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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

TRUSTEE'S OMNIBUS REPLY MEMORANDUM REGARDING THE LEGAL PRINCIPLES AND FRAMEWORK FOR THE ALLOCATION AND DISTRIBUTION OF CUSTOMER PROPERTY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

REGULATIONS

LEGISLATIVE MATERIALS

James W. Giddens (the "Trustee"), trustee for the liquidation of the business of MF Global Inc. ("MFGI" or the "Debtor") under the Securities Investor Protection Act of 1970, as amended ("SIPA"), 15 U.S.C. § 78aaa *et seq*., as and for his omnibus reply to the responses (collectively, the "Responses")[1] interposed to the Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation Distribution of Customer Property (ECF No. 726, the "Trustee's Memorandum"), respectfully states as follows:

PRELIMINARY STATEMENT

1. In response to a direction from the Court to submit their positions "on the rules that apply to distribution from whatever funds are available for distribution" (Tr. of Hr'g re Expedited Mot. of James W. Giddens, Trustee for the Liquidation of MF Global Inc., for an Order Approving Further Emergency Transfers and Distributions to Customers 24:19-20), the Trustee, as well as the Commodity Futures Trading Commission ("CFTC") and Securities Investor Protection Corporation ("SIPC"), submitted briefs outlining the legal framework that the

1. The Responses consist of: (1) Letter from the Chapter 11 MF Global Holdings Ltd. et al., ("Holdings") Creditors' Committee re Briefing re Allocation and Distribution of Customer Property (ECF No. 778) ("Creditors' Committee Letter"); (2) Response of Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. to Briefing Regarding the Legal Principles and Framework for Allocation and Distribution (ECF No. 814) ("Sapere Response"); (3) Response of MF Global Hong Kong Ltd. (Provisional Liquidators Appointed) to Memoranda of Law filed by the CFTC, SIPC and the Trustee Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (ECF No. 817) ("MFG-HK Response"); (4) Response of Bruce Eisen, Dale Mancino, Denis Brink, Patrick O'Malley, M.D., and William Hackenberger to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (ECF No. 818)("Eisen Response"); (5) Response of the Commodity Customer Coalition to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (ECF No. 819) ("CCC Response"); (6) Response of Alexander Coxe, Greenbriar Partners, L.P. and Paul Polger to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (ECF No. 822)("Coxe Response"); (7) Memorandum of Law of John Cassimatis in Response to Memoranda of the Trustee, the Commodity Futures Trading Commission, and the Securities Investor Protection Corporation Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (ECF No. 823) ("Cassimatis Response"); and (8) Holdings Trustee's Response to Briefing Regarding the Legal Principles and Framework for Allocation and Distribution of Customer Property (ECF No. 824) ("Holdings Response"). The Trustee is thus replying to eight separate responses aggregating in excess of eighty-eight pages, and respectfully requests leave to submit this single combined reply in excess of the ten-page limit. A chart listing each of the Responses filed with the Court, and showing the Trustee's replies, is attached hereto as Exhibit A.

Trustee expects to apply to the allocation and distribution of MFGI property. For the most part, the Responses do not contest the Trustee's legal position on the question posed by the Court. Instead, the Responses seek to have the Court rule now on potential means of augmenting commodity customer property to resolve the anticipated shortfall or to obtain premature determinations of how those principles will apply to the Trustee's determination of a substantive piece of a particular claimant's claim.

2. These Responses put the cart before the horse. With respect to the extent of the Trustee's powers and duties under 17 C.F.R. §§ 190.01 through 190.10 (the "Part 190 Regulations") to allocate MFGI property to commodity customers, the Sapere Respondents and the CCC insist that the Court should rule now that the Trustee must allocate all general estate property first to commodity customers until any shortfall is satisfied; the Holdings Trustee challenges the Trustee's power to allocate general estate property to commodity customers, while acknowledging that now is not the time to decide the issue. The Trustee believes that he has authority to seek to make allocations in appropriate circumstances as necessary but has not yet moved to do so as neither the total amount of shortfall to any fund of customer property nor the extent of general estate assets is yet known with any degree of certainty.

3. Likewise, some Respondents raise arguments as to the treatment of warehouse receipts and other certificates of title (collectively "Physicals") that ignore SIPA's extensive reach and that depend on particular facts that should be addressed in the claims process. These Respondents argue that the Physicals reflected on MFGI's books and records for their accounts either are not customer property—or part of the MFGI estate at all—or are customer property, but are necessarily part of the "delivery account" class. SIPA and the Part 190 Regulations govern the determination of what constitutes property of the MFGI estate and the pro rata

distribution of property within an account class. To the extent that Respondents contend that particular fact circumstances dictate particular treatment of their claim, their contentions are appropriately determined pursuant to the claims procedures approved by the Court. Aggrieved claimants will have an opportunity to dispute the Trustee's individual claim determinations. The claims process permits the Trustee and Court to resolve disputes in an orderly fashion that takes into account the interests of the entire estate.

4. Additionally, several of Respondents seek various types of relief that are both procedurally and substantively improper. Procedurally, claimants must seek relief by motion on notice or through an adversary proceeding. See Fed. R. Bankr. P. 7001, 9014(a). Substantively, the arguments are mistaken and in some cases have already been rejected by the Court.

I. THE LIMITED DISPUTES CONCERNING THE LEGAL PRINCIPLES FOR ALLOCATING AND DISTRIBUTING CUSTOMER PROPERTY

5. None of the Responses contest the Trustee's and SIPC's summary of SIPA and the provisions for determination and allocation of customer property for MFGI's securities customers. (Trustee's Mem. ¶¶ 5, 39-51.) Nor does any Response dispute that general estate claims are to be decided under Bankruptcy Code section 726 and that determination of such claims appropriately may be deferred until more is known about the universe of customer claims and customer property. (Id. at ¶¶ 6, 52-54.)

6. With respect to commodity customer property, the Respondents do not contest the Trustee's summary of the key principles guiding the determination of claims and the allocation and distribution of customer property, including that (1) commodity customer property will be allocated and distributed pro rata by account class first to MFGI's public commodity customers and then to MFGI's non-public commodity customers (id. at ¶¶ 18-24), (2) the net equity for each commodity customer will be determined pursuant to the six-step process described in the

Part 190 Regulations (id. at ¶¶ 25-27), and (3) customers with specifically identifiable property ("SIP") are subject to pro rata sharing of customer property within their account class(es) (id. at ¶¶ 31-38).

7. The Responses raise—but do not fully address—two separate threshold challenges to the Trustee's position. First, the Holdings Trustee suggests that an issue remains as to the applicability or enforceability of the Part 190 Regulations—or, more narrowly, the applicability of section 190.08(a)(1)(ii)(J), which provides that other property of the debtor's estate may be deemed customer property to satisfy public customers' claims in the event of a shortfall. Other Respondents also address this provision, arguing for a broad interpretation that it overrides all other interests and requires various limitations on the Trustee's discretion. Second, without disagreeing with the Trustee's summary of allocation and distribution principles for customer property, certain Respondents argue that the Physicals they claim are not part of the MFGI estate and not subject to pro rata distribution.

