

# **EXHIBIT B**



Amsterdam District Court  
Case number: C/13/526263  
Calendar date: Wednesday, February 13, 2013

**PRIMARILY MOTION FOR THE COURT TO DECLINE JURISDICTION ON THE BASIS OF ARTICLE 11 OF THE DUTCH CODE OF CIVIL PROCEDURE [RV], AND ALTERNATIVELY EXCEPTION OF LIS PENDENS ON THE BASIS OF ARTICLE 12 RV, AND ALSO CONDITIONAL STATEMENT OF DEFENSE IN THE PROCEDURAL ISSUE ON THE BASIS OF ARTICLE 843A RV**

In the matter of:

The legal entity organized under the laws of Canada  
**PRICEWATERHOUSECOOPERS LLP**  
Having its registered office and principal place of business in Toronto (Canada)  
Defendant 3 in the main action and in the procedural issue on the basis of Article 843a Rv  
Plaintiff in the procedural issue on the basis of Article 11 Rv and in the procedural issue on the basis of Article 12 Rv  
Counsel: E.M. Soerjatin, LL.M.

vs.:

1. The legal entity organized under the laws of the British Virgin Islands **COLIMA INTERNATIONAL LIMITED**  
Having its registered office in Tortola (British Virgin Islands)
2. The civil-law foundation **STICHTING FAIRFIELD COMPENSATION FOUNDATION**,  
having its registered office and principal place of business in Amsterdam (the Netherlands)  
Plaintiffs in the main action and in the procedural issue on the basis of Article 843a Rv  
Respondents in the procedural issue on the basis of Article 11 Rv and in the procedural issue on the basis of Article 12 Rv  
Counsel: P. Soede, LL.M.

The other defendants in the main action and in the procedural issue on the basis of Article 843a Rv are:

1. The publicly held corporation **PRICEWATERHOUSECOOPERS N.V.**,
  2. The publicly held corporation **PRICEWATERHOUSECOOPERS ACCOUNTANTS N.V.**,
- Both having registered office and principal place of business in Amsterdam



Defendant 1 and 2, respectively, in the main action and in the procedural issue on the basis of Article 843a Rv

Counsel: D.F. Lusingh Scheurleer, LL.M.

Defendant 3 in the main action, also plaintiff in the procedural issues on the basis of Articles 11 and 12 Rv (hereinafter "PwC Canada"), has it stated and moved before all the defenses on the merits, primarily for the Dutch court to decline jurisdiction on the basis of Article 11 Rv, and alternatively for the present proceedings to be stayed on the basis of Article 12 Rv. Furthermore, PwC Canada submits a conditional defense in the procedural issue on the basis of Article 843a Rv.

#### TABLE OF CONTENTS

I.	Introduction	3
II.	<b>PRIMARILY:</b> claim in the procedural issue on the basis of Article 11 Rv (motion for the court to decline jurisdiction)	5
II.1	The facts	5
	(i) PwC Canada	5
	(ii) The auditing services	5
	(iii) <i>Anwar Class Action</i>	11
II.2	The Dutch court does not have jurisdiction over PwC Canada	16
2.1	Primarily: no exception to the main rule of Article 2 Rv; no connection as referred to in Article 7 Rv	16
2.2	Alternatively: abuse of procedural law	25
III.	<b>ALTERNATIVELY:</b> claim in the procedural issue on the basis of Article 12 Rv (exception of <i>lis pendens</i> )	26
IV.	<b>CONDITIONAL</b> defense in the procedural issue on the basis of Article 843a Rv	29



4.1	Primarily: rejection of the claim on the basis of Article 843a Rv	30
4.2	Alternatively: stay of the hearing of the procedural issue on the basis of Article 843a Rv until the final statements in the main action have been filed	41
V.	Tender of evidence	41

## I. INTRODUCTION

1. PwC Canada has taken cognizance of the originating summons, also containing an interim application on the basis of Article 843a Rv from the plaintiffs (hereinafter each individually to be referred to as "Colima" or "the Foundation", as applicable, and jointly to be referred to as "Colima et al.") dated August 15, 2012, which was served on PwC Canada by amended process dated October 23, 2012.
2. In December 2008, Bernard L. Madoff turned himself in to the American police. He admitted that for years he had been guilty of massive fraud – a so-called '*Ponzi Scheme*'- and that the billions of dollars in assets that the securities house Bernard L. Madoff *Investment Securities* LLC (hereinafter: 'BLMIS') run by him, which was under the supervision of the American SEC, should have retained for several investment funds, did not exist.
3. Due to these disclosures, many proceedings were instituted in the United States against various parties (including PwC Canada) by legal entities or natural persons claiming to have suffered damage as a result of the loss of their investments in these funds. These funds include Fairfield Sentry Ltd, Fairfield Sigma Ltd and Fairfield Lambda Ltd (hereinafter: the '*Fairfield Funds*'), which were established under the laws of the British Virgin Islands. Colima and the participants in the Foundation state that they are among the group of investors who suffered damage due to the loss of their investments in the Fairfield Funds.



4. Colima et al. state that PwC Canada failed in the performance of its auditing services in respect of the financial statements of the Fairfield Funds for 2006 and 2007. For that reason, Colima et al. state that PwC Canada is liable to pay them compensation.
5. By letter dated January 15, 2013 the defendants 1 and 2 (hereinafter "PwC Netherlands"), or their counsel, requested that the Amsterdam District Court stay the present proceedings until a judgment had been delivered in the motion for consolidation of the proceedings submitted by PwC Netherlands in the proceedings with reference C/13/521460 (hereinafter the "Krys Proceedings"). By letter of the same date PwC Canada joined the said request and also requested, given its intention to submit a motion contesting jurisdiction, that the present proceedings be referred to the calendar to continue the proceedings in the main action staying the hearing of the procedural issue on the basis of Article 843a Rv. By letter dated January 18, 2013 the calendar judge denied PwC Netherlands' request. When counsel for PwC Canada asked the court registrar by telephone, the latter communicated that the calendar judge had also denied the request of PwC Canada.
6. On January 30, 2013 PwC Canada appeared in the present proceedings. The proceedings were referred to the calendar of February 13, 2013 for defense in the procedural issue on the basis of Article 843a Rv raised by Colima et al.
7. Before all defenses on the merits PwC Canada primarily contests the jurisdiction of the Dutch court and alternatively relies on *lis pendens*. Should the Amsterdam District Court hold that it has jurisdiction to hear the claims of Colima et al. (in the main action and in the procedural issue on the basis of Article 843a Rv) against PwC Canada, PwC Canada submits a defense in the procedural issue on the basis of Article 843a Rv.
8. Below PwC Canada will demonstrate that the Dutch court lacks jurisdiction in respect of PwC Canada, or at least that the Amsterdam District Court is to stay the hearing of the present proceedings until a decision has been rendered in the Class Action pending before the New York District Court (to be explained in further detail below), that there is no



legal ground for Colima et al.'s claim on the basis of Article 843a Rv, and that such claim should, therefore, be rejected.

## II. PRIMARILY: CLAIM IN THE PROCEDURAL ISSUE ON THE BASIS OF ARTICLE 11 RV (MOTION FOR THE COURT TO DECLINE JURISDICTION)

### II.1 The facts

#### *(i) PwC Canada*

1.1 PwC Canada is an independent legal entity, organized under the laws of Ontario, Canada, which is entirely separate from PwC Netherlands. There are no mutual control or ownership relationships. This is not altered by the mere fact that both entities are member firms of the PwC Global Network. This membership does not stretch beyond their authorization to use the PwC name and to share general information. There is no overlap whatsoever in the ownership structure of the various entities, nor is there any turnover or profit sharing between these entities. The PwC Global Network does not practice in the field of accountancy and does not provide any accountancy services to clients. A member firm is not authorized to act on behalf of the PwC Global Network or on behalf of any other member firm, or to bind it vis-à-vis third parties. Each member firm is liable only for its own acts and is not liable for the acts on the part of the PwC Global Network or of any member firm. The same holds true for the PwC Global Network. In other words: PwC Canada and PwC Netherlands do not operate as a "corporate multinational".

#### *(ii) The auditing services*

1.2 As PwC Canada understands it, Fairfield Greenwich Group (hereinafter: 'FGG') retained PwC Netherlands to audit the financial statements of the Fairfield Funds for the 2000, 2001, 2002, 2003, 2004 and 2005 financial years. PwC Netherlands had been instructed to audit the financial statements of these funds, prepared in accordance with International Financial Reporting Standards (hereinafter "IFRS"), in accordance with International Standards on Auditing (hereinafter "ISA"). On a one-off basis PwC Netherlands also audited the financial statements of Greenwich Sentry L.P., an investment fund



established in the United States, prepared in accordance with Generally Accepted Auditing Principles in the United States (hereinafter "US GAAP") for the 2005 financial year, all in accordance with Generally Accepted Accounting Standards in the United States (hereinafter "US GAAS").

- 1.3 PwC Netherlands performed its auditing services in the Netherlands. During the period in which PwC Netherlands performed its auditing services, the accounting records of the said funds were in the possession of Citco Fund Services (Europe) B.V. in Amsterdam. In the fall of 2006, FGG relocated the accounting records of the said funds to Citco Fund Services (Toronto), with offices in Toronto, Canada. As a result, FGG decided to engage another, Canada based, auditor to perform the audit services relating to the funds. This was PwC Canada.
- 1.4 PwC Canada was retained by FGG to audit the financial statements for the 2006 and 2007 financial years of, among others, the Fairfield Funds, of the above Greenwich Sentry L.P., and of another US-based investment fund, i.e. Greenwich Sentry Partners L.P. (Greenwich Sentry L.P. and Greenwich Sentry Partners L.P. hereinafter jointly to be referred to as "the Greenwich Funds"). PwC Canada had been instructed to audit the financial statements of the Fairfield Funds, prepared in accordance with IFRS, in accordance with US GAAS, and to audit the financial statements of the Greenwich Funds, prepared in accordance with US GAAP, in accordance with US GAAS.
- 1.5 PwC Netherlands' audits of the financial statements of the Fairfield Funds were, therefore, performed in accordance with ISA, while PwC Canada's audits of the financial statements of the Fairfield Funds were performed in accordance with US GAAS. Contrary to Colima et al.'s unfounded statements,<sup>1</sup> the standards set forth in US GAAS differ considerably from the ISA standards.
- 1.6 ISA and US GAAS are auditing standards: the standards applicable to the way in which the auditor is to perform its auditing services. Therefore, this is separate from the accounting standards, which relate to the presentation of the financial statements (IFRS

---

<sup>1</sup> Paragraph 4.1 of the summons.



and US GAAP). ISA are adopted by the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC). In the United States the Auditing Standards Board (ASB) of the American Institute of Certified Public Accountants (AICPA) adopts the auditing standards for non-listed entities. The auditing standards for listed entities are adopted by the Public Company Accounting Oversight Board (PCAOB). The PCAOB and AICPA auditing standards are referred to as US GAAS.

