UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MF GLOBAL HOLDINGS LTD., AS PLAN ADMINISTRATOR, Plaintiff, - against - PRICEWATERHOUSECOOPERS LLP, Defendant.	Case No. 14-cv-2197 (VM)(JCF)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO PRICEWATERHOUSECOOPERS LLP'S MISCELLANEOUS MOTION

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PRELIMINARY STATEMENT

After watching trial unfold for a full week without objecting even once that Plaintiff was offering a "new" theory, PwC wants a "do-over." PwC belatedly asks the Court to strike evidence of what actually happened to MF Global, preclude Plaintiff from arguing the true facts, and instruct the jury to disregard those facts under the guise that the Plan Administrator offered a "new theory of causation." But PwC is not really asking the Court to strike some "theory." PwC is asking the Court to strike true, admissible (and already admitted) facts—facts proving that PwC's egregious auditing failures destroyed trust and confidence in MF Global's financial position, which caused its sudden collapse and damages.

The essential predicate of PwC's motion, and each of its proposed remedies, is that PwC was somehow surprised or prejudiced by the Plan Administrator's "new causation theory." As shown below, that predicate is demonstrably false. Not only have these facts been pleaded and discovered, but *PwC's own experts responded* to what PwC now claims is new: that ratings agencies and other market participants did not know of the $6.3 billion in off-balance sheet transactions. Moreover, the specific link of these facts to causation was made in open court *prior to opening*, PwC did not claim that link was "new," and the Court specifically permitted Plaintiff to make that link to the jury. Plaintiff relied on this and opened specifically and in detail on the surprise and loss of trust in MF Global's financial condition that caused its demise and damages. PwC made *no objection*, and never argued to the Court that this was "new."

PwC plainly was not surprised by the Plan Administrator's "new causation theory." To the contrary, PwC anticipated and addressed that "theory" in its opening statement immediately after the Plan Administrator sat down, an opening statement which had been prepared *before* PwC even heard MF Global's opening argument. PwC opened extensively to the jury on the fact that the market was not surprised, claiming that the $6.3 billion in transactions for MF Global's

own account did not surprise the market because it was disclosed elsewhere in the 2011 10-K. Welch Decl. Ex. 1, Tr. at 47:23-48:15. Moreover, as Mr. Turner testified, and as the record evidence now shows, notes to the financial statement or disclosures elsewhere in a 10-K do *not* prevent the balance sheet audited by PwC from being "misleading." Welch Decl. Ex. 1, Tr. 417:14-418:15, 420:4-421:4; Pl. Ex. 740.[1]

The evidence then demonstrated exactly what Plaintiff told the jury the evidence would show. The CEO at the time, Jon Corzine, testified that MF Global failed because confusion in the marketplace caused a loss in trust in MF Global's financials. Welch Decl. Ex. 1, Tr. at 451:19-24. That is already admitted to the jury, again without any objection by PwC that this is "new."[2] These are the facts and the *evidence* in this case. Moreover, PwC joined issue on this theory of causation by eliciting its own evidence related to confusion in the marketplace regarding MF Global's disclosures. PwC may wish such facts and statements were not in evidence, but its remedy is not to ask this Court to strike facts that PwC does not like, or to force Plaintiff to ignore the true facts or be silent on them. PwC did not object all week because, despite its claims to the contrary, PwC apparently knew and had prepared for these causation facts. In a transparently tactical ploy, PwC sat on its hands to see how the evidence developed. After a full week of trial - apparently not liking the way it was going - PwC now brings this motion which should be swiftly rejected by this Court because it has no legal or factual basis,

[1] A copy of Pl. Ex. 740 can be provided upon request.

