UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-cv-118 (VM)	Master File No. 09-cv-118 (VM) (FM)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
CONCERNING REQUESTED CHANGES IN FINAL JUDGMENT

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The Representative Plaintiffs respectfully submit this Supplemental Memorandum to address changes in the Final Judgment that are being requested by the Non-Settling Defendants, and by Plaintiffs in light of developments since the Court granted preliminary approval of the Settlement on November 30, 2012.[1] Submitted herewith as Exhibit 1 is the form of the proposed Final Judgment and Order of Dismissal with Prejudice ("Final Judgment") that Plaintiffs, based on the matters discussed in this Memorandum, respectfully request the Court to enter.[2]

ARGUMENT

The Non-Settling Defendants raise objections only to certain terms of paragraphs 17 and 21 of the Preliminary Approval Order, which are now included in identical form as paragraphs 28 and 29 of the proposed Final Judgment.[3] Neither objection has merit, nor justifies changing the relevant provisions of the Final Judgment.

As an initial matter, the Non-Settling Defendants claim that the provisions at issue are "inequitable" (Citco Mem. at 2), but in fact the inequity would occur if the provisions at issue were to be changed. The Non-Settling Defendants raised these same objections to paragraphs 17 and 21 of the Preliminary Approval Order at the November 30, 2012 Preliminary Approval hearing. *See* Nov. 30, 2012 Transcript ("Tr.") at 20-23, 28-30. Those paragraphs had been incorporated into the Preliminary Approval Order just prior to the hearing at the request of many of the financial institutions that are record holders of the Funds. The principal concern was that

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[1] Capitalized terms not defined herein shall have the meanings defined in the Stipulation of Settlement (Nov. 6, 2012) Dkt. No. 996.

[2] A separate Final Judgment and Order Awarding Fees and Expenses is appended as Exhibit 2.

[3] *See* PWC Defendants' Limited Objections to Plaintiffs' Motion for Final Settlement Approval (Feb. 15, 2013) Dkt. No. 1044 ("PwC Mem."), which Defendant GlobeOp joins as to the confidentiality objections, *id.* at 10-12; and The Citco Defendants' Joinder in the Limited Objections of the PwC Defendants (Feb. 15, 2013) Dkt. No. 1046 ("Citco Mem."). PwC, Citco, and GlobeOp are referred to collectively as the "Non-Settling Defendants."

many Fund shareholders are defendants in "clawback" actions brought by the BLMIS Trustee or the BVI Liquidator of the Fairfield Sentry Funds. Understandably, the shareholders did not want to prejudice their ability to defend those actions by participating (or not) in the Settlement, and counsel for Plaintiffs and the Settling Defendants believed it was unfair to require them to do so. *See* Tr. at 23-28.

The Court considered and denied Non-Settling Defendants' objections on November 30 and, more importantly, ordered that Notice be given – in Court-approved form – to over one thousand Class Members beginning on December 17, 2012. *See* Tr. at 31; Preliminary Approval Order (Dkt. No. 1008), ¶ 8(b). As ordered by the Court, that Notice specifically referenced the substance of paragraphs 17 and 21. *See* Affidavit of Daniel Polizzi (Jan. 31, 2013), Ex. A at 12.

If the Non-Settling Defendants had wanted to contest the Court's denial of their objections, it was incumbent upon them to do so promptly, before the Notice was distributed, and certainly within the 14-day period prescribed by Local Rule 6.3. There was sufficient time – over two weeks – to seek rehearing on full briefing, and if that was unsuccessful, filing a mandamus petition. Indeed, if the Non-Settling Defendants believed that the issues were sufficiently important, they could have sought to stay distribution of the Notice until a final decision was made. But the Non-Settling Defendants did none of this. They were content to let the Class Notices go out. As a result, Class Members relied upon the terms of the Notice in deciding whether to file Exclusion Notices (which were due on the same day as Non-Settling Defendants' Objections were filed), and Proofs of Claim (of which some 176 already have been filed).

Under these circumstances, the Non-Settling Defendants' objections to the paragraphs at issue are now untimely. *See, e.g., Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999)

(waiver is the "intentional relinquishment of a known right," and forfeiture is "the failure to make the timely assertion of a right"); *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003) (laches applies where a party has inexcusably slept on its rights and the unreasonable delay will cause prejudice). In addition, as shown below, the Non-Settling Defendants' objections should be denied on the merits.

I. SUBMISSION TO JURISDICTION (PARAGRAPH 17/28)

Citing virtually no law, the Non-Settling Defendants argue that Class Members should not be allowed to "have their cake and eat it too," allegedly by participating in the Settlement "without submitting to the jurisdiction of this Court for all matters arising from or related to this case." *See* PwC Mem. at 1, 8.

PwC asserts that "[t]here can be no question that under well-established law that Settlement Class Members not already subject to the general jurisdiction of this Court who act in this proceeding will become subject to the specific jurisdiction of this Court for all matters arising from this case." PwC Mem. at 6. On the contrary, the filing of a proof of claim would not necessarily subject the claimants to New York long-arm jurisdiction. *See, e.g.*, *Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 764 (2d Cir. 1983) ("Beacon's defensive declaratory judgment action is not one that the courts of New York have regularly linked to section 302(a)(1) jurisdiction."); *Kimco Exchange Place Corp. v. Thomas Benz, Inc.*, 34 A.D.3d 433, 434, 824 N.Y.S.2d 353, 354 (2d Dep't 2006) ("The defendants' acts of faxing the executed contracts to New York and of making a few telephone calls do not qualify as purposeful acts constituting the transacting of business."). The point of paragraph 17 is simply to maintain the status quo, and thereby encourage injured investors to file claims.