- 1.7 Given the origin of the respective standards alone, there is a fundamental, culture related, difference in nature between these standards and in the way in which they are worked out. US GAAS are rule based, whereas ISA are principle based. The rule based approach tries to promote the desired conduct by setting as many rules as possible. The principle based approach, on the other hand, tries to promote the desired conduct by setting only few rules, but focusing on relevant principles. For example, unlike the rule based approach, the focus of the principle based approach is on the economic reality rather than the form, offering more room for interpretation.
- 1.8 The difference in approach indicated above is expressed in five differences in principle between US GAAS and ISA. These relate to:
- (i) the documentation of the auditing processes;
  - (ii) the going concern considerations;
  - (iii) the assessment of, and reporting on, internal controls relating to financial accounting;
  - (iv) the risk analysis;
  - (v) the engagement of another auditor for part of the audit.

PwC Canada refers to the article by Deborah Lindberg and Deborah Seifert, "A comparison of U.S. Auditing Standards with International Standards on Auditing",





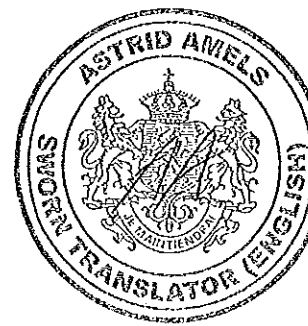
published in The CPA Journal of April 2011, attached as **Exhibit 1a**, in which the stated differences are explained in more detail. The CPA Journal is published by the New York State Society of CPAs,<sup>2</sup> and is widely recognized as a reference. In sum, these differences are based on the difference between the rule based and the principle based approach. As a further illustration of these differences, PwC Canada submits as **Exhibit 1b** a study by AICPA entitled '*Substantive differences between the International Standards on Auditing and Generally Accepted Auditing Standards*' dated August 2012. This shows that US GAAS contain many requirements on the performance of the auditing services that are not found in ISA, and vice versa.

- 1.9 Given the differences between US GAAS and ISA, it is difficult to compare these standards. Therefore, ASB set up the Clarity Project, intended to make US GAAS easier to read, to understand, and to apply. Around the same time, IAASB set up a similar project to clarify ISA. The overall purpose of the two projects is to arrive at a convergence of US GAAS and ISA, so that the respective standards can be more easily compared. This Clarity Project is ongoing, so that - contrary to Colima et al.'s statements - it cannot be accepted that US GAAS and ISA are, in fact, the same standards, let alone that this was the case at the time of the auditing services performed by PwC Netherlands for the financial years 2000 to 2005 inclusive, and the auditing services performed by PwC Canada for the financial years 2006 and 2007.
- 1.10 Another relevant difference is the fact that the 2007 financial statements of the Fairfield Funds, unlike the financial statements audited by PwC Netherlands, contain a reconciliation with US GAAP because of the acquisition by Fairfield Greenwich (Bermuda) Ltd. (the investment advisor of the Fairfield Funds) of a registration with the American supervisory body SEC. In the 2007 financial statements of Fairfield Sentry this was explained as follows:<sup>3</sup>

---

<sup>2</sup> CPA stands for *Certified Public Accountant*.

<sup>3</sup> Exhibit 24 to the summons, paragraph 2.6.10. A similar explanation was included in the financial statements of Fairfield Sigma (Exhibit 29 to the summons, paragraph 2.6.12).



*'As the Company is managed by an SEC registered investment advisor, it is required that the Company issues its financial statements in accordance with United States generally accepted principles (US GAAP) or otherwise presents a reconciliation to US GAAP in the financial statements.'*

On this point, too, PwC Canada's audit engagement was different from PwC Netherlands'. Moreover, PwC Canada's audit engagement also included the Greenwich Funds, unlike the audit engagement of PwC Netherlands. For this reason alone, there is no basis for Colima et al.'s statement that PwC Canada "took over" the audit engagement from PwC Netherlands.<sup>4</sup>

- 1.11 As befits an auditor when accepting a new audit engagement, PwC Canada communicated with PwC Netherlands to inquire whether there were any issues with respect to the funds that PwC Canada should be aware of with a view to its engagement. But contrary to what Colima et al. suggest, the auditing services performed by PwC Canada did not show any overlap with those performed by PwC Netherlands, let alone that PwC Canada's services 'built on' those performed by PwC Netherlands.<sup>5</sup> Moreover, none of the employees affiliated with PwC Netherlands was involved in the auditing services performed by PwC Canada, or vice versa. The fact that both are member firms of the PwC Global Network has not made any difference for PwC Canada's acceptance of the audit engagement and the performance of its auditing services.
- 1.12 PwC Canada was engaged directly by FGG and operated according to a direct assignment of FGG. PwC Canada performed its auditing services in Canada. The audit engagement between PwC Canada and FGG was set forth in the independent engagement letters between PwC Canada and FGG. Not only were these governed by different laws (the laws of Ontario, Canada) than the engagement letters of PwC Netherlands (laws of the Netherlands), the conditions that were applicable differed from those used by PwC Netherlands. For example, PwC Netherlands' conditions included a limitation of liability, while PwC Canada's did not. For these reasons, too, it cannot be accepted that PwC

---

<sup>4</sup> Paragraph 3.38 of the summons.

<sup>5</sup> Paragraph 3.38 of the summons.



Canada and PwC Netherlands had identical engagements, let alone that there was any connection between the two (or between the claims brought against the various defendants based thereon).

1.13 In sum:

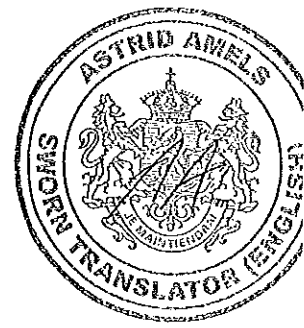
- PwC Canada is an independent Canadian legal entity that is entirely separate from PwC Netherlands; there are no mutual control or ownership relationships;
- The standards used by PwC Canada in the performance of its auditing services (US GAAS) are substantially different from those used by PwC Netherlands (ISA);
- PwC Netherlands' audit engagement related to different financial years (2000 to 2005) than PwC Canada's (2006 and 2007);
- PwC Canada's audit engagement related not only to the Fairfield Funds, but also to the Greenwich Funds;
- Various persons, licensed in different jurisdictions (Canada or the Netherlands respectively) to practice accountancy and subject, therefore, to different rules of professional conduct, performed the audit work for PwC Canada and PwC Netherlands;
- PwC Canada performed its auditing services independently, entirely separate from PwC Netherlands, according to a direct assignment of FGG (rather than an assignment of PwC Netherlands). PwC Canada was not involved in any way whatsoever in the preparation, adoption or audit of the financial statements of the Fairfield Funds for which PwC Netherlands issued an audit opinion. Nor was PwC Netherlands involved in any way whatsoever in the preparation, adoption or audit of the financial statements of the Fairfield Funds for which PwC Canada issued an audit opinion.



- The engagement of PwC Canada was governed by the laws of Ontario, Canada; the engagement of PwC Netherlands was governed by the laws of the Netherlands;
- There are differences between the conditions applicable to the services performed by PwC Canada and those performed by PwC Netherlands;
- At the time of PwC Netherlands' auditing services the accounting records of the Fairfield Funds were in the Netherlands, in the possession of Citco Fund Services (Europe); at the time of PwC Canada's auditing services, such records were in Canada, in the possession of Citco Fund Services (Toronto);
- PwC Canada performed its auditing services in Canada, while PwC Netherlands performed its auditing services in the Netherlands.

*(iii) Anwar Class Action*

- 1.14 PwC Canada is one of the defendants in a Class Action brought before the United States District Court Southern District of New York in 2009 by an alleged Class of all the shareholders of the Fairfield Funds and several other funds (hereinafter the "Anwar Class Action"). The Anwar Class Action raises the same issues as in the present proceedings, i.e. the question as to whether PwC Canada failed in the performance of its auditing services in respect of the financial statements of (inter alia) the Fairfield Funds and, if so, if that caused damage. PwC Canada refers to the affidavit with exhibits of Timothy A. Duffy (partner with the law firm of Kirkland & Ellis LLP in Chicago, United States) attached hereto as **Exhibit 2**, which explains the nature, the progress and the status of the Anwar Class Action.
- 1.15 When the US court will render a final decision in the Anwar Class Action is difficult to predict at this time. The proceedings on the various motions are expected to be finalized



by the end of 2013. If these are rejected, the main action in the Anwar Class Action is expected to be tried in the first six months of 2014.

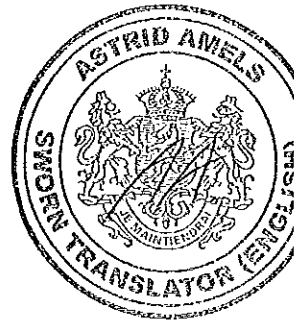
1.16 A Class Action is brought by a number of private individuals or legal entities, known by name, acting as plaintiffs (hereinafter: "the Named Plaintiffs" ), but the proceedings are also conducted for the benefit of parties not identified as Named Plaintiffs (hereinafter: "the Unnamed Plaintiffs"). These Unnamed Plaintiffs together with the Named Plaintiffs make up the envisaged "Class". Before the court assesses the merits of the claims in the Class Action, it will first have to certify the envisaged Class ("Class Certification"). Any judgment in favor of the plaintiffs in a Class Action or a decision of the US court declaring a Class Action Settlement binding, will be binding on all the members of such Class, i.e. including the parties not involved in the Class Action as Plaintiffs. The decision will be non-binding only in respect of a member of the Class that has expressly requested to be excluded from the Class by "opting out" of the class as per specific procedures specified by the court. A party filing such an opt out statement withdraws from the Class and reserves his rights (including the right to bring independent proceedings) against the defendants.