[2] Mr. Corzine's testimony is confirmed by Moody's own, contemporaneous documents that Moody's did not understand that the $6.3 billion in off-balance sheet transactions—off balance sheet per PwC's advice and certified as "presented fairly"—were transactions for MF Global's account: "It was **recently discovered** that MF had **recently** [sic] taken an extremely large position that left its net exposure to European Sovereign debt … at $6.3 billion." See, e.g., Welch Decl. Ex. 3, Pl. Ex. 517 at 48 of 49 (Moody's Rating Committee Memo, dated October 21, 2011). *See infra* at 12, n.6 and 14, n.7.

and because PwC's inexcusable delay has waived any claim of surprise or prejudice that PwC may have had.

ARGUMENT

I. Plaintiff's True Facts Are Nothing New

If PwC were truly surprised by a "theory of causation" that it has gleaned from the evidence presented to the jury for an entire week, this can only be due to its failure to pay attention to the Plan Administrator's allegations, arguments, and pre-trial presentations over the course of the past three years. From the very inception of this litigation, the Plan Administrator made clear that PwC's negligent accounting opinions regarding the RTMs and the DTA led to MF Global's incorrect reporting of those items on its balance sheet and in its financial statements. In short, the Plan Administrator's "theory of causation" is nothing new. *See Norbrook Labs. v. G.C. Hanford Mfg. Co*., 2003 U.S. Dist. LEXIS 23933, No. 5:03 Civ. 165 at *45-47 (N.D.N.Y. Dec. 18, 2003) (denying "motion to preclude [plaintiff] from introducing a 'new' legal theory because [he] did not in fact introduce a new legal theory . . . [but] one accord with the theory presented at the outset").

On March 28, 2014, the Plan Administrator filed its complaint against PwC, alleging that PwC's egregious accounting failures gave rise to MF Global's substantial build-up of Euro RTMs, "undermined investor confidence and that of the rating agencies, and created a higher level of scrutiny and mistrust of MF Global Holdings on the part of its regulators." Compl. ¶ 121.

The Plan Administrator also alleged that PwC's failures regarding the DTA accounting were similarly harmful to the confidence and trust of the relevant parties in the Company's financial condition. After demonstrating that a Valuation Allowance against the DTA should have been declared "no later than May 2010 when MF Global Holdings reported its financial

results for its 2010 fiscal year" in its 10-K (Compl. at ¶ 132), the Plan Administrator alleged that PwC's erroneous DTA conclusion in the May 20, 2011 10-K "plac[ed] its imprimatur on MF Global Holdings' hopes that its turnaround strategy would be sufficient to utilize the entire DTA in the coming year." (Compl. ¶ 134.) When PwC changed its view in October 2011, the Company was required to release an earnings statement (which the trial testimony established was reviewed in advance by PwC) on October 25, 2011, disclosing that it was now taking a $119 million Valuation Allowance against the DTA. (*Id.* at ¶ 135.) The Complaint then identifies how the belated disclosure caused harm to MF Global (*id.* at ¶ 136):

> This DTA valuation allowance occurred at approximately the same time that MF Global Holdings had to disclose the large capital charge imposed by FINRA and to amend its June 30, 2011 10-Q. … In reliance on PwC's negligent audit, quarterly reviews, and accounting advice, MF Global Holdings was placed in the position of taking major hits to its liquidity, capital, and financial position at a time and in a manner that exacerbated the negative effects on the Company in the marketplace when it could least afford it.

The Complaint thus alleged that it was the belated declaration and disclosure of the DTA that affected the market's perception of MF Global's financial condition and ability to generate future profits.

The Plan Administrator further alleged that, "[i]n October 2011, following the announcement of the September 30, 2011 financial results, the Company's credit rating was downgraded. The downgrade, in turn, put further pressure on the Company's liquidity." *Id.* ¶ 139. Specifically, the Complaint alleges that "[o]n October 25, 2011, after MF Global Holdings announced its results for its second fiscal quarter ended September 30, 2011, posting a $191.6 million GAAP net loss, compared with a loss of $94.3 million for the same period the prior year, the Company's stock price fell that day by almost 50%" (*id.* at ¶ 141). These allegations put PwC on notice that disclosures related to the RTM portfolio and the Valuation

Allowance in late October 2011 led market participants who relied on MF Global's financial statements to question MF Global's financial condition, causing investors to flee the Company, counterparties to demand greater margins, rating agencies to downgrade the Company, and a liquidity crisis that it could not survive.

