER AUTHORIZING THE APPOINTMENT  
OF AN OFFICIAL COMMITTEE OF COMMODITY BROKER  
CUSTOMERS AND APPROVING COMPENSATION OF ALLOWED  
FEES AND EXPENSES OF COMMITTEE PROFESSIONALS**

Certain commodity broker customers (the "Movants")<sup>1</sup> of MF Global Inc. ("MFGI"), hereby move this Court for the entry of an order pursuant to sections 105, 503 and 705 of Title 11 of the United States Code (the "Bankruptcy Code"): (i) authorizing the appointment in the above-captioned proceeding (the "MFGI Proceeding") of an official committee of commodity broker customers of MFGI (the "Customer Committee"), and (ii) approving compensation of

<sup>1</sup> The Movants are David Rosen, Daniel Shak, Gary Parziale, Michael Caponiti and David Kotz, commodities customers of MFGI, and constitute the steering committee for an ad hoc group of commodity customers, as detailed below.

fees and expenses of committee professionals as administrative expenses of the commodity customer property estate (the "Motion"). In support of this motion, the Movants respectfully represent as follows:

### **Preliminary Statement**

1. The MFGI Proceeding is two cases in one—a SIPA liquidation of a securities broker-dealer, and a chapter 7 liquidation of a commodity broker. Administering this dual track proceeding in a case of this size and complexity will present significant challenges to the SIPA trustee and will inevitably raise significant and novel issues of the interplay of these two liquidation regimes. Yet the entire proceeding is being administered by a SIPA trustee whose experience appears to be primarily in SIPA securities broker liquidations rather than commodity broker liquidations<sup>2</sup> and whose track record in the Lehman Brothers proceeding does not bode well for a prompt resolution of this case. The commodity broker customers have enormous amounts of collateral frozen at MFGI. It appears that approximately \$5.4 billion of commodity customer funds were required to be segregated by MFGI, and over \$600 million of those funds is reported missing.<sup>3</sup> Those funds are the lifeblood of their businesses and must be returned to their rightful owners in a prompt and fair manner. Chapter 7 of the Bankruptcy Code, which applies to the commodity broker aspects of this case, contemplates the formation of a creditors' committee.<sup>4</sup> Nothing in SIPA prevents the appointment of an official committee in such a dual

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<sup>2</sup> See In re MF Global Inc., No. 11-02790 (MG) (SIPA), Hr'g Tr. Nov. 2, 2011 at 39 ("November 2 Transcript," a copy of which is attached hereto as Exhibit A) in which Mr. Kobak of Hughes Hubbard & Reed LLP acknowledges that his firm's experience is more on the securities side.

<sup>3</sup> See November 2 Transcript at 29.

<sup>4</sup> Although section 705 of the Bankruptcy Code provides for the election of a committee of unsecured creditors, the creditors entitled to distribution here are not merely general unsecured creditors, but enjoy a priority in customer property under subchapter IV of chapter 7.

track proceeding. To the contrary, for the reasons set forth below, an official committee of commodity broker customers is critical to the efficient administration of this case and to the prompt and fair distribution of commodity customer property. Moreover, to ensure effective commodity customer representation and a level playing field, the allowed professional fees and expenses of such a committee should be compensated as administrative expenses of the commodity customer property estate.

### **Background**

2. MFGI is a futures commission merchant, a broker-dealer registered with the United States Securities and Exchange commission (“SEC”), and a member of the Securities Investor Protection Corporation (“SIPC”).<sup>5</sup>

3. On October 31, 2011 (the “Petition Date”), on complaint and application of SIPC, the United States District Court for the Southern District of New York (Engelmayer, J.) entered an order (“SIPA Order”) commencing the MFGI Proceeding under the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §78aaa et seq. (“SIPA”), appointing James W. Giddens as trustee (the “Trustee”), and removing the MFGI Proceeding to this Court. The MFGI Proceeding has two aspects: a stockbroker liquidation under SIPA, and a commodity broker liquidation under subchapter IV of chapter 7 of the Bankruptcy Code.