1.17 The Plaintiffs have brought the Anwar Class Action :

*'on behalf of all shareholders in Fairfield Sentry Limited, Fairfield Sigma Limited, Greenwich Sentry, L.P., and Greenwich Sentry Partners, L.P., as of December 10, 2008 ("the Class"), who suffered a net loss of principal invested in the Funds',*

including also Colima and the participants in the Foundation (if and to the extent it is established in court that their statement that they have invested in the Fairfield Funds is founded).

1.18 On January 11, 2012 the Plaintiffs in the Anwar Class Action requested the US court to certify this Class. The US court is expected to render a decision on this issue in the next six months. To support the request for certification of the Class, the Plaintiffs argued, inter alia, that the inclusion of foreign members of the envisaged Class does not preclude



the certification of the Class, because the Dutch court "" would recognize a U.S. class action judgment or settlement"". The Plaintiffs thereby referred to a statement of Professor Hans Smit of Columbia University School of Law to the effect that, if and to the extent that the Class Members are Class Members from the Netherlands and several other jurisdictions, the inclusion of foreign Class Members does not preclude the certification of the Class, inter alia because *"there was no doubt that Dutch courts would [...] recognize U.S. class action judgments purporting to bind the Dutch members of the class who did not opt out."* Although PwC Canada in the Anwar Class Action disputed the certification of the Class, it did not put up a defense against the assumption that if a Class is certified, a Class Action judgment will qualify in the Netherlands for enforcement against a Dutch Class Member that has not filed an opt out statement. PwC Canada refers to paragraphs 6-8 of the affidavit of Timothy Duffy and the Exhibits referred to there (Exhibit 2).

- 1.19 If the U.S. court certifies the Class as envisaged by the Plaintiffs, Colima and the participants in the Foundation are both Class Members in the Anwar Class Action and (substantive) plaintiffs in the present proceedings. Furthermore, PwC Canada points out the following.
- 1.20 PwC Canada has recently, on request, received from Colima et al. copies of participation agreements allegedly entered into between the Foundation and the participants. As PwC Canada understands it, Colima et al. will still file these with the Court Registry.<sup>6</sup> A first comparison of these documents to the Second Consolidated Amended Complaint dated September 29, 2009 of the Plaintiffs in the Anwar Class Action (Exhibit A to Exhibit 2) shows that a number of participants in the Foundation are also acting as Named Plaintiffs in the Class Action, to wit the following private individuals and legal entities:
- **ABN AMRO Life S.A. Luxembourg:** participant 57176 in the Foundation, and Plaintiff no. 6 (as shareholder in Fairfield Sentry) and Plaintiff no. 80 (as a shareholder in Fairfield Sigma) in the Anwar Class Action;

---

<sup>6</sup> Paragraph 2.8 of the summons.



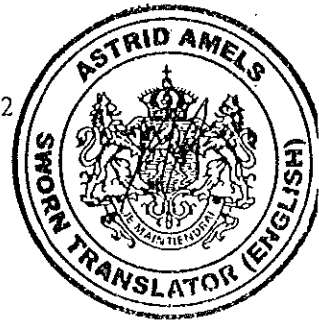
- **Stienaklif B.V.:** participant 56529 in the Foundation, and Plaintiff no. 70 (as a shareholder in Fairfield Sentry) in the Anwar Class Action;
- **Tampa N.V.:** participant 56596 in the Foundation, and Plaintiff no. 72 (as a shareholder in Fairfield Sentry) and Plaintiff no. 104 (as a shareholder in Fairfield Sigma) in the Anwar Class Action;
- **A.P. van de Bovenkamp and H. van Capelle:** participants 56628 in the Foundation, and Plaintiff no. 81 (as shareholder in Fairfield Sentry) in the Anwar Class Action;

1.21 Furthermore, the following participants in the Foundation may be acting as Named Plaintiffs in the Anwar Class Action:

- **K. Borstlap** is participant 57175 in the Foundation; in the Anwar Class Action **Johanna L.M. van Unnik-Borstlap** is acting as Plaintiff no. 44 (as a shareholder in Fairfield Sentry) and as Plaintiff no. 95 (as a shareholder in Fairfield Sigma);
- **Banca Partner SPA** is participant 58212 in the Foundation; in the Anwar Class Action **Banca Sella Holding SPA** is acting as Plaintiff no. 83 (as a shareholder in Fairfield Sentry).

In the absence of more detailed information PwC cannot verify whether these are the same or affiliated private individuals or legal entities. Colima et al. are invited to explain this in their defense in the present procedural issue, failing which it should be assumed that the said participants in the Foundation are the same as the said Named Plaintiffs in the Anwar Class Action.

1.22 On November 6, 2012 the Plaintiffs (i.e. including the said participants as Named Plaintiffs) reached a settlement in the Anwar Class Action with the defendants referred to in the Second Consolidated Amended Complaint as the "Fairfield Greenwich Defendants" (hereinafter the "Partial Settlement"). The Settlement Agreement forms part of Exhibit F to Exhibit 2. The Plaintiffs have requested the U.S. court to certify a



Settlement Class for purposes of the Partial Settlement, in order to be able to distribute the amount of the Partial Settlement to the Settlement Class Members. On March 22, 2013 a hearing will be held in which the request for approval of the Partial Settlement and the certification of the Settlement Class will be heard. The U.S. court is expected to decide on this issue within a short period after such date.

- 1.23 If the U.S. court approves the settlement and certifies the Settlement Class, Colima and the other participants in the Foundation will also be parties to the Partial Settlement as Settlement Class Members, and they will qualify for a payment from the settlement, which will amount to USD 50 to 80 million, unless they affirmatively request to be excluded from the Class by filing an "opt out" statement on time.

**II.2 The Dutch court does not have jurisdiction over PwC Canada / the Amsterdam District Court should declare that it lacks jurisdiction**

- 2.1 Primarily: no exception to the main rule of Article 2 Rv; no connection as referred to in Article 7 Rv

2.1.1 The main rule is that the Dutch court has jurisdiction if the defendant has its permanent address or habitual residence in the Netherlands (Article 2 Rv). First and foremost, the Dutch court cannot derive jurisdiction over PwC Canada from Article 2 Rv, as PwC Canada has its registered office and principal place of business in Toronto, Canada.

2.1.2 In respect of the jurisdiction of the Dutch court over PwC Canada, Colima et al. rely on facts and circumstances that, in Colima et al.'s view, would justify application of Article 7 Rv. Colima et al. state that the claims against PwC Netherlands and PwC Canada are based on the same facts and circumstances, and that the legal questions to be answered are identical as well.

- 2.1.3 Article 7 (1) Rv reads as follows:

*"If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with*





*respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency."*

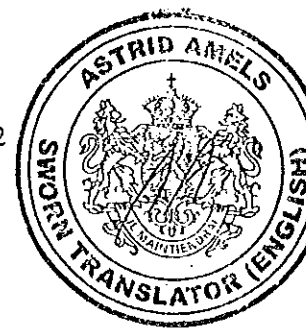
According to legal precedent Article 7 Rv should be applied restrictively, as an exception to the main rule.<sup>7</sup>

- 2.1.4 The mere fact that Colima et al. claim that PwC Canada and PwC Netherlands be jointly and severally ordered to pay damages, does - contrary to what Colima et al. imply - not create the connection between the claims against PwC Canada and those against PwC Netherlands required for application of Article 7 Rv. This is all the more cogent as the standards referred to in the summons for assessment of the question as to whether PwC Netherlands and PwC Canada have acted unlawfully only relate to regulations that do not apply to the engagement of PwC Canada.<sup>8</sup> Colima et al. conveniently treat PwC Canada and PwC Netherlands alike, in a (failed) attempt to disguise the fact that there is no connection. To that extent Colima et al. have failed to substantiate sufficiently why Article 7 Rv would be applicable to this matter.
- 2.1.5 For other reasons, too, there is no ground to accept an exception to the main rule of Article 2 Rv by way of application of Article 7 Rv in these proceedings. To that effect PwC Canada submits as follows.
- 2.1.6 The required connection as referred to in, or at least the close link as required by, Article 7 Rv does not exist between the claims against PwC Canada and those against PwC Netherlands. The question as to whether PwC Netherlands performed its services in accordance with the laws applicable to its own engagement and the relevant auditing standards is entirely different from the question as to whether PwC Canada performed its services in accordance with the laws applicable to its own engagement and the relevant auditing standards. After all, each of these questions is to be assessed on its own merits. Colima et al. are to provide evidence of the alleged failure by each of the defendants

---

<sup>7</sup> Amsterdam District Court, June 23, 2010, JOR 2010/225, annotated by Tzankova (SOBI/Deloitte).

<sup>8</sup> Chapter VI of the summons: The auditing standards to be observed, to wit: International Standards on Accounting (ISA).



separately and individually, in different periods (2000-2005 and 2006-2007, respectively), and in respect of different auditing standards (ISA and US GAAS, respectively). The mere fact that the object of the audit performed by PwC Netherlands and PwC Canada (the Fairfield Funds) shows some overlap does not entail that the claims are based on the same - factual - ground.

- 2.1.7 Colima et al.'s - unsubstantiated - statement that, by applying Article 7 Rv, it should be avoided that "irreconcilable decisions are rendered if the cases are tried separately" fails. There is no question of the situation (and Colima et al. have failed to state that there is) that awarding or rejecting the claims against PwC Netherlands would have consequences for PwC Canada's liability and vice versa. After all, PwC Netherlands' acts are separate from those of PwC Canada. In other words: there is no risk of divergence as a result of contradictory decisions against PwC Netherlands and PwC Canada, respectively, in a - factually and legally - identical situation. For this reason, too, there is no reason for "simultaneous hearing and trying, in order to avoid that irreconcilable decisions be rendered in the event of separate trying of the matters".
- 2.1.8 It can also be concluded from the foregoing that PwC Canada and PwC Netherlands cannot be held liable for the same damage. After all: the mere fact that a plaintiff that is of the opinion that it has suffered damage during a certain period has a claim against two defendants does not entail that those defendants are liable for the same damage. This is not altered by the fact that Colima et al. envisage a joint and several order against PwC Netherlands and PwC Canada.
- 2.1.9 Even assuming that there is any liability whatsoever - which there is not - each of the defendants can only be held liable for the alleged damaging results of its own acts (in short: the issue of unqualified audit opinions). Each of these audit opinions is independent: the opinions were issued by different entities, using different auditing standards, at different times, under different engagement letters to which different conditions and laws were applicable, and for different years. Colima et al. have failed to state, let alone substantiate, that - and why - the circumstances at the time of the audit engagement of PwC Netherlands were identical or similar to those under which PwC



Canada performed its auditing services. Incidentally, based on the foregoing, PwC Canada disputes that this was the case.