Discovery in this action proceeded on the basis of these and other allegations, concluding in July 2015, and on August 21, 2015, the Plan Administrator proffered the expert reports of Dr. David Mordecai and Paul K. Michaud.[3] Dr. Mordecai opined, among other things, that "off-balance sheet accounting substantially masked the economics underlying these sovereign exposures." Mordecai Report ¶ 1. Similarly, Mr. Michaud opined, among other things, that, "[h]ad MF Global been required to account for the Euro RTMs on its balance sheet, regulators, ratings agencies, investors, and other market participants would have been able to see that MFGI's leverage ratio was increasing as the volumes of its Euro RTM transactions increased." Michaud Report ¶ 72. "These results would have been contrary to the specific guidance given to MF Global by the ratings agencies." *Id*. ¶ 8; *see also* Michaud Report, ¶¶ 22, 116; Mordecai Report ¶¶ 47, 48. Indeed, had PwC advised MF Global, correctly, that it had to account for its Euro RTM transactions on the balance sheet, doing so "would have alerted regulators, ratings

[3] The "Mordecai Report" refers to the Expert Report of David K.A. Mordecai, dated August 21, 2015, a copy of which is attached to the Declaration of David K.A. Mordecai, dated March 8, 2016, in opposition to PwC's Motion for Summary Judgment. Citations to specific paragraphs of the Mordecai Report are cited herein as "Mordecai ¶ _." The "Michaud Report" refers to the Expert Report of Paul K. Michaud, dated August 2015, a copy of which is attached to the Declaration of Paul K. Michaud, dated March 8, 2016, in opposition to PwC's Motion for Summary Judgment. Citations to specific paragraphs of the Michaud Report are cited herein as "Michaud ¶_." Copies can be provided upon request, including via electronic mail.

agencies, investors and other market participants that MF Global's leverage ratio was increasing as the volume of its Euro RTM transactions increased." Michaud Report ¶ 117.

Evidently recognizing the Plan Administrator's intent to prove a causal connection between PwC's audit failures, the ability of regulators, ratings agencies, investors, and other market participants to "see" MF Global's financial condition, and MF Global's collapse, PwC proffered the expert report of Dr. Kenneth R. Lehn, who responded directly to Dr. Mordecai's and Mr. Michaud's contentions.[4] Specifically, Dr. Lehn asserted that MF Global had made "extensive disclosures …both in notes to its financial statements and other portions of its periodic financial reports" (Lehn Report ¶ 39) and concluded, contrary to the facts, that:

> Neither Mr. Michaud nor Dr. Mordecai provides a reasonable basis to conclude that ***regulators, ratings agencies and other market participants did not know*** that MF Global was accumulating Euro RTMs, accounting for these transactions as sales, and de-recognizing the associated assets and liabilities from its consolidated balance sheet, or that regulators, ratings agencies and other market participants ***would have viewed MF Global differently*** if it had not accounted for its Euro RTMs as sales transactions.

[4] PwC elected not to proffer affirmative opinions from its experts, but instead was content to offer purely responsive opinions. PwC successfully moved to preclude the Plan Administrator from presenting certain causation related opinions of Dr. Mordecai and Mr. Michaud. Dkt. No. 135 at 28-32. To the extent the Plan Administrator is now required to narrow the scope of its experts' testimony in light of the Court's decisions on motions *in limine*, PwC's expert testimony should likewise be curtailed. *See, e.g.*, *S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 679-80 (S.D.N.Y. 2013) (precluding rebuttal testimony on topics outside the scope of opposing party's expert testimony); *LaSalle Bank Nat. Ass'n v. CIBC*, No. 08 Civ. 8426, 2012 WL 466785, at *3 (S.D.N.Y. Feb. 14, 2012) (precluding rebuttal testimony where plaintiff withdrew expert witness); *NIC Holding Corp. v. Lukoil, Pan Americas*, No. 05 Civ. 09372, 2009 U.S. Dist. LEXIS 32580, 9-12 (S.D.N.Y. Apr. 14, 2009) (precluding rebuttal expert from testifying in case-in-chief and agreeing that "unless and until Defendants' experts testify, Plaintiff's experts will be unable, as a practical matter, to offer true rebuttal testimony.").