A. The Trustee Has Clear Statutory Authority to Pursue Customer Property.

8. The Holdings Trustee expresses concern that the SIPA Trustee will allocate all general estate property to customers and "deny[ ] the rights of creditors to recover from property that is not, and was never, deposited by customers." (Holdings Response ¶ 4, ECF No. 824.) He contends that "the Part 190 Regulations do not apply in a SIPA proceeding because a SIPA proceeding is not a case under chapter 7" and that the "plain language of section 766(j)(2) [of the Bankruptcy Code] should prevail."[2] (Id. at ¶ 9.) The Holdings Trustee states that his interest

2. These arguments were also raised by the Holdings Creditors' Committee. Although the Holdings Creditors' Committee stated that it "is not requesting to intervene [in this matter] as a party," it filed a letter (ECF No. 778) for the purpose of "alert[ing]" the Court to the question regarding whether the Part 190 Regulations apply to this

(Footnote continued on next page)

derives from "intercompany claims" for "significant intercompany loans made to MFGI" that are asserted to be traceable and "separate and apart from customer property." Id .

9. This legal position is clearly contravened by the plain language of SIPA. As the CFTC pointed out in its December 22, 2011 letter to the Court, SIPA § 78fff-1(a) vests the Trustee "with the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a case under title 11," and further provides that the Trustee "shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7." (See 12/22/11 Letter from the CFTC re In re MF Global, Inc., ECF No. 781.) SIPA thus arms the Trustee with any additional powers available to a chapter 7 trustee. Accordingly, the Part 190 Regulations, including the customer property provision on which the Holdings Trustee focuses, apply in this proceeding.

10. In any event, the definition of "customer property" in section 761 of the Bankruptcy Code commodity broker liquidation subchapter encompasses substantially more than just the segregated or traceable property of commodity customers, including "property that was unlawfully converted from and that is the lawful property of the estate," and "other property of the debtor that any applicable law, rule or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property." 11 U.S.C. §§ 761(10)(A)(viii), (ix) (emphasis added). SIPA contains similar provisions for property of securities customers. These broad provisions enable the Trustee to take actions to marshal additional property to benefit commodity and

(Footnote continued from prior page)
case. The Trustee disputes that the Holdings Creditors' Committee has standing in this SIPA proceeding; the issue of standing is the subject of separate briefing requested by the Court.

securities customers in certain circumstances. There is no point in arguing over the scope of such powers now based on speculation about potential conflicts with respect to hypothetical assets. The Trustee may move to allocate specific assets in a specific manner at an appropriate time and will do so on notice to all customers and creditors.

B. Certain Respondents' Arguments That Their Claims Are For Property Outside of the Estate Are Contrary to SIPA.

11. The Eisen and Coxe Respondents argue that under Bankruptcy Code section 541, certain Physicals on MFGI's books and records are not property of the MFGI estate, and thus are not subject to pro rata distribution. (See Eisen Resp. 2-3, ECF No. 818; Coxe Response ¶¶ 9, 20-22, ECF No. 822.) The Eisen Respondents argue that absent title to the Physicals identified on its books, "MFGI could only, at best, be acting as a custodian and the Physicals would not be a part of the MFGI estate," (see Eisen Resp. 4, ECF No. 818), while the Coxe Respondents similarly argue that the Physicals were held in trust by MFGI and therefore do not qualify as "property of the estate" under Bankruptcy Code section 541, (see Coxe Response ¶¶ 20-22, ECF No. 822). The Eisen and Coxe Respondents invoke legal principles that are not only inapplicable to this SIPA proceeding, but in fact contrary to it. In a SIPA proceeding, provisions of the Bankruptcy Code apply only "to the extent [they are] consistent with" SIPA.[3] 15 U.S.C. § 78fff(b); Sec. Investor Prot. Corp. v. Lehman Brothers Inc., 433 B.R. 127, 135 (Bankr. S.D.N.Y. 2010); In re Adler Coleman Clearing Corp., 198 B.R. 70, 74 (Bankr. S.D.N.Y. 1996). A provision is not consistent if it "conflicts with an explicit provision" of SIPA. Sec. Investor Prot. Corp. v. Charisma Sec. Corp., 506 F.2d 1191, 1195 (2d Cir. 1974).

3. In specifying the duties of a SIPA trustee, SIPA specifically incorporates the duties specified in the Bankruptcy Code commodity broker liquidation subchapter. 15 U.S.C. § 78fff-1(b).

12. The Eisen Respondents overlook the broad definition of "customer property" applicable to commodity broker liquidation, which includes "cash, a security or other property . . . received, acquired, or held by or for the account of the debtor, from or for the account of a customer," including, among other things, "specifically identifiable customer property";[4] a "warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer"; and "cash, a security or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer." 11 U.S.C. § 761(10). There is no requirement for MFGI to have title or an equitable or beneficial interest in the Physicals for them to be considered customer property. The Coxe Respondents argue that the Physicals they claim do not fall within the definition of "customer property" under section 761(10) of the Bankruptcy Code, but this argument requires fact-specific determination which should be resolved as part of the expedited claims process.

13. The MFGI Liquidation Order specifies that the automatic stay provisions of 11 U.S.C. § 362(a) operate as a stay of, among other things, "any act to obtain possession of property of the estate or property from the estate." (MFGI Liquidation Order ¶ III(C), ECF No. 1.) Section 362(d) of the Bankruptcy Code provides that a party may be entitled to relief from the automatic stay only under certain limited circumstances. 11 U.S.C. § 362(d). Any effort to claim Physicals outside of the claims process must meet the stringent standard adopted by the Second Circuit in Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.), 907 F.2d 1280, 1285-86 (2d Cir. 1990) ("[I]f the movant fails to make an initial

4. The Eisen Respondents admit that the physical commodities, including gold, silver, and palladium, identified on MFGI's books and records for their accounts meet the definition of "specifically identifiable property" set out in 17 C.F.R. § 190.05(a)(2). (See Eisen Resp. at 9, ECF No. 818.)

showing of cause . . . the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.") (adopting twelve factors to be considered in determining whether there is cause to lift the stay). As discussed further below, the fact elements necessary for resolution of the Eisen and Coxe Respondents' rights and interests are more appropriately determined in the claims process.

II. THE CLAIMANT-SPECIFIC ISSUES RAISED IN CERTAIN OF THE RESPONSES WILL BE RESOLVED IN THE CLAIMS PROCESS.

A. Respondents' Claims Regarding Physicals.

14. Several Respondents assert contradictory positions regarding the treatment of Physicals, including that Physicals are not part of the MFGI estate or, alternatively, should be accorded particular treatment. The Eisen and Coxe Respondents argue that (1) the Physicals are held in trust and are not property of the estate or (2) SIP and, indeed, all Physicals should be deemed part of a "delivery account" class. (See Eisen Resp. 2-3, ECF No. 818; Coxe Response ¶¶ 9, 20-22, ECF No. 822.) Mr. Cassimatis likewise references his claims for silver (and for cash), arguing that it should be included in a separate customer account class of physical property. (Cassimatis Resp. ¶ 2, ECF No. 823.) Mr. Cassimatis also asserts entitlement to customer treatment of a purported damages claim arising from the Trustee's purported delay in liquidating his silver (id. at ¶¶ 15-17), while, on the other hand, the Eisen Respondents argue that any liquidation of the Physicals should be deferred until final net equity is determined. (Eisen Resp. 7-8.)