2.1.10 In this respect PwC Canada also refers to Chapter II.1 of this statement:

- PwC Canada and PwC Netherlands are independent and separate legal entities. There are no mutual control or ownership relationships. PwC Canada and PwC Netherlands acted independently of each other;<sup>9</sup>
- PwC Canada and PwC Netherlands did not perform the same services for FGG;
- The auditing services were governed by different standards, both in terms of origin and in terms of substance;
- The auditing services were performed in different continents, and in different years, by different persons on behalf of different firms, based on independent engagement letters to which different conditions and laws were applicable.

For that reason, too, the claims or reproaches are not identical to such an extent that deprivation of PwC Canada's right to be summoned to appear before the court of its place of residence would be justified.

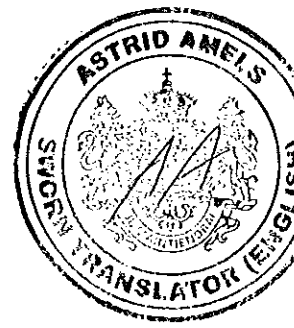
2.1.11 To support the foregoing PwC Canada refers to a comparable matter in this respect in which the Amsterdam District Court declared that it lacked jurisdiction in respect of the claims against a foreign co-defendant (Amsterdam District Court June 23, 2010, JOR 2010/225 annotated by Tzankova (SOBI/Deloitte USA)).<sup>10</sup>

2.1.12 The circumstance referred to in that case as a contraindication against application of Article 7 Rv, to the effect that the foreign defendant (Deloitte USA) had already been

---

<sup>9</sup> In this respect see also Utrecht District Court, November 21, 2012, NJF 2013/29, in which it was assessed to what extent Article 6 (1) EEX Regulation, which is comparable with Article 7 Rv, is applicable. One of the elements pleading against application of that article is the fact that the defendants acted independently of each other (legal ground no. 2.6).

<sup>10</sup> Legal ground no. 6.7.4.



tried on the same subject in the United States is true here as well, given the Anwar Class Action that is pending before the US court. PwC Canada refers to paragraphs 1.14 et seq. of this statement. Since the rationale of Article 7 Rv is to avoid that conflicting decisions are rendered, the Anwar Class Action is an additional argument not to apply Article 7 Rv and, thus, to declare that the Dutch court lacks jurisdiction over PwC Canada. After all, it is certain that a decision of the US court will deal with issues that are at hand in the present proceedings as well, and vice versa. It should be avoided that conflicting judgments are delivered in these proceedings.

2.1.13 In this respect PwC Canada notes that, even if the claim against PwC Canada should be deemed to be based on the same ground and on the same circumstances as the claim against PwC Netherlands, this does not necessarily have to be sufficient to justify application of Article 7 Rv.<sup>11</sup> This is, e.g., like in the present matter, the case if there are also one or more proceedings pending before foreign courts on the same subject and between the same parties. This situation is at hand here, too, given the Anwar Class Action. After all, that circumstance could lead to conflicting decisions, not only in respect of the acts and liability of PwC Canada, but also in respect of its potential liability towards the same private individuals and legal entities. Article 7 Rv is expressly intended to prevent that.<sup>12</sup>

2.1.14 Even if and to the extent that it should turn out that Colima et al. are not involved in the Anwar Class Action (either as a Plaintiff or as a Class Member), PwC Canada refers to a similar matter in which it was held as follows on that point:<sup>13</sup>

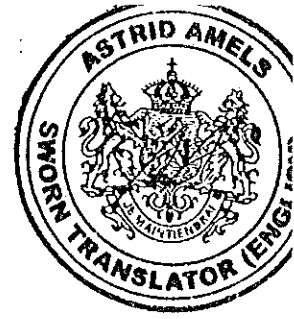
*"This is not altered by the potential fact that a plaintiff is not involved as a party to such foreign proceedings itself. The fact that a court decision applies only between the parties does not make it any less undesirable and ineffective that conflicting decisions are rendered on the same subject."*

---

<sup>11</sup> Utrecht District Court, August 9, 2006, NJF 2006, 633, legal grounds nos. 2.6 - 2.7.

<sup>12</sup> See foregoing note, legal ground no. 2.9.

<sup>13</sup> See foregoing note, legal ground no. 2.10.



- 2.1.15 In any event Colima et al. have the opportunity to join the Anwar Class Action and participate in proceedings before a forum where there is no risk of conflicting judgments. Indeed, a number of participants in the Foundation have already done so by acting as a Named Plaintiff in the Anwar Class Action. In this respect PwC Canada again refers to the Partial Settlement, which was recently reached in the Anwar Class Action. If the Partial Settlement and the Settlement Class are approved by the US court, the participants in the Foundation acting as Plaintiffs in that action, Colima, and the other participants in the Foundation can lay claim to their share in the settlement amount, unless they file an opt out statement on time. It is, however, reasonably to be expected that Colima and the other participants will also exercise their rights under the Partial Settlement. They can't have it both ways: either Colima et al. participate in the Anwar Class Action or they limit themselves to participation in the present proceedings. In any event a choice will have to be made. Colima et al. are, therefore, invited in their defense in the present procedural issue to express their choice.
- 2.1.16 For the sake of completeness, and supererogatorily: the situation as referred to in Article 9 Rv (automatic choice of forum or forum necessitates) is not at hand, even apart from the fact that Colima et al. have not stated any facts or circumstances to that end, and a possible reliance thereon would be out of time. In this respect PwC Canada again refers to the Anwar Class Action and the involvement therein of Colima and the participants in the Foundation as envisaged Class Members and/or Plaintiffs.
- 2.1.17 The Amsterdam District Court cannot derive jurisdiction from Article 6 (e) Rv either. That article provides that the Dutch court also has jurisdiction in the event of an unlawful act matter in which the damaging fact took place in the Netherlands. Incidentally, Colima et al. did not even state that, or submitted facts or circumstances to that effect, so that the court cannot address that, or at least will have to conclude that it has insufficiently been stated or proved that Article 6 (e) Rv applies.
- 2.1.18 In other respects, reliance on Article 6 (e) Rv also fails. This jurisdiction provision should, as an exception to the main rule of Article 2 Rv, be applied restrictively, as is shown by an identical matter before the Amsterdam District Court (June 23, 2010, JOR



2010/225 (SOBI/Deloitte USA)), in which the court held that it could not derive jurisdiction from Article 6 (e) Rv for the following reasons:<sup>14</sup>

*"When assessing whether the Dutch court has jurisdiction pursuant to Article 6, first lines and under e, Rv, it is held, first and foremost, that Deloitte USA is an independent legal entity that [...] is entirely separate from Deloitte Netherlands. As Deloitte USA has argued, undisputed, there are no mutual control or ownership relationships. Furthermore, it is relevant that Deloitte USA acted directly according to the assignment of USF [...], so not of Ahold or Deloitte Netherlands. Furthermore, it is relevant that Deloitte USA performed the acts with which SOBI reproaches it in the United States of America. After all, that is where the USF accounts were audited. The fact that the results of the engagement of Deloitte USA were included in the consolidated Dutch financial statements does not result in the fact that Deloitte USA (in addition to Deloitte Netherlands) can be regarded as the co-responsible auditor for the consolidated Dutch financial statements. After all, it has neither been stated nor proved that Deloitte USA has been involved in any way whatsoever with the preparation, adoption or audit of the consolidated financial statements.*

*Although SOBI also argues that Deloitte USA should be deemed to be an agent of Deloitte Netherlands, that defense has been insufficiently substantiated in light of the foregoing circumstances. The mere fact that the substantive plaintiffs, or a number of them, suffer damage in the Netherlands is insufficient to create jurisdiction on the part of the Dutch court."*

- 2.1.19 PwC Canada even has a stronger case for the inapplicability of Article 7 Rv than Deloitte USA does in the case in question. After all, contrary to the situation of the case referred to, the work of PwC Netherlands and PwC Canada did not take place at the same time. In addition, contrary to the decision referred to, the results of the engagement of PwC Canada were not incorporated in the financial statements that were audited by PwC Netherlands (or vice versa). PwC Canada and PwC Netherlands operated completely

---

<sup>14</sup> Legal ground no. 6.7.3.



independently of each other. PwC Canada refers to paragraphs 1.1 to 1.13 (Chapter II.1 (i) and (ii)) of this statement. These paragraphs also show that PwC Canada was not, and could not be deemed to be, an agent of PwC Netherlands. Incidentally, Colima et al. did not even state that.

- 2.1.20 To the extent that Colima et al. still wish to rely on the application of Article 6 (e) Rv in their defense in this procedural issue, and the Amsterdam District Court would allow that, despite its being out of time, PwC Canada reserves the right to submit a further defense, if necessary in a subsequent document. PwC Canada hereby requests the Amsterdam District Court, if that situation arises, to allow it to do so.
- 2.1.21 Since Colima et al. have failed to state any further facts or circumstances based on which the Dutch court would have jurisdiction, the Amsterdam District Court should declare that it lacks jurisdiction to hear and decide Colima et al.'s claims against PwC Canada, including the claim on the basis of Article 843a Rv.
- 2.1.22 After all, Colima et al.'s statement that "*an alleged lack of jurisdiction of the Amsterdam District Court in respect of the Plaintiffs' claims against PwC Canada will not preclude the claim of the Plaintiffs against PwC Canada for surrender of records*", relying on a ruling of the Supreme Court dated June 8, 2012 (LJN BV8510), fails.<sup>15</sup> Unlike the present matter the Dutch court's jurisdiction was not in dispute in the quoted ruling. In note 13 to his opinion to this ruling the Advocate-General held in this respect as follows:
- '13 Of course, in international matters there should be jurisdiction to hear the claim on the basis of Article 843a Rv. In the present matter the Court of Appeal has jurisdiction to hear that claim pursuant to Article 2 of the EEX Regulation, as the defendant resides in the Netherlands.'* (emphasis added)
- 2.1.23 As in the present matter the Amsterdam District Court lacks jurisdiction over PwC Canada, it cannot hear and decide the claim on the basis of Article 843a Rv in respect of PwC Canada either.