Id. ¶ 40.

Dr. Lehn is wrong. But that is not the point. The salient point is that, given Dr. Lehn's proffered opinion, PwC cannot credibly contend that it did not know or understand how the Plan Administrator might prove causation. To the extent there was any ambiguity concerning the nature and scope of Dr. Mordecai's and Mr. Michaud's opinions, PwC *voluntarily waived* the right to take their depositions. Welch Decl. Ex. 4.

Improper disclosure also featured in PwC's motion for summary judgment. In its opposition to that motion, the Plan Administrator argued that MF Global's collapse was the result of the "accumulation of the sizeable Euro RTM portfolio [and] *public concerns* regarding 'euro-zone sovereign debt,' all of which sparked increases in margin calls against MFG 'threatening overall liquidity' leading to *'grave concerns' of MFG's regulators* concerning its 'viability and whether it should continue operations in the ordinary course and the Moody's downgrades.'" MFG Opposition Br. at 25 (internal quotations and emphasis added). Improper disclosure was also a focus of the Plan Administrator's argument concerning PwC's DTA-related malpractice. The Plan Administrator argued that the "trier of fact can conclude that the announcement on October 25, 2011 of the $119 million valuation allowance was a substantial cause of the bankruptcy filing one week later." *Id.* at 28. The Court agreed. Noting the "immediate" Moody's downgrade following that announcement and the fact of MF Global's bankruptcy petition less than one week later, the Court found that "[o]n this record a jury could find that PwC's advice as to the timing of the valuation allowance was one of the factors, along with the sales accounting decision, that caused MF Global's losses." *MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 199 F. Supp. 3d 818, 844 (S.D.N.Y. 2016). That is entirely consistent with the Plan Administrator's trial theory.

The Plan Administrator reiterated its "theory of causation" in its pre-trial memorandum, explaining:

> By October [2011], when ***regulators, rating agencies and markets*** fully appreciated MFG's massive proprietary exposure to [Euro RTMs], and MFG was forced to take a more than $100 million write down on its DTA, rating agencies downgraded MFG to 'junk' status.
>
> ***
>
> With [MFG's] ***simultaneous disclosure*** of its massive RTM portfolio and its more than $190 million quarterly loss resulting from its delayed valuation allowance, ***the bottom fell out almost immediately*.**

Dkt. No. 67 at 1, 4 (emphasis supplied).[5]

PwC did not rush into Court and claim that this specific statement of how the facts caused MF Global's demise was "new" and that PwC was surprised. PwC said *nothing*. Similarly, in opposition to PwC's "public watchdog" motion *in limine*, the Plan Administrator reiterated:

> While the professional duty PwC owed and breached was to MF Global, MF Global hired PwC to ***provide assurance*** that its financial statements were not materially misstated, not only to itself (*i.e.*, its management, board of directors and shareholders), but also ***to the multiple public parties on which MF Global depended to remain in business—such as regulators, ratings agencies, creditors and counterparties***.
>
> ***
>
> Thus, an explanation of PwC's "watchdog" role is vital for the jury to understand ***how PwC's professional negligence was a direct and proximate cause of MF Global's harm***.

[5] *See MF Global Holdings v. PricewaterhouseCoopers LLP*, No. 14-cv-2197, 2017 U.S. Dist. LEXIS 34751, at *4 (S.D.N.Y. Mar. 2, 2017) ("It is beyond dispute that an independent auditor's function is important to the investing public and regulators as well as to the company whose books are being audited.").

