UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PASHA S. ANWAR and JULIA ANWAR, on behalf of themselves and all other similarly situated investors in the Greenwich Sentry, L.P. private investment limited partnership,

Plaintiffs,

v. 09-CV-118 (VM)

FAIRFIELD GREENWICH GROUP, FAIRFIELD GREENWICH LIMITED, a Cayman Islands company, FAIRFIELD GREENWICH (BERMUDA) LTD., FAIRFIELD GREENWICH ADVISORS LLC, WALTER M. NOEL, JR., ANDRES PIEDRAHITA, JEFFREY TUCKER, BRIAN FRANCOUER, and AMIT VIJAYVERGIYA,

Defendants.

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New York, N.Y.
March 22, 2013
11:15 a.m.

Before:

HON. VICTOR MARRERO,

District Judge

APPEARANCES

LOVELL STEWART HALEBIAN JACOBSON LLP
Attorneys for Plaintiffs Anwar
BY: VICTOR E. STEWART, ESQ.

WOLF POPPER LLP
Attorneys for Plaintiffs Pacific West, et al.
BY: ROBERT C. FINKEL, ESQ.

BOIES, SCHILLER & FLEXNER LLP
Attorneys for Plaintiffs Anwar, et al.
BY: DAVID A. BARRETT, ESQ.
STUART H. SINGER

SIMPSON THACHER & BARTLETT LLP
Attorneys for Defendants Fairfield Greenwich
BY: MARK G. CUNHA, ESQ.
JEFFREY ROETHER, ESQ.

KIRKLAND & ELLIS LLP
Attorneys for Defendant PriceWaterhouseCoopers Canada
BY: AMY E. CRAWFORD
LUKE C. RUSE, ESQ.

HUGHES HUBBARD & REED LLP
Attorneys for Defendant PriceWaterhouseCoopers Netherlands
BY: WILLIAM R. MAGUIRE, ESQ.

KOBRE & KIM LLP
Attorneys for Defendant Globe Financial Services
BY: JONATHAN D. COGAN

PAUL WEISS RIFKIND WHARTON & GARRISON
Attorneys for Citco defendants
BY: ANDREW GORDON
PATRICK SOMERS

RIVERO MESTRE
Attorneys for Defendant Gallery
BY: JORGE A. MESTRE

(Case called)

THE COURT: Good morning, this is a proceeding in a matter of Anwar v. Fairfield Greenwich and others, docket number 09 Civ. 0118. The Court scheduled this proceeding as a public hearing on the final approval of the proposed settlement between the plaintiffs and the Fairfield Greenwich defendants. So we will begin by hearing the presentation by the plaintiffs, the reasons why they believe the settlement should be approved as fair and reasonable under the Second Circuit's standards in the Grinnell case.

Before we do that, let me just indicate that the Court issued two related decisions and orders this week in this case. One denying the application by the SIPA trustee for an injunction staying this action and, second, a request from the Morning Mist plaintiffs objecting to the settlement and requesting some information from the plaintiffs. The Court issued a ruling on that matter this morning denying the Morning Mist plaintiffs' request.

Can we proceed then directly into the presentation of the proposed settlement.

Mr. Barrett, are you speaking for plaintiffs?

MR. BARRETT: I am, your Honor. Thank you very much. We are very pleased to be here. With me at the counsel table are some of the lawyers who have worked as colead counsel for the plaintiffs. Stuart Singer from Boies Schiller, Robert

Finkel from Wolf Popper, and Victor Stewart from the Lovell Stewart Halebian firm. I think we have got many, many other people in the back, as I think some of the other parties do.

I know that the Court, is to say the least, is very familiar with this case, as your opinion earlier this week, once again, demonstrated to us. And I am going to try to be relatively brief. If there is anything more that the Court needs to know, I'm happy to provide it. On the other hand, if I'm going into too much detail, I know you will let me know that as well.

First, let me just give a general outline of the proposed settlement with the Fairfield Greenwich defendants. The basic terms are that the defendants have agreed to pay a total of $80,250,000 in settlement of the case. In addition to that amount, there is consideration which we believe further benefits the settlement class in the form of waivers by the defendants of indemnification claims or rights which they otherwise may have against the various funds that they manage. The constitute of documents of those funds, as is typical, gave the managers the right to indemnification in, among other things, that would arguably apply in a situation like this.