Of course, settlements in complex class actions are highly favored. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy") (internal quotation marks and citation omitted). In this case, paragraph 17 was included, as counsel for the Settling Defendants told the Court, because

> We are gravely concerned that many, many, many beneficial owners who are entitled to recover under this settlement will in fact decide not to participate in the settlement but will opt out for that reason alone because of these clawback concerns and other concerns regarding jurisdiction in the United States.

Tr. at 28. In sufficient numbers, this could "potentially torpedo[ ] this entire settlement." *Id.* Thus, the provision was important to both sides to make the Settlement work.

Furthermore, as the Non-Settling Defendants' papers demonstrate, the real reason for their objection is that they are trying to gain an advantage over certain class members who have sued them separately in the Netherlands. *See* PwC Mem. at 9; Citco Mem. at 2. The Non-Settling Defendants have argued to the Dutch court "that the claims against them should be dismissed or stayed because the [Dutch] plaintiffs . . . are putative class members in [*Anwar*]." *Id.* But that argument is not affected one way or the other by paragraph 28. By its terms, the argument does not depend on the extent of this Court's jurisdiction over Class Members. The Non-Settling Defendants are free to argue to the Dutch court – for whatever value it has – that Class Members are receiving compensation for part of their losses from the Settlement. The Non-Settling Defendants can argue now that a class has been certified against them which includes investors in the Netherlands. Nothing in the Dutch Court's decision (*id.* at 2) suggests that the court's refusal to dismiss or stay the Dutch action turned on whether this Court has

jurisdiction over Class Members; rather, the issue was whether the Dutch plaintiffs had been fully compensated for their losses in this Action.

In any event, if the Non-Settling Defendants violated both U.S. and New York law, as well as Dutch law, there is nothing inherently unfair about Plaintiffs seeking to recover a portion of their losses in each legal system. Nor is there any basis to change the heavily negotiated, judicially sanctioned and widely relied upon Settlement terms, merely to afford a vaguely-described possible benefit to non-parties to the Settlement in separate litigation overseas. In short, there was good reason to include paragraph 17 in the Preliminary Approval Order and to carry it over as paragraph 28 of the Final Judgment, and the Non-Settling Defendants suffer no cognizable harm as a result.[4]

II. CONFIDENTIALITY OF CLAIMS AND OPT-OUTS (PARAGRAPH 21/29)

The Non-Settling Defendants argue that paragraph 21 of the Preliminary Approval Order should not be carried forward as paragraph 29 of the Final Judgment to the extent that it prevents them from having access to "exclusion and claim information provided by the members of the proposed Settlement Class . . . so that . . . Defendants can know who is, and who is not, bound by the Court's orders and judgments." *See* PwC Mem. at 1-2. The Non-Settling Defendants ignore, however, that paragraph 29 contains not only customary provisions providing that claims

[4] Moreover, if the Non-Settling Defendants believed that in granting preliminary approval, the Court should have required Class Members to opt in or out of the entire case for all purposes as to all Defendants, (which presumably would have supported their position in the Dutch courts), rather than just opt-out of the partial Settlement, they had the right to raise that argument in opposition to the Preliminary Approval Motion. But again, they failed to do so. It is perfectly proper for the Court to allow separate opt-out rights for a partial Settlement while the remainder of the case proceeds. *See, e.g., In re Enron Corp. Litig.*, 2008 U.S. Dist LEXIS 24656 at *65 n. 21 (S.D.Tex. Sept. 8, 2008) (class member opted out of certain partial settlements, but remained in class with respect to other partial settlements).

data is confidential, but also an express exception which *allows* access to that information upon "a further order of this Court upon a showing of necessity."

Particularly in light of the reliance that Class Members and Opt-outs have placed on this provision as it was contained in the Notice and Preliminary Approval Order, Plaintiffs believe that it strikes the right balance between the need for confidentially and Defendants' asserted interests.[5] The "necessity" exception in Paragraph 29 allows the Non-Settling Defendants to gain access to the information upon an appropriate showing. It may well be that such a showing could be made at an appropriate stage in the litigation if, for example, the Non-Settling Defendants need to know which, if any, of the parties who are suing them in the Netherlands have filed Proofs of Claims, or need, for purposes of reducing their damages liability, to confirm the amount that a shareholder receives from the Settlement. Those issues can easily be addressed as they arise by the Magistrate Judge.

III. CERTIFICATION OF THE SETTLEMENT CLASS

The proposed Final Judgment also references (in paragraph 6) the Court's March 6, 2013 Order (Dkt. No. 1068) clarifying that the February 25, 2013 Decision and Order granting class certification in part and denying it in part (Dkt. No. 1052), leaves undisturbed the definition of the Settlement Class contained in the Preliminary Approval Order. Accordingly, Settlement Class Members in the 25 countries that the Court excluded from the definition of the litigation class in the February 25, 2013 Order can make claims in the Settlement and be paid on the same basis as all other Settlement Class Members. As stated by Plaintiffs in their letter to the Court of March 4, 2013 (Dkt. No. 1067), where, as here, the FG Defendants have settled to buy peace

[5] Because of this reliance by Class Members on the specific terms of the Preliminary Approval Order and Class Notice, Plaintiffs do not believe it is appropriate to grant the Non-Settling Defendants access to this material under the current Confidentiality Order (*see* PwC Mem. at 2).

from further litigation, have consented to a worldwide class, and Settlement Class Members from the Excluded Countries are required to execute individual releases as part of the claims process, a worldwide class is properly certified for settlement purposes.

CONCLUSION

For the reasons stated herein, the Non-Settling Defendants' objections to the Final Judgment should be rejected and paragraphs 28 and 29 included therein as proposed by Plaintiffs. Paragraph 6 of the proposed Final Judgment should be modified as set forth therein.

March 8, 2013

Respectfully submitted,

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