4. On November 7, 2011, a group of commodity broker customers of MFGI, including Movants, convened to form an ad hoc committee to protect their interests in the SIPA Proceeding. Mr. David Rosen, a commodity broker customer of MFGI and a

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<sup>5</sup> Upon information and belief, the commodity broker business of MFGI is significantly larger than its securities broker business.

member of the New York Mercantile Exchange (“NYMEX”), organized this open meeting for all traders who are members of the New York exchanges run by CME Group (“CME”) and the IntercontinentalExchange (“ICE”) and who cleared their trades through MFGI. See “Angry MFG Global Customers Get Organized,” Forbes, November 6, 2011, a copy of which is attached hereto as Exhibit B. Mr. Rosen solicited attendance for this meeting by posting notices around the trading floors and in the building housing the NYMEX, COMEX and ICE exchanges, and additional participants learned of the meeting through the Forbes article. More than 80 commodity customers of MFGI who are members of these New York exchanges attended this meeting, resulting in the formation of an ad hoc group.<sup>6</sup> See the accompanying Declaration of David Rosen dated November 15, 2011 (“Rosen Dec.”) at ¶4.

### **Relief Requested**

5. By this Motion, the Movants seek an order of this Court (i) authorizing the appointment of a Customer Committee, and (ii) approving compensation of fees and expenses of committee professionals as administrative expenses of the commodity customer property estate.

6. The Court has jurisdiction over this Motion and the MFGI Proceeding pursuant to 28 U.S.C. §§ 157, 1334 and 15 U.S.C. §78eee (a)(3), (b)(2) and (b)(4). The statutory predicates for the relief sought herein are sections 105, 503 and 705 of the Bankruptcy Code.

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<sup>6</sup> At present, this ad hoc group includes 66 commodity customers of MFGI. Additional customers have indicated an interest in joining.

### **The Court Should Appoint an Official Committee of Commodity Broker Customers in the SIPA Proceeding**

7. The Movants submit that the appointment of an Official Committee of Commodity Broker Customers is necessary and appropriate in this case and respectfully request that this Court order the appointment of such a Customer Committee. The proposed members of the customer committee are business people who are active participants in the commodities business and, if appointed, would have a duty and would be best equipped to represent the interests of the commodity broker customers. As reflected in the numerous letters filed with the Court, these customers are dependent upon a prompt return of their customer property with which to continue their respective businesses.

8. The MFGI Proceeding is both a proceeding under SIPA involving the liquidation of a stockbroker, and a chapter 7 liquidation of a commodity broker under subchapter IV of chapter 7 of the Bankruptcy Code.<sup>7</sup> As noted in the *Collier* treatise, issues surrounding the liquidation of such a “joint broker” are not addressed in any detail in either the Bankruptcy Code or SIPA. See 6 *Collier on Bankruptcy* ¶760.08 (16th ed. 2011) (“Collier”). “An analysis of the provisions, however, suggests that the trustee would administer separate estates, one under each of the subchapters.” Id.; see also Commodity Fut. Trad. Comm’n, *Bankruptcy—Final Rules*, 48 Fed. Reg. 8716, 8719 (Mar. 1, 1983) (“It should be noted that [the commodity broker and stockbroker liquidation subchapters] are structured so that any customer property held by such a [joint broker] can be distributed as separate estates under the two subchapters”).<sup>8</sup>

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<sup>7</sup> SIPA vests the Trustee with the duties of a trustee in a chapter 7 case including, in the case of a commodity broker, the duties specified in subchapter IV. 15 U.S.C. §78fff-1.

<sup>8</sup> The statutory provisions for election of a trustee and committee in a chapter 7 case are somewhat inconsistent with SIPA and commodity broker liquidations. Section 705 of the Bankruptcy Code provides:

9. Given the complexity and magnitude of the MFGI Proceeding, commodity customers need a committee to protect their common interests. A Customer Committee can work with the Trustee to ensure that the commodity customer priority is properly and fairly applied, and represent the interests of commodity customers in respect of any issues that may arise between the commodity customer and securities customer estates, or with the general unsecured creditors. For example, identification of the commodity customer property estate, potential augmentation of that estate through avoidance under section 764 of the Bankruptcy Code, implementation of regulations of the Commodity Futures Trading Commission (“CFTC”) regarding the customer property estate and distribution of customer property (including, without limitation, implementation of 17 C.F.R. §190.08(J) which includes other property of the debtor

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(a) At the meeting under section 341 (a) of this title, creditors that may vote for a trustee under section 702 (a) of this title may elect a committee of not fewer than three, and not more than eleven, creditors, each of whom holds an allowable unsecured claim of a kind entitled to distribution under section 726 (a)(2) of this title.