THE COURT: Again, for the record, clarify who the settling defendants here are. They are directors, managers and individuals as opposed to the entities.

MR. BARRETT: Technically, your Honor, the settling

defendants are two entities. I will try to get the names right. Fairfield Greenwich Limited and Fairfield Greenwich Bermuda Limited. Those are technically the settling defendants. However, the consideration for the settlement, while I think technically it was funneled through those defendants, which have continued to operate as corporate entities, although they essentially have no assets except what is contributed to them, the consideration for the settlement is being provided entirely by the individual named defendants.

And with respect to that, every defendant who is named and every individual defendant who is named in our complaint is contributing some amount of money, the vast majority of the money is coming from the three founders: Walter Noel, Jeffrey Tucker, and Andres Piedrahita, I believe. Consequently, those individuals are receiving releases. There are a number of other corporate entities that were part of the Fairfield Greenwich complex that are receiving releases, and there are, as the release provides, a number of affiliated persons who are also receiving releases.

But the goal here really, your Honor, was that defendants wished, and we believed it was appropriate that anyone who was essentially connected with the Fairfield operation should be released as part of the settlement.

As I mentioned, the consideration, the monetary consideration is coming entirely from the individuals. The

waivers of indemnity are also effectively given by the individuals there. They are the people who have -- they are the entities which have the indemnification claim. In some cases, it's the entities that have the indemnification claims. Those claims include, needless to say, a waiver of any claim relating to the $80 million that's being paid, as well as a waiver of $20 million worth of claims that they have or would have for legal fees and other expenses associated not only with this litigation, but other proceedings in which they have been involved.

And while there may be some defenses that the funds would have to those claims, on the other hand, they are certainly litigable claims on the part of the defendants, and the effect is that those claims will be taken out of the liquidation proceedings of the funds and, ultimately, to the extent that class members are entitled to distributions from the liquidation of the various funds, they will benefit by the fact that those claims are not made, are not available against the funds.

As I believe I explained to your Honor when we were here at preliminary approval hearing, our class consists, or I should say the settlement class consists of beneficial owners of the various Fairfield Greenwich funds who have suffered a net loss of principal. And we do not yet know, at least with respect to Fairfield Century, the largest of the funds by a

very large margin, what basis assets in that fund will be distributed to former shareholders. That fund is undergoing liquidation in the British Virgin Islands. In fact, plaintiffs' counsel were responsible for initiating the original proceeding which put Fairfield Century fund into liquidation in the British Virgin Islands, again something that we think benefited the class.

But under BVI law I think it's uncertain whether the distributions and there will be distributions in some amount, we really don't know yet how much, whether the distributions from that fund will be made on a net loss basis, as they would be in a U.S. bankruptcy under these circumstances, or whether they will be made on some other basis such as the shareholdings of individual shareholders at the time that the funds shut down, which was contemporaneously with Madoff's collapse.

And if it is the latter, then there is not going to be perfect congruence between the net losers in our case and the shareholders in the liquidation case, but we believe there will be very substantial overlap, a very large number. By definition, anyone in our class is a net loser and was a shareholder as of December 2008, so they will get something. It's just a question of the basis on which it will be distributed in the liquidation.

In any event, a long way of saying that we think that our participation in the liquidation, our obtaining as part of

the settlement waivers of indemnity are actually benefits to the class, even though the liquidation is itself a separate proceeding.

I think those are the principal economic terms of the settlement. There are some other terms. One of them was a contingent term that only went into effect if the defendants chose to terminate the settlement because there were too many people had opted out. That issue has been taken care of. The defendants did not terminate the settlement. So that provision is no longer relevant.

There is an additional provision which under certain circumstances could pay the class up to $5 million if it does not get the $30 million escrow fund, which I will get to in a minute.

The settlement, as the Court knows, provides for the payment of $50,250,000 into a settlement fund which is available for distribution immediately to shareholders, subject to the payment of fees and expenses that we will ask your Honor to approve, and subject to an allowance of $500,000 for administration and notice of expenses.