---

<sup>15</sup> Paragraph 6.23 of the summons.



2.1.24 If and to the extent that the court should reject the motion contesting jurisdiction, PwC Canada requests that the court declare that the judgment in this procedural issue is subject to interim appeal on the basis of Article 337 Rv.

2.1.25 The question as to whether the Dutch court has jurisdiction in this matter with respect to PwC Canada is a fundamental legal question, which extends to the further hearing of the case. If the Amsterdam District Court assumes that it has jurisdiction, this means that another decision (i.e.: no jurisdiction) would substantially shorten the proceedings. Cf. Supreme Court January 23, 2004, JBPR 2004, 22, and Rotterdam District Court December 14, 2011, LJN BV5038; NJ 2012/118, in which a request pursuant to Article 337 Rv was honored for the following reasons:

*"If the prescription defense had been honored, this would have ended the case. It is therefore clear that this is a black and white situation that could potentially have big consequences for the outcome of the proceedings."*

In the case referred to, the parties were given the opportunity, in the interlocutory judgment, to express their views on the question as to whether they wanted to submit evidence and, if so, to substantiate their tender of evidence. The court considered in this respect:

*"Such procedural acts are not necessary if it should turn out that the prescription defense is ruled on differently on appeal."*

That is why interim appeal was allowed. The fact that the case referred to concerns a prescription defense and the case in question pertains to a jurisdiction defense does not make the cases any less comparable.

2.1.26 Within this scope, PwC Canada also points out that if it would not be allowed to lodge an interim appeal against the refusal in this procedural issue, it would have to incur substantial costs to continue these proceedings in the first instance, while - in view of its challenge to the jurisdiction of the Dutch court, which PwC Canada considers to be a matter of principle - it must be assumed that PwC Canada will also address the matter of





jurisdiction on appeal. Cf. Utrecht District Court November 21, 2012, LJN BY3661; NJF 2013/29. Also for the sake of judicial efficiency, there is a reason to allow interim appeal. Cf. Arnhem District Court December 12, 2012, LJN BY7919.

2.1.27 In view of the substantial interests of PwC Canada and the fundamental character of the legal question, and in view of the short term of these proceedings, interim appeal will not result in any unreasonable delay of these proceedings, which have been ongoing for a mere two weeks.

## 2.2 Alternatively: abuse of procedural law

2.2.1 Colima et al. are abusing procedural law by bringing claims against PwC Canada before the Dutch court on an evidently insufficient basis, for the sole purpose of creating jurisdiction over PwC Canada, and withdrawing PwC Canada from the jurisdiction of the court of its own place of residence. This is all the more cogent, since PwC Canada has expressly pointed out to Colima et al. the lack of jurisdiction of the Dutch court. PwC Canada refers to the letter from its General Counsel Robert J. Osborne dated Tuesday, June 19, 2012 to counsel for Colima et al. (**Exhibit 3**).

2.2.2 For the factual basis of this reliance on abuse of procedural law, PwC Canada refers to its statements in Chapters 2.1 en II.3 of this statement. With the present proceedings Colima et al. intend to reach the same goal as for which the Anwar Class Action is intended: to bind a well-defined group of alleged injured parties by way of judicial intervention. Not only do a number of participants in the Foundation act both in the Anwar Class Action and as Plaintiffs or substantive plaintiffs in the present proceedings, which is unacceptable, Colima's interests, and those of the other participants in the Foundation, are already properly represented in the pending Class Action.

2.2.3 In other words: Colima et al. are trying to have it both ways. There is no justification for that.

### **III. ALTERNATIVELY: CLAIM IN THE PROCEDURAL ISSUE ON THE BASIS OF ARTICLE 12 RV (EXCEPTION OF LIS PENDENS)**



- 3.1 As stated above, the Anwar Class Action has been pending before the US court since 2009. PwC Canada refers to the affidavit of Timothy Duffy with exhibits (Exhibit 2 to this motion), explaining the nature, course and status of the Anwar Class Action. Colima et al. have since summoned PwC Canada in the present proceedings. There are good grounds to apply Article 12 Rv, so that the Amsterdam District Court will stay the hearing of the present proceedings until a final decision has been rendered in the Anwar Class Action, or the claims brought therein against PwC Canada have otherwise been decided. The lis pendens provision of Article 12 Rv intends to avoid that two proceedings between the same parties on the same subject are conducted simultaneously, which is inefficient and entails the risk of conflicting decisions.
- 3.2 In case law it is assumed that the assessment of the reliance on Article 12 Rv should be linked up with European Court of Justice case law on the lis pendens provision pursuant to Article 27 of Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter the "EEX Regulation").<sup>16</sup> This is not altered by the fact that the EEX Regulation is not applicable to PwC Canada.
- 3.3 The requirements developed in case law for the application of Article 12 Rv have been met.
- The same parties*
- 3.4 The term "the same parties" is broadly interpreted: the parties need not be identical. The parties are "the same" when the interests are identical and inextricably linked.<sup>17</sup>
- 3.5 A number of participants in the Foundation also act as Named Plaintiffs in the Anwar Class Action, which is conducted on behalf of an envisaged Class of which Colima and the other participants likely form part, and in which a Partial Settlement was recently reached, which will be binding on Colima and the other participants in the Foundation as

<sup>16</sup> Inter alia Amsterdam District Court, February 21, 2007, LJN BA4506.

<sup>17</sup> ECJ May 19, 1998, C-351/96 Jur. 1998 p. I-03075 (Drouot).



well after the Settlement Class has been certified, save an opt out. The requirement of "the same parties" has been met in accordance with the interpretation thereof in case law.

*The same subject*

3.6 According to case law, the term "the same subject" is broadly interpreted as well.<sup>18</sup> The claims need not be completely identical. The subject of the Anwar Class Action and the present proceedings is, however, identical, so that the requirement of "the same subject" has been met as well. Although, unlike the European Court of Justice, the Dutch court does not test whether there is "the same cause", it can, for the sake of completeness, be established that the Anwar Class Action and the present proceedings relate to the same cause. According to the European Court of Justice the "cause" includes the facts and the legal rule submitted to substantiate the claim, and the "subject" is the purpose of the claim.<sup>19</sup> In the present matter, the "cause" is - in sum - found in the facts and circumstances submitted by Colima et al. or the Plaintiffs, as applicable, in respect of the Madoff Ponzi Scheme, and both proceedings are intended to establish PwC Canada's liability on account of failure in its auditing services in respect of the financial statements of the funds.

3.7 Therefore, the foregoing shows that there is an adequate forum elsewhere (New York), where the same parties are involved in proceedings on the same subject, and with respect to which it can be established that this is an acceptable forum for Colima et al., as they have agreed to disputes being brought before the New York court. After all: assuming that Colima et al. have, indeed, invested in one or more of the Fairfield Funds as a shareholder, such investment is governed by the subscription agreements as per the samples attached hereto as Exhibits 4a, 4b, and 4c. These samples form part of the respective *Private Placement Memoranda* ("PPM") of the Fairfield Funds. Colima et al. have submitted two PPMs of Fairfield Sentry and two PPMs of Fairfield Sigma as exhibits to the summons.<sup>20</sup> However, these are incomplete: the PPM of Lambda was not

<sup>18</sup> ECJ December 8, 1987, 144/86 Jur. 1987, p. 4861 (Gubish); ECJ December 6, 1994, C-406/92 Jur. 1994, p. I-05439 (Tatry); ECJ May 8, 2003, C-11/01 Jur. 2003, p. I-04207 (Gartner).

<sup>19</sup> ECJ December 6, 1994, C-406/92 Jur. 1994 p. I-05439 (Tatry).

<sup>20</sup> Exhibits 1 and 2 and exhibits 12 and 13 respectively to the summons.



submitted as an exhibit; the subscription documents are missing from the PPMs of Fairfield Sentry; the same applies to the PPM of Sigma that was submitted as Exhibit 13 to the summons, and the last pages thereof are missing. Colima et al. are invited to submit these documents in complete form with the statement of defense in the procedural issue.

3.8 The three samples all contain the same forum selection clause:<sup>21</sup>

*'Subscriber agrees that any suit, action or proceeding ("Proceeding") with respect to this Agreement and the Fund may be brought in New York. Subscriber irrevocably submits to the jurisdiction of New York courts with respect to any Proceeding [...].'*

Incidentally, the same forum selection clause was included in the subscription documents to the PPM of Sigma submitted as Exhibit 12 (Appendix A, page 6, clause 20).

3.9 The Plaintiffs in the Anwar Class Action have confirmed that *'all of the subscribers agreed to a forum selection clause that conferred jurisdiction on the New York courts'*. So, by signing the subscription agreements, Colima et al. agreed to apply to the New York court, and they also have the opportunity to bring their claims there. In fact: a number of participants in the Foundation actually did so by acting as Named Plaintiffs in the Anwar Class Action, and Colima and the other participants in the Foundation are entitled to the outcome of the Anwar Class Action as Class Members, without having to do anything (assuming that the Class will be certified), or at least they can decide to lay claim to their share in the Partial Settlement.

3.10 According to the decision of the Amsterdam District Court dated June 23, 2010, JOR 2010/225, annotated by Tzankova, a decision of a U.S. court approving a Class Action Settlement qualifies for recognition and enforcement in the Netherlands. If this is also established in the present situation in respect of any decision of the New York District Court in due time, the Dutch court is to declare that it lacks jurisdiction in the present proceedings to hear and decide Colima et al.'s claims against PwC Canada.

---

<sup>21</sup> Fairfield Sentry: Article 21; Fairfield Sigma: Article 20; Fairfield Lambda: Article 20.