(b) A committee elected under subsection (a) of this section may consult with the trustee or the United States trustee in connection with the administration of the estate, make recommendations to the trustee or the United States trustee respecting the performance of the trustee’s duties, and submit to the court or the United States trustee any question affecting the administration of the estate.

11 U.S.C. §705. Section 702(a) of the Bankruptcy Code, in turn, provides that:

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726 (a)(2), 726 (a)(3), 726 (a)(4), 752 (a), 766 (h), or 766 (i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor’s interest as a creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

11 U.S.C. §702(a); see H.R. Rep. No. 97-420, 97TH Cong., 2ND Sess. at 414 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 586 (noting clarification in 1982 Bankruptcy Code amendments that “customers of debtors under subchapters III or IV are entitled to participate in the election of a trustee”). Thus, commodity broker customers are entitled to elect a committee pursuant to section 705 of the Bankruptcy Code. The relief requested in this Motion, appointment of a committee of commodity customers, is also authorized under section 105 of the Bankruptcy Code, which permits the Court to “issue any order,

in the customer property estate to the extent there would be a shortfall) are all complicated issues where commodity customers will benefit from a Customer Committee's participation and oversight. Moreover, to the extent that certain MFGI commodity and securities accounts may have been cross-margined, 17 C.F.R. Part 190, Appendix B provides for the subordination of claims of customers with cross-margin accounts to claims of customers whose accounts contain only commodity contracts, to ensure that the commodity estate is not diminished by distributions of cross margin account property to stockbroker customers. See Collier, ¶760.08. Commodity customers of MFGI have an interest in ensuring that these provisions are properly enforced.

10. A major goal of the MFGI Proceeding must be the prompt distribution of commodity customer property to customers. Currently, substantial customer funds and other property are frozen at MFGI, awaiting the outcome of the Trustee's investigation, efforts to identify the customer estate, and processing of customer claims. See November 2 Transcript at 27 (indicating that roughly 48,000 MFGI accounts clear through CME). In a typical bankruptcy, a creditor may have a claim based upon some number of receivables, but the impact of the debtor's bankruptcy is de minimis to the creditor's business as a whole. In stark contrast, the customer property frozen at MFGI is the very lifeblood of MFGI commodity customers' businesses. They cannot trade without it. Prompt distribution to these customers is critical to their viability and thus safeguards the commodity future business as a whole. See Rosen Dec. at ¶5. A Customer Committee can assist in expediting this process, not by hindering the Trustee's activities, but by working with the Trustee to facilitate and streamline the process. Absent involvement of a Customer Committee, commodity customers face a substantial risk of excessive delay and uncertainty.

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process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy

11. In this regard, we note the example of the dual chapter 11/SIPA Lehman Brothers proceedings. The Lehman Brothers chapter 11 estates, with the active involvement of an official committee of unsecured creditors and several ad hoc creditor committees, are moving toward distributions to creditors at a faster clip than the Lehman Brothers Inc. (“LBI”) SIPA proceeding under the stewardship of the same SIPA trustee.<sup>9</sup> These concerns are laid out in detail in the November 4, 2011 letter from Representatives Edward R. Royce and Scott Garrett to Hon. Mary L. Schapiro of the SEC and Stephen P. Harbeck of SIPC, a copy of which is annexed hereto as Exhibit D. While we do not question the Trustee’s diligence here, the oversight of an official Customer Committee which consists of business people cannot but help ensure the expeditious resolution of the MFGI Proceeding. Although CME has recently announced its offer to provide a substantial financial guarantee to enable the Trustee to make a prompt interim distribution to commodity customers whose funds are currently frozen,<sup>10</sup> it remains to be seen on what terms and how quickly this may happen. Any protracted delay here could be disastrous to MFGI’s commodity customers and to the markets in which they trade.

12. A Customer Committee in the MFGI Proceeding would work to avoid any undue delay in the MFGI Proceeding and will foster an expeditious and fair resolution of the case. Because of the appointment of a SIPA trustee, customers and creditors on the commodity broker side are deprived of the right they ordinarily would have in chapter 7 liquidation to elect a trustee

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Code].” 11 U.S.C. §105(a).

<sup>9</sup> See In re Lehman Brothers Holdings, Inc., No. 08-13555 (JMP), Hr’g Tr. Aug. 30, 2011, at 16 (Debtor’s counsel acknowledges important role played by official and unofficial committees in negotiating chapter 11 plan), attached hereto as Exhibit C.