I'm happy to report that the entire $50,250,000 has been funded by the defendants. Insofar as it's not been used for notice and administration costs, we have that money in escrow. I should point out that approximately half of that money is in the form of what is called a guarantee by a

reputable Swiss bank. We have had that reviewed by Swiss counsel and are assured by them that this document, which they call a guarantee, is the functional equivalent of, I think, what you and I would call a letter of credit, so that payment of that amount, whenever it becomes necessary to have that cash, is guaranteed by a bank which, again, checking with Swiss counsel, is solvent and will make good on that guarantee.

So we had the money available to distribute as soon or in the event that the settlement is approved by your Honor, and if there are appeals that the settlement judgment becomes final.

With respect to the remaining $30 million, that money will go into what we call an escrow fund. And that fund, as your Honor noted in your opinion with respect to the trustee's injunction motion earlier this week, that fund is available to -- the fund is effectively available, will be reduced in amount if the defendants pay certain claims. The most significant of those claims is the claim that has been made against the defendant by the Madoff trustee. And if those claims are resolved favorably and there are no open claims of the type that are covered by the escrow provision, in 2016 or by 2016, that $30 million will become available for distribution to the settlement class as well.

And with respect to that $30 million, half of it, again, has been provided in the form of the same type of bank

guarantee that I described earlier to your Honor. The remaining $15 million, as was agreed in the stipulation of settlement that your Honor preliminarily approved, can be paid by the defendants either in cash or in the form of a security interest in property. And we are presently finalizing the details of those security interests. We expect that that will be done very shortly. And we are happy to report to your Honor on the status of that. It is less urgent in the sense that the money is not needed now or indeed any time soon, since it would not be available to the plaintiffs for distribution until 2016. So we believe that's part of the reason that we believe that the security interests were an appropriate way to bring those funds or those assets into the settlement. And as I say, it's all put together or certainly will be put together very shortly.

THE COURT: Is there a deadline that defines very shortly?

MR. BARRETT: Your Honor, unfortunately, it was, I believe, supposed to be finished several days ago. Due to the complexities which I think neither side anticipated, of drafting of the appropriate security interests and getting them into place, we have not finalized that process. I would certainly hope it means within a week or two. I'll commit that it means within two weeks.

THE COURT: Would it be more prudent for this Court to

wait until that is sealed before giving final approval to the settlement if it makes sense otherwise?

MR. BARRETT: Your Honor, I certainly wouldn't have a problem with that. On the other hand, I don't think it is necessary because we know that the assets are there in the form of real property, among some other assets, and in the final --

THE COURT: You have heard the expression, Mr. Barrett, here today, gone tomorrow?

MR. BARRETT: I'm sorry.

THE COURT: Have you heard the expression, here today, gone tomorrow?

MR. BARRETT: Your Honor, in fairness to the defendants, as you may recall, when this case first started, Mr. Finkel came in and sought a preliminary attachment against these same defendants, which your Honor denied. And as far as we are aware, there has been no inappropriate disposition or dissolution of assets since that time over four years ago, and we have no reason to think that that is going to occur. I certainly understand your Honor's concern. What I was going to say is that the final paragraph of the proposed final judgment provides that the Court retains jurisdiction, essentially, to, among other things, enforce the provisions of the judgment and specifically the stipulation of settlement. So the defendants would effectively be under and are now by virtue of the preliminary approval order under court order to provide this

security. On the other hand, if the Court is more comfortable, we certainly wouldn't argue that you shouldn't do that.

Let me say a little bit about the reasons for the settlement. To address the Grinnell factors which your Honor referred to earlier, first of all, there is the complexity, expense, and likely duration of the litigation. I don't have to explain at length to the Court the complexity of this litigation. Your Honor has written, I think, probably well over 300 pages of opinions which attests to the complexity of the issues, as well as the challenges that plaintiffs' counsel have faced in pursuing the litigation.

The expenses, as the Court has seen, on our side are close I think now to $30 million in legal fees, and I'm sure that the defendants have together spent significantly more than that.

In terms of the likely duration of the case, the present procedural status is that fact discovery is now scheduled by Judge Maas' order to end on June 30 of this year. That will be followed by a period of expert discovery. I think realistically, knowing the defendants and the kinds of issues that are in the case, we can expect there probably will be substantial summary judgment motions. And so best case I would think we would be looking at a trial in mid to late 2014 with appeals, I would guess, being likely, whatever the outcome of the trial is. We would be talking about maybe judgments being

final some time in 2015 or thereafter.