15. The conflicting positions taken by the Eisen Respondents and Mr. Cassimatis concerning the proper timing of liquidating the Physicals overlook that section 190.02(f) specifically contemplates the liquidation of Physicals after the transfers authorized by the Bankruptcy Code and section 190.06 are completed, and prior to a determination of the Physicals

customers' net equity or pro rata distribution. See 17 C.F.R. §§ 190.02(f), 190.06(e); 11 U.S.C. § 764(b).

16. Moreover, the Respondents' differing positions and the fact-specific nature of their assertions serves to highlight that the individual claims must be resolved in the expedited customer claims process approved by the Court. For example, for any particular claimed Physical to meet the criteria to qualify as SIP that is part of a "delivery account," as narrowly described in the Part 190 Regulations, it must be either a warehouse receipt, bill of lading or other document of title or physical commodity held specifically for the purpose of delivery or exercise, which as of the Filing Date is specifically identifiable on the debtor's books and records as received from or for the account of a particular customer. For the Trustee to ascertain whether qualifying criteria are met for any particular claimed Physical will require fact-specific determinations based on reconciling MFGI's books and records with individual claims. (See Trustee's Mem. ¶ 24.) Once the Trustee has information on the range of customer claims to Physicals and how they are reflected on MFGI's books and record, the determinations of net equity and account class can be undertaken in a consistent and fair way.

B. MF Global Hong Kong Ltd.

17. Acknowledging that a "proprietary account" is not a public customer account under the Part 190 Regulations, the Provisional Liquidators of MF Global Hong Kong Ltd. ("MFG-HK") reserve the right to seek public customer treatment for claims on behalf of MFG-HK's customers for assets at MFGI maintained in customer segregated Omnibus Accounts. (MFG-HK Resp. ¶¶ 6-7, ECF No. 817.) It is appropriate that this issue be reserved for the claims process. The Trustee also notes that the Court has authorized him to agree to alternative procedures for intercompany claims. (See Order Approving Trustee's Expedited Appl. to Establish Parallel Customer Claims Processes and Related Relief 3, ECF No. 423.)

III. CERTAIN RESPONSES INCORRECTLY PORTRAY THE DISCRETION OF THE TRUSTEE AND IMPROPERLY SEEK TO INTERVENE IN THE TRUSTEE'S INVESTIGATION

18. The Sapere Respondents contend that the Trustee has irreconcilable conflicting duties to commodity customers, securities customers, and creditors of the general estate. (Sapere Resp. 6-13, ECF No. 814.) They assert that "[i]n order for the Trustee to meet his obligations to MFGI's commodity customers, the Trustee must wrest from the [Broker-Dealer] 'unit' of MFGI and from persons to whom the [Broker-Dealer] unit disbursed the commodities customers' segregated account fund as much of that $1.2+ Billion [of missing segregated account funds] as is feasible. At the same time, in order to meet his obligations to MFGI's securities customers, the Trustee must retain for the benefit of securities customers as much of MFGI's general estate as is feasible." (Id. at 9.) The Sapere Respondents and others seek to limit the Trustee's discretion in a manner which would impede his ability to administer the MFGI estate and fulfill his statutory duties.

A. The Purported Legal Grounds For The Respondents' Requests Are Erroneous

19. The Sapere Respondents and others essentially contend that the Trustee cannot oversee the liquidation of a joint commodity broker-security dealer. This position overlooks that the liquidation of joint FCM broker-dealers and the resolution of "competing interests" were specifically contemplated by the CFTC when it proposed the Part 190 Regulations. See 48 Fed. Reg. 57,535, 57,535 (Nov. 24, 1981) (acknowledging the unique issues that will arise in the liquidation of a joint commodity broker-security dealer and noting that such issues are best dealt with on a case-by-case basis given "the likelihood that each such bankruptcy will be unique, and the many different and competing interests involved").

20. In fact, trustees—whether chapter 11, chapter 7 or SIPA—routinely address conflicting demands by creditors, and the resolution of such conflicts does not constitute a breach of fiduciary duty. See, e.g., Kusch v. Mishkin (In re Adler, Coleman Clearing Corp.), No. 95-08203 (JLG), 1998 WL 551972, at *17 (Bankr. S.D.N.Y. Aug. 24, 1998) (dismissing a claim for breach of fiduciary duty, rejecting the argument that SIPA Trustee owed a greater duty to a customer of a creditor than a general creditor, and holding that "the trustee's duty to the SIPA estate as a whole clearly prevails over the interests of a single customer"), aff'd, 208 F.3d 202 (2d Cir. 2000). Numerous courts have recognized that in any insolvency proceeding there are inherent conflicts between classes of customers and creditors and that such conflicts do not warrant extraordinary protective measures. See, e.g., Official Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1317 (1st Cir. 1993) (noting that "[n]o two creditors have identical interests, and [that] the [Bankruptcy] Code implicitly recognizes that fact by providing a procedural framework for handling the various divergent interests of the parties to a bankruptcy") (citation omitted); Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02-Civ-6274 (GBD), 2003 WL 22327118, at *7 (S.D.N.Y. Oct. 10, 2003) (noting that conflicts between classes of creditors are "inherent in all bankruptcy cases and inevitable in complex cases," but that administration by "a single trustee or committee is commonplace in the scheme of bankruptcy administration and [that] its positives often outweigh any negatives" (internal quotations omitted)); In re Adelphia Commc'ns Corp., 359 B.R. 54, 64 (Bankr. S.D.N.Y. 2006) (noting that "conflicts between classes of a single debtor, which likewise involve competing claims on the part of those classes to what will usually be a pool of limited assets, will be present in many, if not most, chapter 11 cases"); In re Hills Stores Co., 137 B.R. 4, 5 (Bankr. S.D.N.Y. 1992) (denying appointment of additional creditors'

committee because "[c]onflicts are not unusual in reorganization and in most cases can be expected among creditors who are acting to protect their separate business interests"); In re Baldwin-United Corp., 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983) (denying appointment of additional creditors' committees to protect specific classes of creditors because "[c]onflicts among creditors are inherent in all bankruptcy cases[, and in complex cases] . . . are inevitable," and further noting that such protective measures will not "engender harmony or alleviate conflict among creditors . . . [but that] the opposite would result, and at an astronomical cost to the bankruptcy estates").

21. That SIPA accords the Trustee broad discretion in fulfilling his statutory duties is well-established and not contested by Respondents. (See Trustee's Mem. at 5.) The Part 190 Regulations also are replete with express references to the Trustee's discretion. See, e.g., 17 C.F.R. § 190.02(d) (trustee has the discretion to determine what information is sufficient proof of customer's claim); 17 C.F.R. § 190.04(e)(4) (trustee discretion to set time for meeting margin calls); 17 C.F.R. § 190.08(d)(1)(ii) (customers seeking return of SIP must deposit cash "plus a reasonable reserve in the trustee's sole discretion"). By contrast, Respondents provide absolutely no relevant authority for stripping the Trustee of his authority.

B. The Relief Requested By Certain Respondents Would Interfere With And Delay the Trustee's Performance of His Duties.

22. Some Respondents suggest that they should be permitted to take Rule 2004 examinations of the Trustee regarding their MFGI accounts and Physicals, and of third parties acting as a repository of these Physicals. (See Eisen Resp. 8, ECF No. 818.) Other Respondents propose that the Court require the Trustee to provide commodity customers with immediate and full access to discovery obtained during the course of his investigation. (See Sapere Resp. 15, ECF No. 814.) Additionally, several Respondents request that the Court allow commodity

customers to "pursue possible claims and leads" (see id. at 15); or that the Court require the Trustee to "immediately begin to pursue claims to recover customer funds (even if it requires an entity to or through which customer funds flowed to give up alternative funds)" (see CCC Response 2-3, ECF No. 819). These requests are inconsistent with the Trustee's statutory authority and duties with respect to MFGI. If and when Respondents bring their requests to the Court in a procedurally proper way, they should be denied.