<sup>10</sup> See CME Group News Release, “CME Group and CME Trust to Provide \$300M Guarantee to SIPC Trustee to Help Facilitate Release of Customer-Segregated Funds,” dated November 11, 2011, attached hereto as Exhibit E.



of their choosing.<sup>11</sup> Commodity customers of MFGI currently have no advocate in the process and are receiving little to no information. An official committee would be a fiduciary to its customer constituency and would provide that advocacy and foster transparency and open lines of communication. See In re Lehman Brothers Inc., No. 08-01420 (JMP) (SIPA), 2008 WL 5423214, at \*3-4 (Bankr. S.D.N.Y. Nov. 26, 2008) (recognizing the value of creditor groups in a SIPA proceeding to foster communication and ensure adequate representation of common interests). As Judge Peck observed in permitting a group of former employees of LBI to obtain discovery of a list of similarly-situated creditors in order to form an ad hoc group:

Moreover, despite the fact that administration in a SIPA liquidation case does not call for the organization of committees nor does it specify any procedure for formation of groups of jointly represented parties, there is nothing that prevents such coordinated creditor activity nor is such activity inconsistent with the purposes of a SIPA case. Given the unprecedented scale of this SIPA liquidation, the consensual formation of groups of creditors with common interests and shared objectives may even be beneficial and simplify certain aspects of case administration.

Id. at \*4.

13. Apart from making an interim distribution to commodity customers, the critical next step in the MFGI Proceeding is tracing the shortfall in MFGI customer accounts. This Court has made clear in its Memorandum Opinion Granting SIPC Trustee's Motion for an Order Granting Authority to Issue Subpoenas for the Production of Documents and the Examination of the Debtor's Current and Former Officers, Directors, and Employees and Other Persons, dated November 4, 2011 [Docket No. 36], that the Trustee must be permitted to conduct this investigation without the participation of or interference by other parties in interest. Id. at 2-3.

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<sup>11</sup> In contrast to an elected chapter 7 trustee, a SIPA trustee is designated by SIPC in its sole discretion. See 15 U.S.C. §78eee(b)(3).

The Movants do not seek appointment of a Customer Committee in order to insinuate themselves into this investigatory process. Rather, a Customer Committee could work with the Trustee to implement the recommendations of his investigative report, identify the assets of the commodity customer estate, and ensure the prompt and fair distribution of commodity customer property to such customers in accordance with the priority scheme established in the Bankruptcy Code and the regulations of the CFTC. This role is fully consistent with the role of chapter 7 committees envisioned by section 705(b), which is to “consult with the trustee or the United States trustee in connection with the administration of the estate, make recommendations to the trustee or the United States trustee respecting the performance of the trustee’s duties, and submit to the court or the United States trustee any question affecting the administration of the estate.”

14. To ensure that the interests of commodity broker customers are immediately protected, the Movants further respectfully request that the Court appoint the Customer Committee, to initially consist of the four customers who are the Movants herein.<sup>12</sup> While Movants believe they constitute a representative cross section of the MFGI commodity customers, if any issue were to arise regarding the composition of the Customer Committee, the membership of the Customer Committee could be expanded so that all customer constituencies are represented. Cf. 11 U.S.C. §1102(a)(4). Indeed, the Movants have already been contacted by others seeking to join such a Customer Committee. Movants welcome participation on a Customer Committee of other interested commodity customers.

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<sup>12</sup> In a chapter 11 case, section 1102(b)(1) of the Bankruptcy Code contemplates the continuance of prepetition committees. While section 1102 is not directly applicable here, the exigencies of this situation suggest that similar relief is appropriate with respect to the Movants as members of the steering committee of an ad hoc customer group.

**The Court Should Authorize the Allowance and Payment of Fees and Expenses of the Customer Committee's Professionals as Administrative Expenses of the Commodity Customer Property Estate**

15. Prior to filing this Motion, certain of the Movants requested that CME, of which they are members, cover the legal expenses incurred by MFGI's commodity customers as a result of the account shortfall and MFGI's bankruptcy. To date, CME has failed to respond.

16. While not expressly provided in section 705 of the Bankruptcy Code, this Court has the power to and should authorize the allowance and payment of fees and expenses of Customer Committee professionals as administrative expenses of the commodity customer property estate.

17. Section 766(h) of the Bankruptcy Code provides for the ratable distribution of commodity customer property to commodity customers on account of their allowed net equity claims, "in priority to all other claims, except claims of a kind specified in section 507(a)(2) of this title that are attributable to the administration of customer property." Section 507(a)(2), in turn, provides a priority for administrative expenses allowed under section 503(b).