In terms of this settlement getting money to the class members today, we think the timing of getting the money now, being able promptly to distribute it to the class members and, of course, avoiding all of the risks and the very complex legal issues and factual issues that are presented by the case, are a very, very meaningful benefit.

Let me jump, because it's related to the stage of the proceeding and the information reviewed and analyzed, while fact discovery is continuing through the end of June, at the time we negotiated this settlement, and certainly even to a greater extent now, there has been a tremendous amount of discovery, and I think we have a very good knowledge of the facts in the case. They are somewhere close to 10 million pages of documents that have been produced and analyzed by plaintiffs' counsel. Not all of those were from the Fairfield defendants, but certainly a large number were. There have been dozens of depositions.

In addition, as part of the settlement process, as I believe your Honor knows, we were able to conduct work product due diligence interviews of a number of the Fairfield Greenwich defendants. And at the end of the day I think we have a massive amount of information about the merits of the case, and in terms of that factor it clearly favors settlement.

The risks of establishing liability and damages,

again, I think your Honor's opinions identify many legal issues on which we face risks. And as with any case of this time, particularly a case with allegations of things like fraud and breach of fiduciary duty, there are factual issues.

Another factor, the risk of maintaining the action as a class action through trial, your Honor has just recently ruled on the class certification motion. And as you are well aware, that motion is hotly contested and, indeed, the remaining defendants, the non-Fairfield defendants, have filed Rule 23(f) petitions seeking review of the class certification decision in the Second Circuit. We will be opposing those in the next couple of weeks. But clearly there is a risk with respect to whether class certification will be sustained. And your Honor already narrowed the class somewhat by excluding certain countries from the certification order.

The amount of the settlement, and I think this is a critical factor, the amount of the settlement, unfortunately, is relatively modest compared to the magnitude of the losses that have been suffered by the class members. We recognize that, we understand that. The losses, undoubtedly, are in excess of a billion dollars, maybe several billion dollars, and 80 million or 50 million is not a large drop in that bucket.

However, we have also satisfied ourselves that it is an amount that by sort of reasonable measure exhausts the ability of these defendants to pay and perhaps, more

importantly, it is an amount that we believe is at least as large and may very well be significantly larger than the amount which we could reasonably expect to collect if the case were to proceed to trial, we were to win at a trial, we were to preserve that verdict on appeal, and then we were to go out and try to collect the judgment.

As your Honor knows, we have received a financial disclosure and conducted due diligence with respect to that from the defendants, particularly from the three founders who were largely funding the settlement. And this is, first of all, substantial portion of their net worth that they as individuals are putting into the settlement. Secondly, a very large part of that amount, which is being contributed to the settlement, is ultimately going to come from a trust that Mr. Piedrahita set up a number of years ago, well before there was any issue with respect to Madoff or anything else. And there are, it was explained to us, some good independent reasons for doing that. It is an offshore trust. He is a discretionary beneficiary of the trust. And we have looked hard at the trust and I believe the Madoff trustee has looked hard at the trust. And we believe the most likely outcome if one tried to collect a judgment against that trust is it would not be possible.

And, in addition, Mr. Piedrahita is a resident of Spain and that is also entirely legitimate. He has lived

overseas for at least the past decade, if not longer. And so particularly with respect to him, collection we believe would be problematic at best. But as a result of the settlement, the trustees of the trust for his benefit have agreed that they will contribute a very substantial portion of the settlement, presumably because it enhances Mr. Piedrahita's life. But I think the critical point here is that it is highly unlikely that money would be available in the event of a trial and a judgment that would highly be unavailable to collect that is being made available in order to effectuate this settlement.

THE COURT: Let me ask Mr. Barrett, on this point, as you undoubtedly know, the trustee in bankruptcy has been more than active and assertive and aggressive in ferreting out funds from wherever they exist anywhere in the world for that distribution to the investors. In those efforts have there been any settlements or any collections that you're aware of that may provide analogues to the settlement that you describe here or the difficulties of obtaining anything further, ringing blood out of the stone? Those are your arguments, in essence.