23. The Trustee alone has statutory investigative authority with respect to MFGI, and he alone has the unique responsibility of protecting its customers and administering the estate, including the responsibility to marshal customer assets in the manner Congress intended. As part of his investigation, the Trustee, with the assistance of his professionals, is analyzing his ability to obtain recoveries, by litigation or negotiation, against certain financial institutions, MFGI affiliates, and others to recover customer property.

24. Respondents' attempt to interject or claim an oversight role with respect to the Trustee's investigation and pursuit of potential claims is not authorized by and is contrary to SIPA and the Bankruptcy Code. (See Mem. Op. and Order 4, 6, ECF No. 459 (finding no statutory authority for appointment of official committee in a SIPA liquidation and finding that even if the Court had the discretion, it would not do so).) As this Court has already recognized, the Trustee "is a very experienced SIPA Trustee, represented by very experienced counsel, with mandated oversight provided by SIPC and the CFTC, and, of course, by this Court." (Id. at 10.) The requested additional oversight by certain Respondents is thus neither authorized nor necessary.

25. Notwithstanding the Trustee's efforts to supply customers and the public with information as often as is feasible,[5] the third party access and participation requested by Respondent are inconsistent with the Trustee effectively carrying out the investigation mandated by SIPA. Indeed, as this Court has previously recognized, the Trustee "must be permitted to conduct his investigation without being required to divulge his investigatory steps or the discovery obtained to any other party-in-interest." (Mem. Op. Granting SIPA Trustee's Mot. For an Order Granting Authority to Issue Subpoenas for the Produc. Of Docs. And the Examination of the Debtor's Current and Former Officers, Directors, and Employees and Other Persons 2, ECF No. 36.) It is equally clear that the Trustee's investigation and pursuit of claims must be free from intrusion by third parties whose primary objective is to protect their own individual interests without due regard for the interests of customers or creditors of the estate as a whole. Respondents have not demonstrated exceptional circumstances that would warrant Rule 2004 discovery to the detriment of MFGI's former customers and creditors as a whole.[6]

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5 The extensive efforts by the Trustee to provide timely information by both formal and informal means to customers, creditors, and the public are described in the recent status report to the Court. (Trustee's Sixty Day Report on Status of Liquidation at ¶¶ 24–25, ECF No. 835.)

6 Indeed, in the Lehman Brothers proceedings, recognizing that Rule 2004 discovery creates enormous burden for the trustee, and should be reserved for exceptional circumstances, Judge Peck denied requests for Rule 2004 discovery absent exceptional circumstances. (See, e.g., Tr. of Hr'g re Mot. Of The Bank of New York Mellon Trust Co., N.A. as Indenture Trustee, for Order Pursuant to Bankruptcy Rule 2004 Directing Examination of, and Production of, Documents by Lehman Bros. Holdings Inc., Lehman Bros. Inc., Lehman Bros. Commodity Servs. Inc. and Barclays Capital Inc. at 88:15-17, 90:24-91:2, In re Lehman Brothers Inc., Case No. 08-01420 (JMP) (LBHI Docket No. 4030) (Bankr. S.D.N.Y. Jan. 14, 2009) (Excerpt attached as Exhibit B).)

CONCLUSION

The principles for the allocation and distribution of customer property set forth in the Trustee's Memorandum are largely uncontested and should be accepted by the Court as applicable to this proceeding. To the extent that certain Respondents have raised discrete concerns regarding the application of the principles to particular claims or have asked that the Court rule now on speculative potential conflicts that may arise in the future, the issues raised are either demonstrably unfounded or, at best, not yet ripe for determination.

Dated: New York, New York
January 18, 2012

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EXHIBIT A

Exhibit A: Specific Limited Responses and the Trustee's Replies

1. Letter re Briefing re Allocation And Distribution Of Customer Property, submitted by Martin J. Bienenstock on behalf of the Statutory Creditors' Committee in the Chapter 11 Cases of MF Global Holdings Ltd. and MF Global Finance USA Inc. (Dewey & LeBoeuf LLP)	**(ECF No. 778)**

Response	**Trustee's Reply***
▪ The Holdings Creditors' Committee suggests that CFTC Part 190 Regulations do not apply to the SIPA liquidation of MFGI because MFGI is not a chapter 7 debtor. (Ltr. at 2.)	▪ This legal position is clearly contravened by the plain language of SIPA. As the CFTC pointed out in its December 22, 2011 letter to the Court, SIPA § 78fff-1(a) vests the Trustee "with the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a case under title 11," and further provides that the Trustee "shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7." (Trustee's Reply ¶ 9 (citing 12/22/11 Letter from the CFTC re In re MF Global, Inc., ECF No. 781).) SIPA thus arms the Trustee with any additional powers available to a chapter 7 trustee. Accordingly, the Part 190 Regulations, including the customer property provision on which the Holdings Trustee focuses, apply in this proceeding. (Trustee's Reply ¶ 9.)

2. Response of Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. to Briefing Regarding the Legal Principles and Framework for Allocation and Distribution (Ford Marrin Esposito Witmeyer & Gleser, L.L.P.)	**(ECF No. 814)**

Response	**Trustee's Reply**
▪ If MFGI has a general estate, it should be allocated first to restoring deficiencies in commodity customers' segregated accounts, then to restoring deficiencies in securities customers'	▪ The Trustee believes that he has authority to seek to make allocations in appropriate circumstances as necessary but has not yet moved to do so as neither the total amount of shortfall to any fund of customer property nor the extent of

* The Trustee disputes that the Holdings Creditors' Committee has standing in this SIPA proceeding; the issue of standing is the subject of separate briefing requested by the Court.