18. As noted above, a Customer Committee would greatly benefit the commodity customer estate by acting as a fiduciary and advocate for commodity customers, fostering open communications with the Trustee and working with the Trustee to maximize the pool of commodity customer property and to streamline the claims and distribution process. For all of these reasons, it is appropriate that the fees and expenses of a Customer Committee constitute allowable administrative expenses of the commodity customer property estate. This will also ensure that the fees and expenses of the Customer Committee are borne fairly pro rata by the commodity customers, and not by securities customers or other creditors. Payment of Customer Committee professionals out of the commodity customer property estate will benefit all

commodity customers equally and, therefore, should be borne ratably by commodity customers for their mutual benefit.

19. In authorizing allowance of compensation to the Customer Committee, this Court should be guided by Sable, Makoroff & Gusky, P.C. v. White (In re Lyons Transp. Lines, Inc.), 162 B.R. 460 (W.D. Pa. 1994). In Lyons, the court approved compensation for counsel to the committee of unsecured creditors in a chapter 7 case. Id. The court held that the committee and its counsel were necessary “in order to assist the trustee and the court in considerations of the various sides of the complex issues involved in the case”. Id. at 463. Similarly here, the issues are complex, and the involvement of the Customer Committee would aid the Court and the Trustee in making determinations that will affect the timing and amount of commodity customer distributions. The efforts of the Customer Committee and its professionals will benefit all commodity customers, including those customers taking part in the bulk transfer process approved by this Court, who have significant amounts of collateral frozen at MFGI, and have an interest in a speedy resolution of customer claims and distribution of customer property.

20. In addition, the court in Lyons recognized that counsel was necessary because of the valuable input that the committee could provide, and the need for the committee to be able to communicate its views to the parties involved. Id. at 461. Accordingly, the court held that it could exercise its authority under section 105(a) of the Bankruptcy Code to allow counsel to the committee to continue to provide services, payable from estate assets, in order to facilitate the administration of the estate. See also In re Wonder Corp. of Am., 72 B.R. 580, 583 n.3 (Bankr. D. Conn. 1987) (court approved employment of counsel for chapter 7 creditors’ committee

pursuant to section 105(a)).<sup>13</sup> Given the valuable contributions to be provided by both the Customer Committee and its counsel, the importance of facilitating communication between the Customer Committee, the Trustee, and the Court, is evident. Therefore, allowing the payment of fees and expenses of the Customer Committee professionals would not only be permissible pursuant to section 105(a), it would be appropriate in this case since these services are necessary and would provide a clear benefit to the estate.

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<sup>13</sup> Those cases that have held that a creditors' committee may not be compensated out of the estate in chapter 7 cases are not controlling here and, in any event, inappropriately relied on legislative history. See Official Creditor's Committee v. Metzger (In re Dominelli), 788 F.2d 584 (9th Cir. 1986); In re Willbet Enters., Inc., 43 B.R. 90 (Bankr. E.D. Pa. 1984). These cases relied on the legislative history of section 705 of the Bankruptcy Code to show that the omission of a compensation provision in section 705 was intentional and thereby somehow limited a court's power to grant compensation under section 105(a) of the Bankruptcy Code. However, section 705 itself does not expressly prohibit compensation of chapter 7 committee professionals, and doing so under section 105(a) would not be an impermissible exercise of the Court's equitable powers. See Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 995 (2d Cir. 1990) (bankruptcy court's equitable powers cannot be exercised in derogation of other provisions of the Bankruptcy Code). Adopting the propositions put forth in Dominelli and Willbet, on the other hand, would impermissibly elevate the legislative history to the status of a legislative enactment. Indeed, the Third Circuit has expressly criticized the reasoning of Willbet as unduly restricting the scope of section 105(a). Wedgewood Inv. Fund, Ltd. V. Wedgewood Realty Grp. (In re Wedgewood Realty Group, Ltd.), 878 F.2d 693, 700 (3rd Cir. 1989).

**CONCLUSION**

WHEREFORE, based on the foregoing, the Movants respectfully request that this Court enter an order in the form attached hereto as Exhibit F authorizing the appointment of an Official Committee of Commodity Broker Customers, and authorizing allowance and payment of fees and expenses of Customer Committee professionals as administrative expenses of the commodity customer property estate.

Dated: November 15, 2011  
New York, New York

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