Dkt. No. 173 (Letter to Hon. Victor Marrero, Feb. 23, 2017) at 3-5 (emphasis supplied). Again, the Court agreed. The Court did not permit Plaintiff to say "public watchdog" but specifically said it was important for Plaintiff to explain PwC's role to the jury. Welch Decl. Ex. 1, Tr. at 91:17-92:6 (""[O]ur whole causation is that those people lost trust and that's why – I know I can't say the word public watchdog but that's what the Supreme Court and the Second Circuit has said, people rely on those numbers and when they lose trust they walk away. I mean, that's our case. So I have to explain why.")

Finally, it is black-letter law that the Plan Administrator is entitled to plead in the alternative, causation is inherently a fact-dependent analysis, and is entitled to explain the actual evidence to the jury, regardless of whether that evidence is "new" or "unexpected.". *See, e.g., In re MTBE Prods. Liab. Litig.*, 739 F. Supp. 2d 576 (S.D.N.Y. 2010) (plaintiff "asserted three separate theories of causation at trial . . . [one of which was] developed during the course of this [action] as an alternative to traditional theories of toxic tort causation."); *see also Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343 (2d Cir. 1994) ("[A] party may properly submit a case on alternative theories.").

II. PwC's Objection Is Too Late and Prejudicial

The day before opening statements, the Plan Administrator disclosed to PwC the slide deck it intended to present to the jury, illustrating in graphic detail how the evidence will show that PwC's audit failures caused a loss of trust and confidence in MF Global's financial position, which was a substantial factor in MF Global's collapse. *See* Welch Decl. Ex. 2. If the slides themselves did not make that patently obvious—and they do—the Plan Administrator unambiguously spelled it out in open court before the jury was even seated.

In response to PwC's objection that certain slides suggested that PwC had a ***duty*** to the "investing public, regulators and other stakeholders, *et cetera*" (Welch Decl. Ex. 1, Tr. at 7:14-

21), the Plan Administrator countered that third parties' reliance on PwC's certification of MF Global's audited financial statements "***goes directly to causation***," explaining:

> These parties lost trust and confidence in MF Global's financial position. That is exactly the certification they put in their independent auditor's report. If they lose trust, they stop doing business with the company. The investors … customers withdraw their funds, lenders stop lending, and ***that's the causal chain***. The parties lost trust as a result of PwC's audit failures, and that is [why] we're collecting on behalf of MF Global because PwC failed to do its job.

Id. at 7:24-8:8 (emphasis supplied).

Driving home the point that the connection between PwC's audit failures and the loss of "trust and confidence" in MF Global's financial position is a "***causation issue***," the Plan Administrator continued:

> those were parties that needed to trust MF Global, and when they lost that trust, they began to do what anyone would do when you lose trust in the financial condition of a company; you withdraw funds, you stop lending, and that is exactly what happened. Those are the facts we are going to prove.

Welch Decl. Ex. 1, Tr. 9:21-10:3; *see also id.* at 9:18-20 ("customers withdrew funds, lenders stopped lending as a result of PwC's audit failures and the fact that the market lost confidence").

This explicit, detailed explanation of how the facts caused MF Global's loss did not sound alarms for PwC. PwC did not stand up and say "Judge, this is a whole new theory and you must exclude it!" PwC said nothing about this being new.

The Court did not find the explanation out of bounds either. The Court permitted the slides—as long as Plaintiff did not argue that PwC had a legal duty to these third parties who lost trust and confidence. *See id*. at 7:6-8; 8:9-14. Plaintiff relied on the Court's ruling and gave this exact explanation of causation to the jury, based on the facts that would be proved.

In its opening statement, the Plan Administrator published its slide deck to the jury and, as previewed in oral argument concerning those slides, explained to the jury that the evidence will show, and since has shown, that PwC's audit failures were a substantial ***cause*** of MF Global's collapse. *Id*. at 38:10-41:23. The Plan Administrator explained that PwC's job is to assure "those who rely on the financial statements, those who do business with the company can have trust and confidence in the company's financial position" (*id.* at 14:21-15:05) and further that MF Global "relied on PwC to create trust in its financial position, trust that was essential for MF Global to do business" (*id*. at 14:24-15:02). The Plan Administrator concluded that, when:

> PwC's audit failures came to light in October of 2011, and MF Global's true financial position became known, ***the parties on whom MF Global relied lost confidence in the company's financial position***, sparking a cash crisis that rapidly resulted in one of the largest financial collapses in American history."