segregated accounts, then to general estate property. (Resp. at 4, 6.) ▪ MFGI transferred commodities customers' segregated account assets from the FCM side of the MFGI business to the broker-dealer side of MFGI's operations and thence used the assets to make various payments of the MF Global worldwide enterprise. The equitable interest of the funds missing from segregated customer accounts remains with commodities customers, who therefore have priority. (Resp. at 4–5.)	general estate assets is yet known with any degree of certainty. (Trustee's Reply ¶ 2.)
▪ The Trustee has irreconcilable conflicting duties to commodity customers, securities customers, and creditors of the general estate. (Resp. at 6–13.)	▪ This position overlooks that the liquidation of joint FCM broker-dealers and the resolution of "competing interests" were specifically contemplated by the CFTC when it proposed the Part 190 Regulations. (Trustee's Reply ¶ 19 (citing 48 Fed. Reg. 57,535, 57,535 (Nov. 24, 1981).) In fact, trustees—whether chapter 11, chapter 7 or SIPA—routinely address conflicting demands by creditors, and the resolution of such conflicts does not constitute a breach of fiduciary duty. (Trustee's Reply ¶ 20 (citing Kusch v. Mishkin (In re Adler, Coleman Clearing Corp.), No. 95-08203 (JLG), 1998 WL 551972, at *17 (Bankr. S.D.N.Y. Aug. 24, 1998).) Numerous courts have recognized that in any insolvency proceeding there are inherent conflicts between classes of customers and creditors and that such conflicts do not warrant extraordinary protective measures. (Trustee's Reply ¶ 20 (citing Official Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1317 (1st Cir. 1993); Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02-Civ-6274 (GBD), 2003 WL 22327118, at *7 (S.D.N.Y. Oct. 10, 2003); In re Adelphia Commc'ns Corp., 359 B.R. 54, 64 (Bankr. S.D.N.Y. 2006); In re Hills Stores Co., 137 B.R. 4, 5 (Bankr. S.D.N.Y. 1992); In re Baldwin-United Corp., 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983).)
▪ Although the Trustee has a measure of discretion in respect of administrative matters relating to timing and form of distribution, nothing provides the Trustee with discretion to accommodate securities customers or anyone else in obviation of the protections afforded to commodities customers by Part 190. (Resp. at 13–15.)	▪ That SIPA accords the Trustee broad discretion in fulfilling his statutory duties is well-established and not contested by Respondents. (See Trustee's Mem. at 5.) The Part 190 Regulations also are replete with express references to the Trustee's discretion. (Trustee's Reply ¶ 21 (citing 17 C.F.R. § 190.02(d); 17 C.F.R. § 190.04(e)(4); 17 C.F.R. § 190.08(d)(1)(ii).) Respondents provide absolutely no relevant authority for stripping the Trustee of his authority. (Trustee's Reply ¶ 21.)
▪ In light of the Trustee's conflicting duties, the Court should: (i) require the Trustee to share timely and fully with commodity customers the material details of the information he learns about what happened to their segregated-account funds; (ii) allow commodity customers to pursue possible claims and leads; and	▪ The Trustee alone has statutory investigative authority with respect to MFGI, and he alone has the unique responsibility of protecting its customers and administering the estate, including the responsibility to marshal customer assets in the manner Congress intended. As part of his investigation, the Trustee, with the assistance of his professionals, is analyzing his ability to obtain recoveries, by litigation or

(iii) reserve to the Court alone the decision on the precedence of commodity customers' claims, with that decision to be made only after the potential general estate is identified. (Resp. at 15.) ▪ One or more persons who are, or represent exclusively the interests of, commodity customers with segregated-account deficiencies should be afforded access to detailed information about what happened to their segregated-account funds; otherwise commodity customers would not have a meaningful opportunity to be heard in advance of actions taken or omitted to be taken by the Trustee with respect to recovery of assets going forward. (Resp. at 15–16.)	negotiation, against certain financial institutions, MFGI affiliates, and others to recover customer property. Respondents' attempt to interject or claim an oversight role with respect to the Trustee's investigation and pursuit of potential claims is not authorized by and is contrary to SIPA and the Bankruptcy Code. (Trustee's Reply ¶¶ 23-24 (citing Mem. Op. and Order 4, 6, ECF No. 459).) ▪ Notwithstanding the Trustee's efforts to supply customers and the public with information as often as is feasible, the third party access and participation requested by Respondent are inconsistent with the Trustee effectively carrying out the investigation mandated by SIPA. Indeed, as this Court has previously recognized, the Trustee "must be permitted to conduct his investigation without being required to divulge his investigatory steps or the discovery obtained to any other party-in-interest." (Trustee's Reply ¶ 25 (citing Mem. Op. Granting SIPA Trustee's Mot. For an Order Granting Authority to Issue Subpoenas for the Produc. Of Docs. And the Examination of the Debtor's Current and Former Officers, Directors, and Employees and Other Persons 2, ECF No. 36).)

3. Response of MF Global Hong Kong Ltd. (Provisional Liquidators Appointed) to Memoranda of Law filed by the CFTC, SIPC and the Trustee Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (Linklaters LLP)	**(ECF No. 817)**
Response	**Trustee's Reply**
▪ MF Global Hong Kong Ltd.'s omnibus accounts for the benefit of clients of MF Global Hong Kong Ltd. are properly distinguishable from its proprietary claims. (Resp. at 4.)	▪ It is appropriate that this issue be reserved for the claims process. The Trustee also notes that the Court has authorized him to agree to alternative procedures for intercompany claims. (Trustee's Reply ¶ 17 (citing Order Approving Trustee's Expedited Appl. to Establish Parallel Customer Claims Processes and Related Relief 3, ECF No. 423).)

4. Response of Bruce Eisen, Dale Mancino, Denis Brink, Patrick O'Malley, M.D., and William Hackenberger to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (Barnes & Thornburg LLP)	**(ECF No. 818)**
Response	**Trustee's Reply**
▪ Because the physical commodities customers (i) paid in full for their physical commodities, which were (ii) specifically identifiable by serial numbers, (iii) were subject to documents of title held by the physical commodities customers, and (iv) were	▪ This argument overlooks the broad definition of "customer property" applicable to commodity broker liquidation, which includes "cash, a security or other property . . . received, acquired, or held by or for the account of the debtor, from or for the account of a customer," including, among other things, "specifically identifiable

stored with depositories which acted as bailees for the physical commodities and charged storage fees for their services, the physical commodities customers have sole ownership of the physical commodities and it is doubtful whether the MFGI estate has the indicia of the type of interest needed to make the physical commodities property of the MFGI estate. (Resp. at 4.) ▪ MFGI did not have the ability to buy, sell, margin, or in any way negotiate the warrants that reflected title to the physical commodities. MFGI also did not carry the physical commodities on its balance sheet. Thus, it is questionable whether MFGI ever properly negotiated title to the physical commodities from the physical commodities customers pursuant to UCC Article 7 prior to the commencement of the MFGI liquidation, and the physical commodities are not part of the MFGI estate. (Resp. at 5–7.) ▪ Irrespective of who holds legal title to the physical commodities, given MFGI's representations, failure to provide value, and lack of evidence of control over the physical commodities—as well as the physical commodities customers' ownership of the physical commodities—equity and good conscience dictate that the physical commodities are being held in a constructive trust for the physical commodities customers. (Resp. at 7.)	customer property"; a "warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer"; and "cash, a security or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer." (Trustee's Reply ¶ 12 (quoting 11 U.S.C. § 761(10)).) There is no requirement for MFGI to have title or an equitable or beneficial interest in the Physicals for them to be considered customer property. (Trustee's Reply ¶ 12.)
▪ Should the physical commodities be property of the MFGI estate, then they must be classified within the "delivery account" subclass, intended to protect customers with "specifically identifiable property" from the "dilutive effects of the *pro rata* provisions of the [CFTC Regulations]." (Resp. at 9.) ▪ The "delivery account" subclass should be liberally applied to all specifically identifiable property, irrespective of other account activity. (Resp. at 11.)	▪ This issue is fact-specific among individual claimants and as to particular Physicals, and must be resolved in the expedited customer claims process approved by the Court. For example, for any particular claimed Physical to meet the criteria to qualify as SIP that is part of a "delivery account," as narrowly described in the Part 190 Regulations, it must be either a warehouse receipt, bill of lading or other document of title or physical commodity held specifically for the purpose of delivery or exercise, which as of the Filing Date is specifically identifiable on the debtor's books and records as received from or for the account of a particular customer. For the Trustee to ascertain whether qualifying criteria are met for any particular claimed Physical will require fact-specific determinations based on reconciling MFGI's books and records with individual claims. (Trustee's Reply ¶ 16 (citing Trustee's Mem. ¶ 24).) Once the Trustee has information on the range of customer claims to Physicals and how they are reflected on MFGI's books and record, the determinations of net equity and account class can be undertaken in a consistent and fair way. (Trustee's Reply ¶ 16.)
▪ Both the CFTC Regulations and the Bankruptcy Code bar the Trustee from liquidating the physical commodities until there has been a formal determination of the physical commodities	▪ Respondents' argument overlooks § 190.02(f) of the CFTC Regulations, which specifically contemplates the liquidation of Physicals prior to a determination of the Physicals customers' net equity or pro rata distribution after the transfers authorized