MR. BARRETT: Standing here today, your Honor, I'm not aware of anything comparable. Perhaps Mr. Cunha, who has kept up with some of these things a little more than we have, would have a sense. I think I'm limited in what I can say about our communications with the trustees. I do think they are probably covered by settlement privilege. But I think I can say that

the trustee has had access to the same financial information that we have had access to. And, as you know, the trustee is very adamant about his position, but I don't think he's really -- other than saying, oh, yeah, it's fraudulent conveyance, we can trace it to the ends of the earth, nothing has been indicated to me to suggest that they think there is a serious ability to pursue that money or to obtain it, let me just say.

But, you know, he certainly has his litigation, hasn't gone very far so far, and I think the defendants feel that they may very well be able to defeat it. We hope that they do because then the class gets the $30 million, or is much more likely to get the $30 million. But that's the trustees' issue. If we do learn of efforts like that, we will certainly let you know. As I say, I'm not aware of anything where the trustee has actually litigated this sort of thing, in other words, tried to execute a judgment as opposed to simply basically getting settlements from people.

I should also say, with respect to the amount of settlement, your Honor, and I think this is significant, Fairfield Greenwich did have E&O insurance, but it was not in a very large amount. It was 10 or $20 million. And that insurance was exhausted by legal fees very early on in the post-Madoff litigation, not just our case, but, again, several other significant litigations and investigations that the

defendants faced. So there is no insurance coverage here. Again, this is, I think, somewhat unusual settlement in this type of action in that the money is coming entirely from individuals.

In addition, the sort of numbers that we see on the financial statements makes sense when you look at the overall picture of how much money came into Fairfield Greenwich and, in particular, we have information as to the distributions that were made to these defendants. And you look at the amounts that would be paid in taxes, the living expenses. There is no doubt that they all lived very comfortably, to say the least, the living expenses that you might expect from that kind of a lifestyle, and from the assets that are available still, from the fact that they or their family members had somewhere around $70 million that was invested in these Madoff-related funds themselves, and that money for them is completely lost.

They are not making any claims for that in any of the proceedings. And the legal fees which, again, have been, since the insurance was exhausted, coming entirely out of the individuals' pockets. And I know Mr. Cunha and his firm are very efficient, but I still suspect that those fees are rather substantial for individuals to pay and indeed many of the individual defendants also have their own separate counsel who are from major firms, like Debevoise and White & Case and Kasowitz Benson. There are substantial amounts going out the

door in legal fees. And if the case were to continue, as I suggested, for another two or three years or more, more and more of the money that the defendants have available to fund the settlement or to pay a judgment will be eaten up in legal fees and in living expenses.

I think that bearing all of those factors in mind, we believe that the amount of the settlement, while it is frustratingly low in terms of the magnitude of the losses, is entirely within the range of reason, which is the standard that your Honor, I believe, will apply under all of these circumstances.

In addition, as we have said before, we believe that another significant advantage of the class -- I am not quite sure where it fits under the Grinnell framework -- another significant advantage for the class of this settlement is the fact that it will enable us, going forward, to focus the case on the remaining institutional defendants. And, in particular, Pricewaterhouse Coopers defendants, the Citco defendants -- Citco is the largest administrator of hedge funds in the world -- and another third defendant called GlobeOp, which was involved for a shorter period of time, but was also the administrator of the domestic Fairfield funds.

And we believe that discovery has shown as to those defendants we have very strong factual case gratifyingly. The evidence, I would characterize is significantly stronger than

the allegations in the complaint, which your Honor has upheld. And clearly these institutional defendants have a far greater capacity to pay a judgment or a settlement than the individual Fairfield defendants. And by settlement, by enabling us to really focus our energy and our resources on those defendants, we believe is a significant benefit.

Mr. Cunha and his team have been formidable opponents. I have noticed even in the discussions that we have had among counsel since Mr. Cunha stopped participating at the end of last year, it's easier. It's a lot simpler when you are dealing with basically two groups of counsel rather than three, and particularly with Simpson Thacher not being involved. It makes life easier. I don't know if these two things are related or not, but as your Honor saw within the last few weeks, Citco made a change in its counsel from the firm in Miami that was originally and has been defending it for the last four years, and instead brought in the wall Paul Weiss firm, who are here today. And to me that suggests that they are, at the very least, they are taking this case very, very seriously, as they should. And I would much rather be litigating against Paul Weiss alone than Paul Weiss and Simpson Thacher, to be blunt about it.