Id. at 16:01-16:06) (emphasis added). PwC never objected that the Plan Administrator's slides or opening statement articulated a new or in any way improper "theory of causation."

PwC asserted in its own opening statement—as PwC's expert, Dr. Lehn, had previously asserted in his expert report—that there was no surprise or confusion among market participants concerning MF Global's financial condition in October 2011 because the Euro RTM portfolio was supposedly sufficiently disclosed in the footnotes in MF Global's year-end financial statement for the fiscal year 2011. Specifically, PwC argued:

> [T]he $6.3 billion that you heard the Plan Administrator talk about. That didn't get ***disclosed*** late in October 2011, it was ***disclosed*** in the March 31, 2011 10-K that MF Global publicly filed with the government that everybody in the world could read.

Welch Decl. Ex. 1, Tr. at 49:1-4 (emphasis supplied). PwC continued:

> You are going to hear that ***rating agencies like Moody's*** read 10-Ks all day long. They read MF Global's 10-K and 10-Q [and] they ***knew about MF Global's $6.3 billion investment*** in European Sovereign bonds when they read this document. ***[Moody's] will***

> ***tell you that the disclosure in this document was transparent – not hidden, but transparent to them***.

Welch Decl. Ex. 1, Tr. at 49:4-8 (emphasis supplied); *see also id.* at 47:18-49:9. While PwC is wrong,[6] PwC plainly was not surprised by the Plan Administrator's "new causation theory." To the contrary, PwC anticipated and addressed that "theory" in its opening statement immediately after the Plan Administrator sat down.

After opening statements, PwC not only failed to object to the Plan Administrator's "theory of causation," PwC failed to object as the Plan Administrator elicited evidence proving that "theory." It is now too late, and would be too prejudicial, to do so.

First, the Plan Administrator called Lynn Turner. Mr. Turner, the former chief accountant of the Securities and Exchange Commission, explained PwC's role as the auditor of MF Global as follows:

> So Price Waterhouse Coopers [sic] as the auditor is to examine those numbers to make sure they fairly present the company ***so that when someone relies on those financial statements*** when deciding to invest in that company or perhaps another company, one of the competitors, that ***they know they can trust those numbers***, that the numbers are credible. If you can't trust the numbers, then why would you ever invest in a company, so to speak? It is like your bank, if you don't trust your bank, why would you ever give them money? The same thing here.

[6] *See, e.g.*, Welch Decl. Ex. 3, Pl. Ex. 517 at 48 of 49 (Moody's Rating Committee Memo, dated October 21, 2011) ("five votes for downgrade" – "It was *recently* discovered that MF had *recently* [sic] taken an extremely large position that left its net exposure to European Sovereign debt … at $6.3 billion." – "Key Facts: European exposures, regulatory capital breach, recent earnings [*i.e.*, DTA]"). Emphasis added. PwC has stipulated that Pl. Ex. 517, including the Rating Committee Memo on page 48, is an authenticated business record, and the Plan Administrator has obtained a certification of business records from Moody's proving the same. That certification and PwC's stipulation overcome and dispense with any hearsay and reliability objections. PwC's only remaining objections are relevance and Fed. R. Evid. 403. *See infra* at 14, n.7.

Welch Decl. Ex. 1, Tr. at 88-7:16 (emphasis supplied). PwC objected that Mr. Turner "should not be allowed to testify about PwC's ***duty*** of trust to investors and others." Welch Decl. Ex. 1, Tr. at 90:23-24 (emphasis supplied). Again, the Plan Administrator explained:

> Mr. Thomas: [O]ur whole ***theory of causation***, which is what actually happened here, is that all those people he just talked about took out their money immediately and the entire company collapsed . . . those ***people lost trust*** . . . ***people rely on those numbers and when they lose trust they walk away. I mean, that's our case***.
>
> The Court: Understood.