customers' *pro rata* distribution (let alone by the January 31st deadline when the customer claim forms are due). (Resp. at 3, 12.) To allow the Trustee to distribute the physical commodities *pro rata* among all customers or to liquidate the physical commodities would violate the physical commodities customers' rights under Bankruptcy Code § 766 and §§ 190.05 and 190.08 of the CFTC regulations. Moreover, such actions could result in conversion of the physical commodities. (Resp. at 2–3.)	by § 190.06 are completed. (Trustee's Reply ¶ 15.) The requirement that customer property be distributed ratably applies to SIP. (See Trustee's Mem. ¶¶ 33, 35 (citing CFTC Interpretive Letter No. 90-1 (Jan. 19, 1990); 46 Fed. Reg. 57,535, 57,538)); see also 11 U.S.C. § 766(h). The Court's December 12, 2011 Order approving the third bulk transfer of MFGI commodity customer property to other FCMs authorized the Trustee to distribute Physicals to MFGI's former customers on the same pro rata distribution basis applicable to accounts of U.S. Segregated Property Customers, without prejudice to any future determination of whether the Physicals or some subset thereof, constitutes a separate class of customer property or is entitled to disparate treatment. (See Order Granting Expedited Mot. to Approve Further Transfers and Distributions for MF Global Inc. United States Commodity Futures Customers 2, ECF No. 717.)
▪ If the Court intends to allow the Trustee to liquidate, the physical commodities customers seek the Court's permission to take immediate Rule 2004 examinations of (i) the Trustee, regarding the physical commodities customers' MFGI accounts and the physical commodities and (ii) any entity acting as a bailee or depository of the physical commodities. ▪ The physical commodities customers also ask that they be afforded the opportunity to present evidence that the physical commodities are not property of the MFGI estate, in a hearing prior to January 31, 2012 (the date after which the Trustee presently intends to liquidate the assets). (Resp. at 8.) ▪ Before the Trustee is allowed to liquidate physical commodities, the Trustee should be required to adduce evidence that (i) MFGI had a sufficient possessory interest in the physical commodities so as to make those commodities "property" of the estate. (Resp. at 2.) ▪ Before the Trustee is allowed to liquidate physical commodities, the Trustee should be required to adduce evidence that (ii) MFGI held the physical property for some purpose other than "delivery or exercise." (Resp. at 2.)	▪ These requests are inconsistent with the Trustee's statutory authority and duties with respect to MFGI. Rule 2004 discovery creates enormous burden for the Trustee, and should be reserved for exceptional circumstances. (Trustee's Reply ¶ 25 & n.6.) Respondents have not demonstrated exceptional circumstances that would warrant Rule 2004 discovery to the detriment of MFGI's former customers and creditors as a whole. (Trustee's Reply ¶ 25.) ▪ The argument that the Physicals are not property of the MFGI estate overlooks the broad definition of "customer property" applicable to commodity broker liquidation, which includes "cash, a security or other property . . . received, acquired, or held by or for the account of the debtor, from or for the account of a customer," including, among other things, "specifically identifiable customer property"; a "warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer"; and "cash, a security or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer." (Trustee's Reply ¶ 12 (quoting 11 U.S.C. § 761(10)).) There is no requirement for MFGI to have title or an equitable or beneficial interest in the Physicals for them to be considered customer property. (Trustee's Reply ¶ 12.) ▪ This issue of whether particular Physicals meet the criteria to qualify as SIP that is part of a "delivery account," as narrowly described in the Part 190 Regulations, is properly reserved for determination during the expedited claims process. (Trustee's Reply ¶ 16 (citing Trustee's Mem. ¶ 24).) Once the Trustee has information on the range of customer claims to Physicals and how they are reflected on MFGI's books and record, the determinations of net equity and account class can be undertaken in a consistent and fair way. (Trustee's Reply ¶ 16.)

5. Response of Commodity Customer Coalition to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (Barnes & Thornburg LLP)	**(ECF No. 819)**
Response	**Trustee's Reply**
▪ Customers are entitled to a first-priority interest (with the exception of certain administrative expenses) in any and all MFGI property, to the extent needed in order to fill the reported $1.2 billion shortfall in customer segregated funds. (Resp. at 2, 3, 5.) ▪ The concept of customer property is broadly defined and expansively construed, regardless of whether the property was specifically segregated or even traceable to a customer account, to include as much of the debtor's property as is needed to ensure that customers receive a complete return of their property. (Resp. at 5.) ▪ Customers' first priority right must follow customer funds to each and every entity to or through which customer funds flowed. (Resp. at 2.) ▪ MFGI commodity customers ought to receive a first-priority right over all other creditors to the extent needed to make them whole—whether such property is considered "other property" of MFGI, is found at entities other than MFGI, or passed through entities other than MFGI. (Resp. at 6.)	▪ The definition of "customer property" in section 761 of the Bankruptcy Code commodity broker liquidation subchapter encompasses substantially more than just the segregated or traceable property of commodity customers, including "property that was unlawfully converted from and that is the lawful property of the estate," and "other property of the debtor that any applicable law, rule or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property." (Trustee's Reply ¶ 10 (citing 11 U.S.C. §§ 761(10)(A)(viii), (ix) (emphasis added)).) SIPA contains similar provisions for property of securities customers. These broad provisions enable the Trustee to take actions to marshal additional property to benefit commodity and securities customers in certain circumstances. There is no point in arguing over the scope of such powers now based on speculation about potential conflicts with respect to hypothetical assets. The Trustee may move to allocate specific assets in a specific manner at an appropriate time and will do so on notice to all customers and creditors. (Trustee's Reply ¶ 10.)
▪ The Bankruptcy Code requires the Trustee to bring avoidance actions to recover improperly transferred property, which is to be returned to the MFGI estate and treated as customer property subject to distribution, even if such property is found at MF Global Holdings Ltd. and its subsidiaries, or any other entity. (Resp. at 6.) ▪ The Trustee must immediately begin to pursue claims to recover customer funds (even if it requires an entity to or through which customer funds flowed to give up alternative funds), so that decisions about distribution and allocation of customer property in these proceedings can be made quickly and efficiently. (Resp. at 2–3, 9.)	▪ The Trustee alone has statutory investigative authority with respect to MFGI, and he alone has the unique responsibility of protecting its customers and administering the estate, including the responsibility to marshal customer assets in the manner Congress intended. As part of his investigation, the Trustee, with the assistance of his professionals, is analyzing his ability to obtain recoveries, by litigation or negotiation, against certain financial institutions, MFGI affiliates, and others to recover customer property. (Trustee's Reply ¶ 23.) Respondents' attempt to interject or claim an oversight role with respect to the Trustee's investigation and pursuit of potential claims is not authorized by and is contrary to SIPA and the Bankruptcy Code. (Trustee's Reply ¶ 24 (citing Mem. Op. and Order 4, 6, ECF No. 459).)