Finally, the Grinnell factor, the last Grinnell factor is the settlement class' reaction to the settlement. And in that regard, your Honor, I first want to report, and you've got

in front of you two affidavits from Rust Consulting, which is the settlement administration firm that we have retained, I want to report that the process of notice has proceeded as the Court directed in the preliminary approval order. The advertisements concerning the settlement were published as directed on a worldwide basis. The notices have gone out to the settlement class members or potential class members.

Rust itself -- these are the most recent statistics that are probably a little different than the last affidavit that your Honor has -- Rust itself has sent out over 2,200 notice packets. Many of the notices went to financial or other institutions which were record owners but not beneficial owners. The preliminary approval order directed that those institutions, in turn, notify their beneficial owners. We know that that has been happening. We have received inquiries from those record owners. A number of them have said, whether the Court ordered it or not, we understand that it's our obligation as an institution to pass this sort of thing on to our customers, and we are doing that. So we believe that the notices have gone out on a very extensive basis.

In addition, as the order provided, Rust set up a website, Fairfield Greenwich website, which has all of the relevant documents as well as the claim forms available on it. That website to date has had over 4,400 hits. And they also had a call-in number which has received about 200 calls. In

addition, I know all of the plaintiff firms have received inquiries from people who are interested in the settlement with one kind of question or another, which we have certainly endeavored to respond to as best we can.

The period for submitting proofs of claim, your Honor, lasts until April 17. So it's another three weeks or so. Despite the fact that the period has not yet ended and, indeed, the settlement administrator, as I think is in the second affidavit, indicates, says you would expect that a large majority of claims come in during the last week or two of the process. Notwithstanding that, to date over 400 claims have been filed. None of these, I should say, claims have been audited in the sense that the settlement administrator going through making sure everything is backed up with documentation. If it's not, going back to the claimant and asking if they can back it up. Ultimately, they may not be able to accept them if proper documentation is not available. But just using these gross unaudited numbers, there have been over 400 claims, and the total net loss of those claims, again, on an unaudited basis, is in excess of $400 million. So there have been very substantial number of claims and substantial dollar amount of claims.

In contrast to that, your Honor, in addressing the reaction of the class to the settlement, there have been four objections that were filed to the settlement by class members.

Three of them, I believe, were in the form of letters. I think one of those objectors may address your Honor later. But I think it's fair to characterize those as very general objections which basically say, we lost a lot of money, you didn't get enough money. In the case of two of them, the lawyers are getting paid or asking for too much money. But literally no specifics as to why or how we could have done better or addressing all of the reasons that I detailed to your Honor and that are set forth in the papers that we believe make the settlement appropriate.

The fourth objection by a class member is by a company called Morning Mist. I will talk about that objection a little more later. But that objection, as your Honor found this morning, does not criticize the amount of the settlement, and that party did not opt out. So I think that counts as a vote in favor that they have the problem with the release of the derivative claims.

In addition, two of the remaining or all of the remaining defendants raised objections. Again, they were very clear, those are limited objections. They relate to particular terms of the final judgment and I'll address those in a moment.

In addition, opt-outs are certainly considered a relevant factor in assessing the reaction of the class to the settlement. In this case, a total of ten opt-outs were received. However, as we set forth in our papers, three of

those opt-outs failed to conform to the requirements that were set forth in your Honor's order. We provided copies of all of those and an explanation of why.

And, in addition, Mr. Finkel wrote letters to all three of those purported opt-outs explaining that their request to opt out were being rejected by the parties. And we received no response whatsoever in reply to Mr. Finkel's warning letters, if you will. So in the view of the settling parties, those opt-outs are invalid and the proposed order that we have presented to your Honor does not list those three nonconforming opt-outs in the listing of parties who have opted out.

Then there were four other significant opt-outs that were timely and met all of the requirements. And with respect to those I'm pleased to report that as of Wednesday, which was the deadline for doing so, those four opt-outs have been withdrawn and those parties will be participating as class members in the settlement.