Id. at 91:02-92:14. (Emphasis added). Again, PwC said *nothing* about this being "new" or PwC being "surprised." Mr. Turner's testimony resumed and he continued to testify about the "role of an auditor and whether or not PwC did [its] job" without any further objection. *Id*. at 93:8-9; *see also id.* 93:3-97:22.

The Plan Administrator then called the former CEO of MF Global, Jon Corzine, who testified that, to survive, it was essential that MF Global's regulators, counterparties, lenders and others had trust and confidence in MF Global's financial position, which was grounded in MF Global's "audited financial statements audited by [PwC]." Welch Decl. Ex. 1, Tr. at 469-73. PwC sat back silently and without objection through all of this testimony, including while the Plan Administrator walked Mr. Corzine through one of its central opening slides—MF Global's Relationships of Trust—and proved substantial elements of its "theory of causation."

Mr. Corzine testified to facts that he stated to Congress immediately after the bankruptcy and during his four-day deposition in this and the other MDL actions; facts that PwC has quoted with approval in motions in this case. Now that the jury has heard Mr. Corzine's sworn testimony, PwC is not happy with the realization that it points to PwC's liability rather than its defense, so it now seeks to preclude the jury from considering this evidence.

When PwC cross-examined Mr. Corzine on Friday, the Plan Administrator was surprised and appreciative that PwC affirmatively and repeatedly elicited evidence relating to MF Global's relationship with Moody's. Welch Decl. Ex. 1, Tr. at 791 (introducing Def. Ex. 163 [February 2011 Moody's report]); *id.* at 794 (introducing Def. Ex. 241 [October 2011 Moody's report]). PwC then walked Mr. Corzine through the same disclosures that it claims clearly disclosed MF Global's financial position. Welch Decl. Ex. 1, Tr. at 797: 19-24 and 799:11-16.[7]

The bottom line is this: PwC was *not surprised* and had nothing to "figure out." Plaintiff before opening, during opening, at side-bar, and through witnesses repeatedly and specifically admitted facts and explained the simple truth of what caused MF Global's demise and PwC never objected that this was "new." Still further, PwC elected to proceed with trial without objection as the Plan Administrator clearly articulated and then put in evidence proving its "theory of causation."

The law does not permit PwC's motion because, by not timely stating an objection, PwC waived any argument or right based on claimed surprise or prejudice. "Once the cat [is] out of the bag, there [is] no excuse for defense counsel not promptly moving to strike the objectionable [evidence], if indeed as a matter of trial tactics he then want[s] [it] struck." *United States v. Jimenez*, 789 F.2d 167, 170 (2d Cir. 1986). "[B]y failing to object until well after both parties had introduced significant evidence on [how PwC's audit failures caused market participants' to

[7] Mr. Cusick asked Mr. Corzine on cross examination whether Def. Ex. 241 – the Moody's October 24 downgrade of MF Global – mentioned "confusion," apparently trying to prove that since if Moody's did not mention confusion, Moody's was not confused. But Pl. Ex. 517 shows that Moody's was confused: Moody's incorrectly believed the RTM position was "recent" and said it had been "recently discovered." This language makes the relevance of Pl. Ex. 517 beyond legitimate dispute, and its probative value far outweighs any remaining prejudice. In fact, it would be prejudicial to the Plan Administrator not to allow Pl. Ex. 517 into evidence. There is no need to wait for a Moody's representative to testify in order to do so, especially in light of the Court's likely imposition of time limits on the parties.

lose trust and confidence in MF Global's financial position], [PwC] thereby waived any objection to testimony about [that issue]." *M.H. v. New York City Dep't of Educ.*, 712 F. Supp. 2d 125, 151 (S.D.N.Y. 2010) (quotation and citation omitted). Such a rule is not harsh. It is necessary. "[R]equiring a contemporaneous objection denies an attorney the opportunity to use an objection for tactical purposes, awaiting the outcome of events or the disclosure of additional information before challenging the propriety of evidence." *Id*. The Court should reject PwC's attempt to pull just such a "tactical" stunt here.