▪ To the extent that MF Global Holdings Ltd. or any other parties impermissibly received customer property from MFGI, they held customer property in trust for MFGI customers subject to the requirements of the Commodity Exchange Act and CFTC regulations, and are liable for any violations of those strictures. (Resp. at 6–8.) ▪ To the extent that MF Global Holdings Ltd. or any other entity received customer property and improperly disposed or converted it, MFGI customers should be granted a first priority lien against that entity's cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents under trust principles. (Resp. at 8.)	▪ The Trustee believes that he has authority to seek to make allocations in appropriate circumstances as necessary but has not yet moved to do so as neither the total amount of shortfall to any fund of customer property nor the extent of general estate assets is yet known with any degree of certainty. (Trustee's Reply ¶ 2.)

6. Response of Alexander Coxe, Greenbriar Partners, L.P., and Paul Polger to Trustee's Memorandum Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (Foley & Lardner LLP) (ECF No. 822)	
Response	**Trustee's Reply**
▪ Metals assets (*i.e.*, custodial metals receipts, metals warrants, and metals warrants proceeds) are not "customer property" under § 761(10) of the Bankruptcy Code and CFTC Rules 190.01(n) and 190.08(a) subject to the *pro rata* distribution provisions in § 766(h) of the Bankruptcy Code. Thus, the principles set forth in the Trustee's Memorandum do not apply to metals assets. (Resp. at 5–6.)	▪ The argument that the metals assets are not "customer property" under § 761(10) of the Bankruptcy Code and CFTC Rules 190.01(n) and 190.08(a) subject to the *pro rata* distribution provisions in § 766(h) of the Bankruptcy Code requires fact-specific determination which should be resolved as part of the expedited claims process.
▪ Metal assets are held in trust by MFGI solely as custodian, for the sole benefit of the metals clients and are not property of MFGI's estate under § 541 of the Bankruptcy Code. (Resp. at 5, 8.) ▪ Section 541(d) of the Bankruptcy Code specifies that "the property of the bankruptcy estate does not include any interest in which the debtor holds only bare legal title" and no equitable interest. Thus, property that was held in trust by the debtor is not "property of the estate" under § 541 of the Bankruptcy Code. (Resp. at 7.)	▪ The argument that the metals assets are not property of the MFGI estate under Bankruptcy Code § 541 overlooks the broad definition of "customer property" applicable to commodity broker liquidation, which includes "cash, a security or other property . . . received, acquired, or held by or for the account of the debtor, from or for the account of a customer," including, among other things, "specifically identifiable customer property"; a "warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer"; and "cash, a security or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer." (Trustee's Reply ¶ 12 (quoting 11 U.S.C. § 761(10)).) There is no requirement for

	MFGI to have title or an equitable or beneficial interest in the Physicals for them to be considered customer property. (Trustee's Reply ¶ 12.)

7. Memorandum of Law of John Cassimatis in Response to Memoranda of the Trustee, the Commodity Futures Trading Commission, and the Securities Investor Protection Corporation Regarding the Legal Principles and Framework for the Allocation and Distribution of Customer Property (Blank Rome LLP)	**(ECF No. 823)**
Response	**Trustee's Reply**
▪ Physical metals, in this case silver, are specifically identifiable property which belong in an account class with other holders of physical property. (Resp. ¶¶ 3, 13.) ▪ Failing to treat specifically identifiable property in its own class and subjecting physical holders to a loss is contrary to the purposes of the commodity laws. (Resp. ¶ 28.) ▪ If physical property is treated as specifically identifiable property in its own account class, it will not materially affect distributions to other customers in this case. (Resp. ¶ 29.) ▪ Holders of physical property such as silver and gold have suffered severe losses in many cases due to the Trustee's failure to promptly return, liquidate, or sufficiently hedge specifically identifiable property. Any loss attributed to the decline in value of a physical metal between the Filing Date and the date of distributions is a customer claim entitled to an additional distribution. The return of physical property was within the Trustee's control, and thus the risk of loss runs to the estate due to the Trustee's delays. (Resp. ¶¶ 3, 15, 25.) ▪ Bankruptcy Code § 766, 17 C.F.R. § 190.02, 17 C.F.R. § 190.03, and Appendix Form 1 to the CFTC Part 190 Regulations require an earlier return or liquidation of specifically identifiable property and are consistent with the policy that the property of customers must be returned or liquidated in a prompt manner. Further, 17 C.F.R. § 190(f) includes a provision requiring a trustee to take immediate action to liquidate specifically identifiable property when the value of such property is declining. (Resp. ¶16–22.) ▪ With permission from the CFTC, the Trustee could have taken	▪ This issue is fact-specific among individual claimants and as to particular Physicals, and therefore must be resolved in the expedited customer claims process approved by the Court. For example, for any particular claimed Physical to meet the criteria to qualify as SIP that is part of a "delivery account," as narrowly described in the Part 190 Regulations, it must be either a warehouse receipt, bill of lading or other document of title or physical commodity held specifically for the purpose of delivery or exercise, which as of the Filing Date is specifically identifiable on the debtor's books and records as received from or for the account of a particular customer. For the Trustee to ascertain whether qualifying criteria are met for any particular claimed Physical will require fact-specific determinations based on reconciling MFGI's books and records with individual claims. (Trustee's Reply ¶ 16 (citing Trustee's Mem. ¶ 24).) Once the Trustee has information on the range of customer claims to Physicals and how they are reflected on MFGI's books and record, the determinations of net equity and account class can be undertaken in a consistent and fair way. (Trustee's Reply ¶ 16.) ▪ The Respondents' differing positions regarding Physicals and the fact-specific nature of their assertions serves to highlight that the individual claims must be resolved in the expedited customer claims process approved by the Court. (Trustee's Reply ¶¶ 14, 16.) ▪ Section 190.02(f) of the CFTC Regulations specifically contemplates the liquidation of Physicals after the transfers authorized by § 190.06 are completed. (Trustee's Reply ¶ 15.) The requirement that customer property be distributed ratably applies to SIP. (See Trustee's Mem. ¶¶ 33, 35 (citing CFTC Interpretive Letter No. 90-1 (Jan. 19, 1990); 46 Fed. Reg. 57,535, 57,538)); see also 11 U.S.C. § 766(h). The Court's December 12, 2011 Order approving the third bulk transfer of MFGI commodity customer property to other FCMs authorized the Trustee to distribute Physicals to MFGI's former customers on the same pro rata distribution basis applicable to accounts of U.S. Segregated Property Customers, without

other actions such as hedging to protect metals clients from the risk of loss, pursuant to 17 C.F.R. § 190.04(d). (Resp. ¶ 26.)	prejudice to any future determination of whether the Physicals or some subset thereof constitutes a separate class of customer property or is entitled to disparate treatment. (See Order Granting Expedited Mot. to Approve Further Transfers and Distributions for MF Global Inc. United States Commodity Futures Customers, 2, ECF No. 717.)
▪ In the alternative, if the Court determines that physical metals are not specifically identifiable property, warehouse receipts for metals should not be considered property of the estate and thus are not subject to the distribution scheme under the commodity laws. (Resp. ¶ 3.)	▪ This argument overlooks the broad definition of "customer property" applicable to commodity broker liquidation, which includes "cash, a security or other property . . . received, acquired, or held by or for the account of the debtor, from or for the account of a customer," including, among other things, "specifically identifiable customer property"; a "warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer"; and "cash, a security or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer." (Trustee's Reply ¶ 12 (quoting 11 U.S.C. § 761(10)).)