3.11 It can be established that the interests raised by Colima et al. in the present Dutch proceedings are already properly protected and/or represented in the Anwar Class Action. There are serious grounds to stay the present proceedings as claimed in this procedural issue.

3.12 If and to the extent that the court should reject the procedural issue on the basis of Article 12 Rv, PwC Canada requests that the court declare that the judgment in this procedural issue is subject to interim appeal on the basis of Article 337 Rv. PwC Canada refers to nos. 2.1.24 to 2.1.27 of this motion for any explanation of this request.

#### IV. **CONDITIONAL DEFENSE IN THE PROCEDURAL ISSUE ON THE BASIS OF ARTICLE 843A RV**

4.0 If and to the extent that the Amsterdam District Court declares that the motion to decline jurisdiction on the basis of Article 11 Rv is unfounded, PwC Canada puts up a defense against Colima et al.'s claim on the basis of Article 843a Rv. In the Netherlands there is no general obligation for the parties to provide exhibits, in that the parties can be obligated to provide information and documents. With a view to the foregoing and to avoid "fishing expeditions", the legislator has set cumulative, restrictive conditions for the allowability of a claim on the basis of Article 843a Rv:

- (i) the plaintiff is to have a *legitimate interest* in the specified records in respect of which he claims inspection, copy or extract;
- (ii) the plaintiff is to indicate which *specified and identified records* are involved;
- (iii) the specified records are to regard a legal relationship to which the plaintiff is a party.

Any such claim is not allowable if:



- (i) the person against whom the claim is directed is under an official or professional or employment obligation of confidentiality, and the records are available to him or are in his possession on that basis alone;
- (ii) there are serious grounds; or
- (iii) it can reasonably be assumed that proper administration of justice is secured even without providing the requested information.

If the claim is awarded the plaintiff pays the costs of inspection, provision of a copy or extract of these specified records.

#### 4.1 Primarily: rejection of the claim on the basis of Article 843a Rv

- 4.1.1 Colima et al. claim submission by PwC Canada of the complete audit files, including the internal documents, relating to the Fairfield Funds for the 2006 and 2007 financial years. PwC Canada will demonstrate below that the cumulative requirements pursuant to Article 843a Rv have not been met, or at least that there are grounds to deny inspection on the basis of Article 843a Rv.
- 4.1.2 Inter alia in the interest of the party that is required to surrender certain records, the party requiring surrender is to indicate clearly why it is claiming surrender of those records. Colima et al. argue at length and in great detail why they are of the opinion that they have a legitimate interest in the documents claimed, but fail. Whether there is a legitimate interest in certain records depends on the factual and legal basis of the substantive claim (read: the claims in the main action) and the defense put up against it.<sup>22</sup>
- 4.1.3 Colima et al. essentially state that PwC Canada should have discovered the fraud at BLMIS and that PwC Canada could not have issued an unqualified opinion in respect of the 2006 and 2007 financial statements of the Fairfield Funds if PwC Canada had carried out the audit services in the manner proposed by Colima et al. In the main action, PwC

---

<sup>22</sup> J. Ekelmans in his comments to Article 843a Rv in the Groene Serie Burgerlijke Rechtsvordering, note 4.4; see also Rotterdam District Court May 4, 2011, LJN BQ5672 (Thybo/Ernst&Young).



Canada will put forward the defense that the audit services performed by it in all respects satisfy the requirements to be set for them and that it has not acted unlawfully. Within this scope, PwC Canada will also put forward the defense that the additional control measures referred to by Colima et al. (regardless of whether these were necessary and called for (which PwC Canada will challenge) and apart from the question whether PwC Canada took these measures) would not have exposed the fraud at BLMIS. In other words: the audit files of PwC Canada are not relevant to that matter and will not (be able to) shed a light on it, meaning that Colima et al. have no legitimate interest in taking note of these audit files.

- 4.1.4 Incidentally, in the main action PwC Canada will also put forward defenses with respect to the cause of action of Colima and the Foundation (including defenses based on Article 305a of Book 3 of the Dutch Civil Code) and/ or the right of Colima and the Foundation to bring the present claims.
- 4.1.5 These defenses are related, inter alia, to the proceedings initiated by the Fairfield Funds and the liquidator of the Fairfield Funds, Kenneth Krys (hereinafter "Krys") on May 28, 2012 against PwC Canada before the Ontario Superior Court of Justice in Canada (hereinafter the "Canadian Krys Proceedings"). The Fairfield Funds and Krys brought a multi-billion dollar claim on account of alleged failure by PwC Canada in its audit of the 2006 and 2007 financial statements of the Fairfield Funds. The claim brought against PwC Canada in the present proceedings is the same as the claim brought in the Canadian Krys Proceedings. Given, inter alia, the fact that Colima et al. are entitled, as a shareholder in the Fairfield Funds, to share in the capital of these funds to be liquidated, which will include damages, if any, to be awarded in the Canadian Krys Proceedings, PwC Canada will argue that, as a shareholder in the Fairfield Funds, Colima et al. do not have the right to bring the present claim against PwC Canada, or at least that by initiating the present proceedings they are speaking out of turn and, thus, do not have any interest in their claim on the basis of Article 843a Rv.
- 4.1.6 PwC Canada's defense in the main action is, therefore, also decisive for the assessment of the question as to whether Colima et al. have the required legitimate interest to bring a



claim on the basis of Article 843a Rv. That defense in the main action and the assessment of the present procedural issue cannot be separated.

4.1.7 At the core, the interest alleged by Colima et al. envisages that if their Article 843a Rv claim is awarded, they intend to provide evidence of their statements. Colima et al. thereby, however, skip several fundamental steps in the process. Not until the court has decided the question as to whether the obligation to furnish facts and evidence has been duly performed can the court assess the question as to whether further provision of evidence is required and should be allowed and, if so, whether the evidence to be provided will require taking cognizance of the relevant data.<sup>23</sup> This situation is not even close to being at hand, so that the claim on the basis of Article 843a Rv should be rejected on account of lack of legitimate interest. In this respect, cf. Rotterdam District Court May 4, 2011, LJN BQ5672 (Thybo/Ernst & Young). In that decision the circumstance - which is, incidentally, similar to the present situation - occurred that in the summons the plaintiff "gave a rather concrete list of the facts and circumstances based on which it moved that [the defendant] had been in default" and that "therefore, it did not need to take cognizance of the relevant data". For that reason, in that matter, the court also concluded that proper administration of justice was secured even without provision of the data claimed. In PwC Canada's view, the court should reach the same conclusions in the present procedural issue.

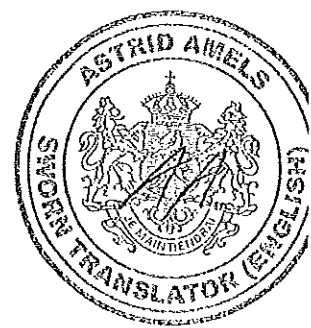
4.1.8 Moreover, it has not been concretely alleged what - evidence law - advantage/disadvantage Colima et al. have in the surrender - or the lack thereof - of the records claimed. There is no more than a suspicion that the records claimed contain information that could support Colima et al.'s positions. Colima et al.'s mere interest in the data claimed is in any event insufficient.<sup>24</sup> After all, Article 843a Rv does not give a license to claim unrestricted surrender of records in order, based thereon, to review whether there may be any liability for the alleged damage. To such extent the claim on the basis of Article 843a Rv has the nature of a fishing expedition.

---

<sup>23</sup> See note 22.

<sup>24</sup> A.I.M. van Mierlo and F.M. Bart, *Parlementaire geschiedenis burgerlijk procesrecht in burgerlijke zaken*, in het bijzonder de wijze van procederen in eerste aanleg, Deventer Kluwer 2002, pp. 553 and 554.





- 4.1.9 PwC Canada is aware of several decisions in summary judgment proceedings in which the obligation of the auditor to provide exhibits was discussed. The mere fact that in a few of those decisions claims on the basis of Article 843a Rv against the auditor were allowed does not mean that those decisions bear relevance to the present situation. First of all, those decisions were rendered in summary judgment proceedings, which by their nature result in preliminary decisions, and in which there is no room for an extensive written debate. Secondly, these show that the situations in which the interest in the relief sought was assumed are not similar to the present case.
- 4.1.10 For example, Colima et al. cannot rely on the decision of the Amsterdam District Court dated December 16, 2010 (JOR 2011/105; 'Jumbodiset') to construe the existence of a legitimate interest.<sup>25</sup> After all, that was the - different - situation where, in takeover negotiations, the plaintiff relied on the financial statements for which the auditor had issued an unqualified opinion. This is not the case here. Colima et al. have not even stated that they relied on the audit opinions issued by PwC Canada in respect of the 2006 and 2007 financial statements. In that respect Colima et al.'s reference to the ruling of the Supreme Court in the Vie d'Or matter is not relevant either.
- 4.1.11 Colima et al.'s reliance on the decision of the Amsterdam District Court dated March 27, 2012 (JOR 2012/5) also fails.<sup>26</sup> From that decision nothing more can be inferred than that a liquidator may have an interest in inspection of the auditor's files, "*since one of the duties of the liquidators* (either as representatives of the joint creditors or otherwise) is to investigate whether the auditor may have failed in its supervision and, if so, to hold the auditor liable for the damage suffered."<sup>27</sup> This situation does not present itself here. Colima et al. do not have any such statutory duty from which it can derive a - legitimate - interest.
- 4.1.12 The requirement of 'specified records' has not been met either. Colima et al. claim production of PwC Canada's full audit files, including the internal documents, merely

---

<sup>25</sup> Paragraph 6.2 of the summons.

<sup>26</sup> Paragraph 6.8 of the summons.

<sup>27</sup> Amsterdam District Court May 11, 2012, JOR 2012/5.



stating a limitation in time. This way, the documents are too general and too little specific to qualify as specified records. This is all the more cogent, since the Dutch Decree on the Supervision of Audit Firms (hereinafter the "Bta") referred to by Colima et al. in this respect in an attempt to specify the records claimed<sup>28</sup> does not apply to PwC Canada. After all, as a Canadian auditors' firm that is not active in the Netherlands, PwC Canada does not come under the supervision provided for by the Bta and the Dutch Act on the Supervision of Audit Firms (hereinafter the "Wta").

