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

In re:

MF GLOBAL Inc.,

Debtor.

Case No. 11-2790 (MG) SIPA

**REPLY OF THE COMMODITY FUTURES TRADING COMMISSION
IN FURTHER SUPPORT OF THE SIPA TRUSTEE'S MOTION TO APPROVE A FIRST
INTERIM DISTRIBUTION FOR ALLOWED COMMODITY FUTURES CLAIMS**

The Commodity Futures Trading Commission (“Commission”) respectfully submits this reply in response to the statement of the Chapter 11 Trustee of MF Global Holdings, Ltd. (“MFG Holdings”) (Doc. # 1218) and the objection of Patrick O’Malley, M.D., Matthew Johnson, and Michael Dokupil (“Three Physicals Customers”) (Doc. # 1206) (“Objection”), pertaining to the SIPA Trustee’s motion to approve a first interim distribution for allowed commodity futures claims (Doc. #1086) (the “Motion”). Neither filing sets forth cause to prevent or delay the SIPA Trustee’s proposed return of customer property. Therefore, the Court should grant the Motion.

I. The Chapter 11 Trustee’s Statement Of “Concerns” Is Improper.

The Chapter 11 Trustee has filed a statement (“Statement of Concerns”) (Doc. # 1218), joined by the Chapter 11 Creditors’ Committee (“Joinder”) (Doc. # 1277), setting forth “a number of concerns” in connection with the proposed return of customer property and suggesting that the SIPA Trustee perform several tasks before the Court approves the distribution. The Chapter 11 Trustee, however, states no basis for conditioning the return of this customer property on the performance of such additional tasks, and the Commission objects to the dissipation of estate assets on any new requirements in this respect beyond those established by the Court’s existing orders. (*See, e.g.*, Doc. # 423.)

More fundamentally, neither the Statement of Concerns nor the Joinder gives any indication of what these parties’ interests are in the SIPA Trustee’s effort, by this Motion, to return the specified customer property to public commodity customers. While the Joinder asserts that MFG Holdings and other affiliated companies “are a claimant in the SIPA estate through subordinated debt, intercompany and equity claims, in addition to customer claims,”¹ neither the Chapter 11 Trustee nor the Creditors’ Committee has ever asserted any claim to the property

¹ *See* Joinder, Exhibit C at 6 (Doc. # 1277-3 at 7).

segregated at MFGI for the benefit of its public commodity customers, or to the other customer property addressed in the Motion. Nor could they. *See* 11 U.S.C. § 766(h) (reserving customer property for distribution to customers “in priority to all other claims” (with an exception not here relevant)); *id.* (providing that a “proprietary account” claim “may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full”); 17 C.F.R. §§ 1.3(y)(1)(vii) & (viii) (defining “proprietary account” to include the account of “a business affiliate that directly or indirectly controls” or “is under common control with” the FCM).²

Accordingly, the Chapter 11 Trustee and Creditors’ Committee have no arguable basis to interfere with commodity customers’ rights to the return of their property. The Court should give no weight to the views expressed in the Statement of Concerns and the Joinder, because they are unconnected to any articulated or legally cognizable interest in the property at issue, and should reject the Chapter 11 Trustee and Creditors’ Committee’s list of demands before granting the Motion.

II. The Delivery Account Class Properly Includes Delivery Credits And Frozen Proceeds.

The Three Physicals Customers object to the inclusion of Delivery Credits and Frozen Proceeds as Physical Customer Property of the Delivery Class. These categories of property, as defined by the SIPA Trustee, include the cash proceeds of physical delivery contracts, whether or not those proceeds had yet been credited to the customer’s account upon entry of the order for

² Any claims by the Chapter 11 Trustee or Creditors’ Committee to general MFGI estate assets in this case are also attenuated, at best, given that customer property includes, among other things, property that was unlawfully converted but is part of the estate, 11 U.S.C. § 761(10)(A)(viii), property that any law requires to be set aside or held for the benefit of a customer, *id.* § 761(10)(A)(ix), and customer property that was withdrawn but subsequently recovered by the SIPA Trustee, 17 C.F.R. § 190.08(a)(ii)(D).

relief. (Motion ¶¶ 24-25.) Under CFTC regulations, such cash is “specifically identifiable property” that may be contained in a “delivery account,” 17 C.F.R. §§ 190.01(kk)(3)-(5), 190.05(a)(2), and is properly attributed to the Delivery Class.

Section 190.05(a)(2) of the CFTC’s regulations provides, in relevant part, that a “[d]elivery account” contains “only the specifically identifiable property associated with delivery set forth in §§ 190.01(kk)(3), (4), and (5).” The Objection focuses exclusively on Section 190.01(kk)(3), which includes physical commodities and documents of title within the definition of specifically identifiable property, but the Objection does not correctly apply Section 190.01(kk)(5), which provides that the “cash price tendered” for such property is also specifically identifiable property that may, under Section 190.05(a)(2), be held in a delivery account. According to the SIPA Trustee’s description, Delivery Credits and Frozen Proceeds meet that definition, so it is appropriate to attribute that property to the Delivery Class.

The Three Physicals Customers correctly note that the Commission intends these regulations to prevent dilution of customer property held in delivery accounts. (Objection ¶ 8.) However, in promulgating the Part 190 regulations, the Commission specifically contemplated that some of that property would be in the form of cash. *See Bankruptcy*, 48 Fed. Reg. 8716, 8731 (Mar. 1, 1983). Thus, alongside Section 190.01(kk)(3), which brings the physical property itself into the delivery account class, the Commission established subparagraphs (4) and (5) to provide that “the ‘price’ deposited for making or taking delivery” is “specifically identifiable property as well.” *Id.* As a result, “any property or cash which becomes captured by the estate incident to delivery” is “extractable under either §§ 190.01(kk)(3), (4), or (5).” *Id.* The proposed distribution, therefore, is a proper exercise of the Trustee’s powers under Sections 190.01(kk) and 190.05(a)(2).

CONCLUSION

For these additional reasons, the Court should grant the Motion.

Respectfully submitted,

COMMODITY FUTURES TRADING COMMISSION

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Date: April 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2012, I caused the foregoing document to be served electronically via the Court's CM/ECF system.

/s/ Robert A. Schwartz