III. PwC's Legal Theory is Wrong

First, the cases relied on by PwC for the proposition that a party cannot assert a "new theory" (Br. at 14-21) are readily distinguishable. In most of those cases, the court precluded the assertion of a new theory of *liability*.[8] In the balance of those cases, the court precluded the assertion of a new theory of *damages*.[9] PwC does not cite a single case precluding a party for asserting a supposedly new theory of *causation*. (Br. at 14).[10]

[8] *See Potthast v. Metro-N. R. Co.*, 400 F.3d 143, 153 (2d Cir. 2005); *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 172-73 (2d Cir. 2005); *Genereux v. Raytheon Co.*, 754 F.3d 51, 58-59 (1st Cir. 2014); *Aldridge v. Forest River Inc.*, 635 F.3d 870, 875-76 (7th Cir. 2001); *Commerce Funding Corp v. Comprehensive Habilitation Services, Inc.*, No. 01 Civ. 3796, 2005 WL 1026515, at *5-6 (S.D.N.Y. May 2, 2005); *Am. Stock Exch., LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93-94 (S.D.N.Y. 2002); *Katt v. City of N.Y.*, 151 F. Supp. 2d 313, 347 (S.D.N.Y. 2001).

[9] *See Robert v. Ground Handling, Inc.*, No. 04 Civ. 4955, 2007 WL 2753862, at *4 (S.D.N.Y. Sept. 20, 2007); *Design Strategies Inc. v. Davis*, 367 F. Supp. 2d 630, 633 (S.D.N.Y. 2005); *Point Prods. A.G. v. Sony Music Entm't, Inc.*, No. 93 Civ. 4001, 2002 WL 31856951, at *2 (S.D.N.Y. Dec. 19, 2002); *ESPN, Inc. v. Office of Comm'r of Baseball*, 76 F. Supp. 2d 416, 420, n.3 (S.D.N.Y. 1999).

[10] The remaining cases PwC cites are not remotely analogous, and PwC does not even to attempt to explain how they are. *Webb v. Robert Lewis Rosen Assocs., Ltd.* 128 F. App'x 793, 797-98 (2d Cir. 2005); *Licciardi v. TIG Ins. Grp.*, 140 F.3d 357, 359-65 (1st Cir. 1998); *Napolitano v. Compania Sud Americana de Vapores*, 421 F.2d 382, 386 (2d Cir. 1970).

Second, PwC's request for a "curative instruction" (Br. at 20 n.4) is baseless. Curative instructions are issued to mitigate alleged prejudice arising from the introduction of certain evidence. *See, e.g.*, *Chemical Bank v. Dana*, 4 F. App'x 1, 5 (2d Cir. 2001). The proposed instruction would severely prejudice the Plan Administrator and PwC has waived any such prejudice.

Third, PwC's judicial estoppel argument (Br. at 15) is likewise meritless because the Plan Administrator's theory of causation is not inconsistent, much less "clearly inconsistent," with any position the Plan Administrator has previously taken. *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012); *see also Adelphia Recovery Tr. v. Goldman, Sachs & Co.*, 748 F.3d 110, 115-16 (2d Cir. 2014) (same); *Jasper v. Sony Music Entm't, Inc.*, 378 F. Supp. 2d 334, 344 (S.D.N.Y. 2005) (same).

Finally, a motion for a mistrial is not a substitute for a timely objection, and where, as here, a party fails to object on a timely basis to supposedly prejudicial evidence, that party should not be allowed to abort proceedings at the eleventh hour by moving for a mistrial. *See Clemente v. Carnicon–Puerto Rico Management Associates, L.C.*, 52 F.3d 383, 387 (1st Cir. 1995).

CONCLUSION

Accordingly, PwC's motion for miscellaneous relief should be denied.

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Respectfully submitted,

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