- 4.1.13 As the records claimed (including the internal documents) are not further specified, the court would facilitate a fishing expedition if it ordered that access be given to the full audit files on the 2006 and 2007 financial statements of the Fairfield Funds, for which expedition Article 843a Rv is expressly not intended.
- 4.1.14 PwC Canada refers to the parliamentary history<sup>29</sup> and HR November 18, 2011, RvdW 2011/1422 (ISG/STC Interfinans). In the matter, which was tried by the Supreme Court, in sum, copies were claimed of all the documents, including reports, minutes, etc., in connection with a broken-down takeover. The Supreme Court held that a request in which the net was thrown so widely did not satisfy the conditions of Article 843a Rv. According to the Supreme Court, a request based on Article 843a Rv requires that it relates to '*specified and identified documents*'. The request in the matter tried by the Supreme Court was so broad and so little specific that it was much rather an indication of a fishing expedition, so that it was contrary to Article 843a Rv, according to the Supreme Court. The present claim has the same defect, which precludes awarding.
- 4.1.15 This is not altered by the fact that there are some decisions in summary judgment proceedings in which the term "the auditor's or audit file" was considered "sufficiently specified", if only because the circumstances of those decisions were not similar to the present situation. PwC Canada refers to paragraphs 4.1.10 and 4.1.11 of this motion. The latter also holds true for the internal documents claimed by Colima et al. as part of the

---

<sup>28</sup> Paragraph 6.16 of the summons.

<sup>29</sup> Explanatory Memorandum to bill 26 855, in: A.I.M. van Mierlo and F.M. Bart, *Parlementaire geschiedenis herziening van het burgerlijk procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg* (2002), p. 554.



audit files. Colima et al. do not have a legitimate interest in surrender of those internal documents, if only because it is not in a position that is comparable with the liquidator. Their reliance on the decision of the Amsterdam District Court dated March 27, 2012 (JOR 2012/5) fails for the reasons set forth above.

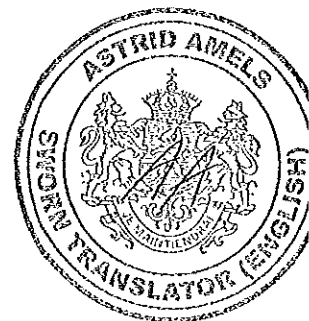
4.1.16 Alternatively, in respect of the internal documents claimed, PwC Canada points out the following. Apart from the fact that Colima et al. fail to specify which documents are concerned, which means that these should be regarded as insufficiently specified, Colima et al. are not entitled to inspect or receive a copy of confidential documents intended for internal purposes only. This includes company or competition-sensitive information (about PwC Canada and its working method), as well as documents drawn up within the scope of the determination of the company's legal position, documents that contain personal views or that are only meant for internal meetings and consultation and that pertain to the exchange of information between PwC Canada and its lawyers. Such documents do not need to be provided, because their nature opposes inspection or making copies based on Article 843a Rv.<sup>30</sup> PwC Canada has an evident interest (serious grounds) in excluding these documents from any allowance of the Article 843a Rv claim. In all other respects, these documents do not contribute to Colima et al.'s intention either, i.e.: assessing whether PwC has or has not properly performed its audit engagement.

4.1.17 As a further alternative, awarding Colima et al.'s claim for PwC Canada to provide 'a description of the document and an explanation as to why that document cannot contribute to the decision to be made by the Plaintiffs on whether or not it has properly performed its duties' in respect of the internal documents,<sup>31</sup> would not only fail to recognize the requirements of Article 843a Rv, but would also entail an unnecessary burden for PwC Canada, entirely disproportional to Colima et al.'s interest. To such extent PwC Canada's interest in "not unnecessarily being harassed"<sup>32</sup> should outweigh

<sup>30</sup> For example: The Hague District Court April 4, 2012, LJN BW2979; Amsterdam District Court September 14, 2012, LJN BY0185; Amsterdam District Court October 2, 2012, LJN BY0187; Amsterdam District Court November 8, 2012, LJN BY2758; Arnhem Court of Appeal August 7, 2012, LJN BX4091.

<sup>31</sup> Paragraph 6.8 of the summons.

<sup>32</sup> Cf.: Rutgers and Flachs on the parliamentary history to Article 843a (former) Rv, in: *Parlementaire geschiedenis nieuw bewijsrecht*, Deventer Kluwer 1988, p. 416.



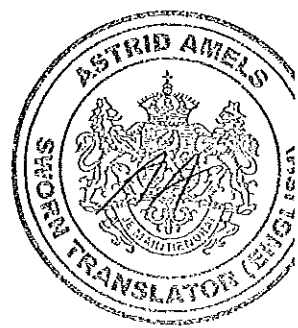
Colima et al.'s interest in surrender of internal documents that cannot contribute to its assessment.

- 4.1.18 Incidentally, PwC Canada notes that Colima et al.'s Article 843a Rv claim, as set forth in the relief sought, is limited to the "complete audit files, including the internal documents". It may be established that the relief sought (and, thus, the claim on the basis of Article 843a Rv) does not relate to the custodian agreement between Citco and the Fairfield Funds, the sub-custody agreement(s) between Citco and BMIS, the SAS 70 opinion allegedly issued by Ernst & Young on November 30, 2005, or "the documentation or any report" of a meeting allegedly held between Citco and PwC.<sup>33</sup> This is not altered by Colima et al.'s assumption that these documents "[are] included in PwC's audit files".
- 4.1.19 Therefore, PwC Canada notes as follows, supererogatorily only, if and to the extent that the court should hold that these documents are included in the claim on the basis of Article 843a Rv.
- 4.1.20 All statements made by PwC Canada above in respect of the lack of a legitimate interest on the part of Colima et al. or the lack of - sufficient - specification, are true for these documents as well. Furthermore, in particular the following provisions hold true.
- 4.1.21 PwC Canada knows, from public information<sup>34</sup> that Deminor, founder of the Foundation, voluntarily *withdrew* its claim against Citco for the surrender of documents about the relationship between Citco and the Fairfield Funds, during the hearing thereof in 2010. The fact that it has, thus, given up the possibility to obtain the said custodian agreements and sub-custody agreement(s) from the appropriate legal entity, Citco, should be at its own expense (and, thus, Colima et al.'s), and does not give Colima et al. any interest in claiming surrender of the said documents by PwC Canada in the present proceedings.

---

<sup>33</sup> Paragraphs 6.9, 6.10 and 6.11 of the summons.

<sup>34</sup> 'Citco weert Madoff beleggers af', in: <http://www.ftm.nl/copypaste/citco-weert-madoff-beleggers-af.aspx>; 'Chris Smeets verslaat boze Madoff beleggers', in: <http://www.quotenet.nl/Nieuws/Chris-Smeets-verslaat-boze-Madoff-beleggers-26897>



- 4.1.22 As far as the SAS 70 opinion and "the documentation or any report" of a meeting, if any, between Citco and PwC are concerned: this, too, is precluded by the fact that Colima et al. conveniently - yet incorrectly - treat PwC Canada and PwC Netherlands alike, without indicating the defendant (PwC Netherlands or PwC Canada) from which they claim surrender of these documents. For the existence of such SAS 70 opinion Colima et al. refer to the defense of the auditor of PwC Netherlands in the disciplinary procedure before the Accountancy Chamber.<sup>35</sup> PwC Canada notes that the acts of the auditor(s) of PwC Canada were not the subject of this disciplinary procedure and that it was not involved in that procedure. The existence of "the documentation or any report" of a meeting between Citco and PwC appears entirely out of thin air. Colima et al. fail to explain when or where such meeting allegedly took place, and which of the defendants (PwC Netherlands or PwC Canada) were allegedly present at the meeting.
- 4.1.23 Finally, PwC Canada disputes the statement that there has been an unlawful act; it will work out this defense in further detail in its defense on the merits (also paragraphs 4.1.3 to 4.1.5 above). The mere statement that there might be an unlawful act, but that this needs to be looked into in more detail based on the claimed documents, is insufficient to assume the legal relationship required by Article 843a Rv.<sup>36</sup> To such extent the claim on the basis of Article 843a Rv does not meet the requirement of a legal relationship to which Colima et al. are a party either, even apart from the fact that the Foundation itself is not a party to the stated legal relationship that would result in the alleged unlawful act and that the Foundation never stated to be a party.
- 4.1.24 Based on the foregoing the claim on the basis of Article 843a Rv is to be rejected because (in sum):
- (i) one or more of the cumulative requirements for Article 843a Rv have not been met (no "legitimate interest", no "specified records", no "legal relationship"), or at least

---

<sup>35</sup> Paragraph 5.20 of the summons.

<sup>36</sup> Amsterdam District Court November 8, 2012, LJN BY2758.



- (ii) serious grounds oppose inspection or making copies, at least
- (iii) proper administration of justice is secured even if the claimed data are not provided.

4.1.25 If and to the extent that the court should allow Colima et al.'s Article 843a claim, either fully or partially, PwC Canada requests that the court allow it to file the documents in question with the registry of the Amsterdam District Court and to impose a prohibition on Colima et al., jointly and severally, pursuant to Article 29(1) preamble and (b) Rv from disclosing information to third parties about the contents of the documents in respect of which the claim for provision was allowed in these proceedings. The audit files contain documents and information with respect to which PwC Canada is subject to a contractual as well as a statutory duty of secrecy. Therefore, Colima et al. must also be subject to such duty of secrecy. Moreover, the claimed documents contain confidential information, not only in respect of the Fairfield Funds, but also with regard to PwC Canada and its working method. In view of the many proceedings that are pending and the notoriety of the 'Madoff issue', it is in the interest of PwC Canada that this information does not become public knowledge and remains with the parties in question. PwC Canada also refers to paragraphs 4.1.16 and 4.1.17 of this motion.

4.1.26 If and to the extent that the court should allow the Article 843a claim of Colima et al., either fully or partially, PwC Canada requests that the court declare that the judgment in this procedural issue is subject to interim appeal on the basis of Article 337 Rv. In view of its challenge of the legal or other grounds for allowance of this claim, which PwC Canada considers to be a matter of principle, it must be assumed that PwC Canada will also address the Article 843a Rv matter on appeal. Cf. Utrecht District Court November 21, 2012, LJN BY3661; NJF 2013/29. For the sake of judicial efficiency, there is a reason to allow interim appeal. Cf. Arnhem District Court December 12, 2012, LJN BY7919.