8. Trustee's Response to Briefing Regarding the Legal Principles and Framework for Allocation and Distribution of Customer Property (Morrison & Foerster LLP) (ECF No. 824)	
Response	**Trustee's Reply**
▪ The SIPA Trustee, SIPC, and the CFTC have acknowledged in their briefs the inconsistency between the plain language in Bankruptcy Code § 766(j)(2) and 17 C.F.R. § 190.08(a)(1)(ii)(j), each addressing how the claims for a shortfall in customer property are to be treated in the liquidation of a commodity broker. (Resp. ¶ 5.) ▪ The Statutory Creditors' Committee for the Chapter 11 Cases has correctly stated in its letter to the Court that the Part 190 Regulations do not apply in a SIPA proceeding because a SIPA proceeding is not a case under chapter 7. (Resp. ¶ 8.) ▪ Accordingly, the plain language of Bankruptcy Code § 766(j)(2) should prevail. (Resp. ¶ 8.) Bankruptcy Code § 766(j)(2) requires a ratable distribution of non-customer assets among MFGI's general estate creditors, including customers that have deficiency claims. (Resp. ¶ 9.)	▪ This legal position is clearly contravened by the plain language of SIPA. As the CFTC pointed out in its December 22, 2011 letter to the Court, SIPA § 78fff-1(a) vests the Trustee "with the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a case under title 11," and further provides that the Trustee "shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7." (Trustee's Reply ¶ 9 (citing 12/22/11 Letter from the CFTC re In re MF Global, Inc., ECF No. 781).) SIPA thus arms the Trustee with any additional powers available to a chapter 7 trustee. Accordingly, the Part 190 Regulations, including the customer property provision on which the Holdings Trustee focuses, apply in this proceeding. (Trustee's Reply ¶ 9.)
▪ MF Global Holdings Ltd. has substantial intercompany claims against MFGI on account of the significant intercompany loans	▪ The definition of "customer property" in section 761 of the Bankruptcy Code commodity broker liquidation subchapter encompasses substantially more than just

made to MFGI. The funding is traceable and is separate from customer property, and thus any recoveries related to such funding should not be diverted by the SIPA Trustee to a customer property pool where customers enjoy priority to the detriment of creditors of the MFGI estate. (Resp. ¶ 9.)	the segregated or traceable property of commodity customers, including "property that was unlawfully converted from and that is the lawful property of the estate," and "other property of the debtor that any applicable law, rule or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property." 11 U.S.C. §§ 761(10)(A)(viii), (ix) (emphasis added). SIPA contains similar provisions for property of securities customers. These broad provisions enable the Trustee to take actions to marshal additional property to benefit commodity and securities customers in certain circumstances. There is no point in arguing over the scope of such powers now based on speculation about potential conflicts with respect to hypothetical assets. The Trustee may move to allocate specific assets in a specific manner at an appropriate time and will do so on notice to all customers and creditors. (Trustee's Reply ¶ 10.)

EXHIBIT B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP)

08-01420 (JMP)(SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 14, 2009

2:32 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Debtors' Motion Directing that Certain Orders and Other Pleadings Entered or Filed in the Chapter 11 Cases of Affiliated Debtors be Made Applicable to Luxembourg Residential Properties Loan Finance S.a.r.l. and BNC Mortgage LLC (BNC Mortgage LLC)

II. CONTESTED MATTERS:

HEARING re Motion of The Walt Disney Company for Appointment of Examiner Pursuant to Section 1104(c)(2) of the Bankruptcy Code

HEARING re New York State Comptroller's Motion To Appoint A Trustee

HEARING re Motion of The Bank Of New York Mellon Trust Company, N.A. as Indenture Trustee, for Order Pursuant to Bankruptcy Rule 2004 Directing Examination of, and Production of, Documents by Lehman Brothers Holdings, Inc., Lehman Brothers, Inc., Lehman Brothers Commodity Services Inc. and Barclays Capital Inc.

HEARING re Debtors' Amended Motion Pursuant to Bankruptcy Rule 1007(c) to Further Extend the Time to File the Debtors Schedules, Statements of Financial Affairs, and Related Documents

including dealing with the Harbinger 2004 requests. And how to deal with certain case management issues that were manifest even in the second week of the case.

We've come a long way, but in certain respects we haven't. We're still dealing with 2004 requests. And I think that certain 2004 requests are to be distinguished from others. In the SIPA case I wrote a very brief opinion granting the motion for 2004 discovery brought by the DCP parties seeking the discovery of certain targeted information that was clearly relevant to the representation of that group, at least in my opinion it was.

I mention it because I don't think there is one law of the case determination that applies to 2004 discovery. In some respects it may be permissible based upon the needs of a part for cause shown. In some respects it's a source of interference, and the proliferation of costs, delay and undue expense.

This is a close question in my view. The fact that the committee has weighed in in opposition to their request, the fact that the debtor has weighed in in opposition to their request, in my view goes much more to orderly case administration than it does to the entitlement to take the discovery in the first instance.

When I first reviewed this contested matter, it was my initial inclination to believe that the issues surrounding

to deny the 2004 request without prejudice to its being reasserted in the future in the even that the information sought is not otherwise forthcoming by virtue of the work of the creditors' committee or the work of the examiner.

Counsel for the committee has stated that the committee is involved as an estate fiduciary in an examination of the facts and circumstances surround the sale of debtors' assets to Barclays. That investigation would appear to subsume many of the same issues that are the subject matter of the pending 2004 request.

Additionally, the argument with respect to appointment of the examiner made clear particularly since the motion was first filed by the Walt Disney Company, that the examiner will be looking into questions of whether or not assets of non-debtor affiliates somehow made their way over to Barclays at the beginning of the case under the authority of the September 20 sale orders.

Under the circumstances, it seems to me that we have one examiner and one creditors' committee that will be dealing with the very same subject matter. Admittedly, they will be dealing with that subject matter not from the perspective of a zealous advocate. And no doubt Mr. Horowitz would be doing this discovery as a zealous advocate. But zealous advocacy is not a requirement to obtain information. I believe under the circumstances that it makes good sense for the case as a whole

for particularized requests for information to be put to one side and not to become the subject of ongoing contested matters in this Court unless exception circumstances can be shown. I believe that no exceptional circumstances have been shown here. But that does not mean that the indentured trustee is not entitled to have questions answered in due course. And I expect that those questions will be answered at some point over the next several months.

In the event that those questions remain outstanding, counsel for the indentured trustee should feel completely free in reasserting its 2004 request and nothing that I've said here is intended to deprive the indentured trustee of the ability to later attempt to assert that the circumstances, in fact, are exceptional. And that such particularized discovery is, as a result, appropriate.

That's my ruling.

MR. HOROWITZ: Your Honor, I ask if we could participate in the examiner meet and confer.

THE COURT: Well, see that's a subject which is no longer before me. My inclination to that is no. And it's no for several reasons. First, as you pointed out in your own comments a few minutes ago, you did not have standing to appear and be heard with respect to the examiner motion because you did not intervene in that proceeding. Secondly, you are not exceptional as it relates to the multitude of individuals who