4.1.27 In the event of allowance, either fully or partially, of the Article 843a Rv claim, PwC Canada also requests that the court does not declare that decision to be provisionally



enforceable, in view of the fundamental character of this decision and the circumstance that, in case of a different decision on appeal, the enforcement of the court's decision cannot be undone anymore. Cf. Groningen District Court February 28, 2012, NJ 2012/429). In addition, a declaration that a judgment either fully or partially in favor of the plaintiffs in this procedural issue is provisionally enforceable would render any interim appeal pointless (Utrecht District Court November 15, 2007, JOR 2007/265), whereas there is no urgent interest in enforcement of a judgment either fully or partially in favor of the plaintiffs (Amsterdam District Court October 11, 2012, LJN BY3785). Within this scope, PwC Canada again points out that the matter of providing evidence is not under discussion as yet (also refer to paragraphs 4.1.6 and 4.1.7 of this motion).

4.1.28 Furthermore, PwC Canada requests, if the court allows the Article 843a Rv claim, either fully or partially, that a term of more than seven working days following service of the judgment be set, i.e. at least two months, for compliance with the judgment in the procedural issue, and that no penalty be attached to this, at any rate to moderate such penalty and at least to impose a maximum, and, finally, to determine that the penalty to be imposed is subject to mitigation by the court, to the extent that enforcement thereof would be unacceptable according to standards of reasonableness and fairness, also taking into consideration the degree to which the order has been complied with, the seriousness of the violation and the degree to which blame can be attributed.

4.1.29 With respect to the term for compliance with the order applies, firstly, that the costs of any provision will be payable by Colima et al. pursuant to Article 843a (1) Rv. In that case, it will only be reasonable for the court to determine that Colima et al., prior to any provision, compensate PwC Canada for these costs by means of an advance, at any rate, to the satisfaction of PwC Canada, provide sufficient security for such costs. Any full or partial order for a surrender can only take effect after such has been arranged. Secondly, a term of seven days is unreasonably short in view of the work required to collect and duplicate the claimed documents, also in view of the extent thereof. A term of at least two months is therefore reasonable.



4.1.30 As far as the claimed penalty is concerned: first and foremost, the court is not obligated to allow a penalty and is not bound by any sums and/or periods of time stated by the plaintiff in its claim. The claimed penalty is unnecessary and disproportional, especially since Colima et al. state that they need the claimed documents to assess *whether* PwC Canada failed to fulfill its auditing duties.

4.2 Alternatively: stay of the hearing of the procedural issue on the basis of Article 843a Rv until the final statements in the main action have been filed

4.2.1 To the extent that the court should not reject the claim on the basis of Article 843a Rv for the reasons submitted in Chapter 4.1 of this motion, it would be obvious, for the same reasons, to stay the hearing of the present procedural issue until the final statements in the main action have been filed. Cf. The Hague District Court November 28, 2012, LJN: BY5231. PwC hereby submits an - alternative - request to that effect to the court.

#### V. TENDER OF EVIDENCE

5.1 Without voluntarily assuming the burden of proof, and only if and to the extent necessary, PwC Canada offers to prove its arguments by all legal means, including by calling witnesses and/or experts.

#### **THEREFORE:**

the Amsterdam District Court is respectfully requested:

#### **I. In respect of the jurisdiction of the Amsterdam District Court:**

Primarily: in the procedural issue on the basis of Article 11 Rv:

in its judgment in the procedural issue on the basis of Article 11 Rv, provisionally enforceable to the extent possible, to declare that it lacks jurisdiction to hear the claims of the plaintiffs in the main action / respondents in this procedural issue against the plaintiff in this procedural issue /





defendant 3 in the main action (including the claim of the plaintiffs in the procedural issue on the basis of Article 843a Rv), and to render a decision on that matter;

Alternatively: in the procedural issue on the basis of Article 12 Rv:

to stay the hearing of the proceedings in the main action, including the hearing of the procedural issue raised by the respondents in this procedural issue / the plaintiffs in the main action on the basis of Article 843a Rv, and to refer such proceedings to the calendar until the District Court of the Southern District of New York in the United States has rendered a final decision in the Anwar Class Action, or otherwise has decided the claims brought against the plaintiff in this procedural issue in the Anwar Class Action;

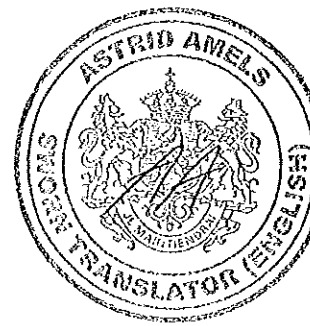
Primarily and - to the extent possible - alternatively:

1. ordering the plaintiffs in the main action / respondents in the procedural issue - provisionally enforceable - jointly and severally, such that payment by one will discharge the other, to pay the costs of the procedural issue;
2. if and to the extent that the court should reject the procedural issue, to declare that the judgment in the procedural issue is subject to interim appeal on the basis of Article 337 (2) Rv;

## **II. Conditionally in respect of the procedural issue on the basis of Article 843a Rv**

if and to the extent that the court should reject the motion contesting jurisdiction on the basis of Article 11 Rv:

Primarily: in its judgment in the procedural issue on the basis of Article 843a Rv, provisionally enforceable to the extent possible, to deny the plaintiffs in this procedural issue their interim application on the basis of Article 843a Rv, ordering the plaintiffs in this procedural issue - provisionally enforceable - jointly and severally, such that payment by one will discharge the other, to pay the costs of this procedural issue;



Alternatively: to stay the hearing of this procedural issue until final statements have been filed in the main action and in that context to refer the hearing of this procedural issue to the postponed cases calendar;

As a further alternative: if and to the extent that the court should award the claim, fully or partially, on the basis of Article 843a Rv in its judgment in this procedural issue:

1. to allow that defendant 3 in this procedural issue file the documents for inspection with the registry of the Amsterdam District Court;
2. to impose a prohibition on the plaintiffs in the procedural issue, jointly and severally, pursuant to Article 29(1) preamble and (b) Rv from disclosing information to third parties about the contents, at any rate to impose a duty of secrecy on the plaintiffs in the procedural issue, jointly and severally, in that respect;
3. to declare that the judgment in this procedural issue is subject to interim appeal on the basis of Article 337 (2) Rv;
4. not to declare that the judgment in this procedural issue is provisionally enforceable;
5. in its judgment in this procedural issue to order that the plaintiffs in this procedural issue are to pay the costs of provision (to be stated by defendant 3 to the plaintiffs in this procedural issue), or such amount as the court may deem just, by way of advance payment prior to the provision to defendant 3 in this procedural issue;
6. to set the term for compliance by defendant 3 in the procedural issue with the judgment in favor of the plaintiffs in this procedural issue at two months at a minimum after payment by the plaintiffs in the procedural issue to defendant 3 in this procedural issue of the advance referred to in the previous paragraph, at any rate at two months at a minimum - at any rate a term that the court deems just - after service of the judgment to be delivered in this matter;



7. not to attach a penalty to allowance of the claim pursuant to Article 843a Rv, at any rate to mitigate the claimed penalty to a sum of EUR 500, at any rate a sum that the court deems just, for every day, or part of a day, that defendant 3 in this procedural issue remains in default, fully or partially, and to impose a maximum on this penalty of EUR 5,000, at any rate a maximum that the court deems just, and to determine that the penalty to be imposed is subject to mitigation by the court, to the extent that enforcement thereof would be unacceptable according to standards of reasonableness and fairness, also taking into consideration the degree to which the order has been complied with, the seriousness of the violation and the degree to which blame can be attributed.

Counsel

This case is handled by Stek, E.M. Soerjatin, LL.M. and M.C. Leijten, LL.M.  
PO Box 10180, NL-1001 ED Amsterdam  
T 020 530 52 37 F 020 530 52 99  
M 06 1008 5791 E ellen.soerjatin@steklaw.com



**EXHIBITS TO THE MOTION OF PWC CANADA  
PRIMARILY MOTION FOR THE COURT TO DECLINE JURISDICTION ON THE  
BASIS OF ARTICLE 11 OF THE DUTCH CODE OF CIVIL PROCEDURE [RV], AND  
ALTERNATIVELY EXCEPTION OF LIS PENDENS ON THE BASIS OF ARTICLE 12  
RV, AND ALSO CONDITIONAL STATEMENT OF DEFENSE IN THE PROCEDURAL  
ISSUE ON THE BASIS OF ARTICLE 843A RV**

- 1.a Article by Deborah Lindberg and Deborah Seifert entitled '*A comparison of U.S. Auditing Standards with International Standards on Auditing*', published in *The CPA Journal* in April 2011
  
- 1.b A study by AICPA entitled '*Substantive differences between the International Standards on Auditing and Generally Accepted Auditing Standards*' dated August 2012
  
2. Affidavit of Timothy A. Duffy with the following exhibits:
  - A. *Second Consolidated Amended Complaint* dated September 29, 2009
  - B. *Motion for Class certification* dated January 11, 2012
  - C. *Memorandum in support of Class certification* dated January 11, 2012
  - D. *Declaration regarding Dutch, Curaçao and other foreign law aspects* by Professor Hans Smit [without enclosures]
  - E. *Defendants' Memorandum of law in opposition to Plaintiffs' motion for class certification* dated January 13, 2012
  - F. *Settlement Agreement / Memorandum in support of preliminary approval of Partial Settlement and of preliminary certification of Settlement Class* dated November 6, 2012 / *Order preliminary approving settlement and providing for notice of proposed settlement* dated November 30, 2012
  
3. Letter from Robert J. Osborne, General Counsel PwC Canada, to the lawyer of Colima et al. dated June 19, 2012
  
- 4.a/b/c Models of the subscription agreements relating to the Fairfield Funds



I, Astrid Amels, authorized by the District Court of 's-Hertogenbosch to act as a sworn translator for the English language (listed in the Register of Sworn Interpreters and Translators under number: 515), hereby declare that, to the best of my knowledge and belief, the foregoing is a true and complete translation of the attached Dutch document.

A. Amels

Eindhoven, February 12, 2013