What we are left with and what the order that we presented to your Honor indicates is three valid opt-outs and three class members who have filed objections to the overall merits of the settlement. And we believe that given that this class is at least a thousand members, maybe well over that, that we have already had over 400 class members who have filed claims indicating that presumably they accept the settlement, have a favorable response to it, we think that this, in terms

of the Grinnell factors, is really overwhelming vote by the class in favor of approving the settlement.

Your Honor, I think in the course of what I've said I've really addressed the fairness of the settlement from the point of view of the plaintiffs' counsel and the representative of plaintiffs. I might just say a word about the plan of allocation, which is part of the stipulation of settlement. I don't think there is anything unusual or controversial about that. Essentially, it says that you look at the net losses of everybody who submits a valid proof of claim, you add up all the net losses, and the distribution to each person will be based on what percentage their net loss constitute of the universe of net losses. It's very simple percentage allocation formula.

Let me come back to the two objections that I mentioned earlier, which are to particular provisions of the settlement or of the final judgment. The first is the objection by the Morning Mist plaintiffs, which as I understand it, is an objection to the fact that the releases contained in the settlement release not only the claims of the class that are alleged in the complaint, but, in addition, release claims by any class member who brings a claim against these defendants in a representative or derivative capacity. And I think that is very important.

What it is releasing is claims that are brought based

on the essentially the same underlying misconduct brought by individuals who are otherwise participating in the settlement and getting paid under the settlement against the defendants who are trying to get out from under as much litigation as possible. And as I think we demonstrated to your Honor in our briefing a few weeks ago on this issue, settlements of this type are entirely permissible under the law. Indeed, they are approved regularly by the courts.

And, in addition, in this case the claims themselves that the derivative plaintiffs purport to bring, that is, claims in the name and in the right and interest of the funds, those claims themselves actually exist and they are the subject of complaints. In the case of all of the funds, actually, as part of the settlements that those funds reached with Mr. Picard, the Madoff trustee, they assigned those claims. The funds assigned those claims to Picard. In return they are actually entitled to some percentage of Picard's recovery, if it ever got that high. But those claims exist. In other words, you have here, your Honor, a derivative -- what's being released is an individual's right to bring a derivative case where the corporation on which -- on whose behalf the individual is bringing that derivative case, literally has already brought the case against its former officers and directors.

So as your Honor remarked, Mr. Picard has been fairly

aggressive in his pursuit of claims. He certainly has, it appears, unlimited funds to pursue them, if he chooses to. And so I think in this case, whatever is being given up by that release -- frankly, I don't know why action hasn't been taken by the appropriate parties simply to move to dismiss the Morning Mist claims on the grounds that there is an independent nonconflicted entity that is pursuing those claims, that nothing meaningful is being given up, but it is a claim that as part of this whole settlement package the defendants have made clear that they believe ought to be dismissed to bring them some measure of peace. We believe that that provision ought to remain in the release and should be part of the final judgment if your Honor enters it.

Secondly, the objections that are made by the nonsettling defendants also are limited in the sense that they only address two provisions of the settlement. Those two provisions are the provision that provides that a person who puts in either an opt-out notice or a proof of claim is not submitting to the jurisdiction of this Court or any court of the United States except with respect to the adjudication of that claim.

And as your Honor may recall from the first hearing, we were asked to include that by representatives of the banks and the financial institutions whose customers are the beneficial owners. And one of the principal reasons was

because those people are, many of them are defendants in clawback actions brought by either the Madoff trustee or by the liquidator of Fairfield Century. And our only goal was to, and I think it's an appropriate goal for a class action, was to compensate people for losses that they suffered. And in compensating them we didn't think it was appropriate to change their position one way or the other with respect to whatever jurisdictional arguments they might be subject to in those other cases where we know a number of them are defendants. And so that was the rationale for that provision.

In addition, as Mr. Cunha told you at the last hearing, the defendants were very supportive of that provision for a simple reason that they believed that it discouraged opt-outs. If people thought that by somehow participating in this class, in this settlement they would be subjecting themselves to jurisdiction that otherwise might not exist, they might very well choose to opt out. And if that reached a certain level, then the defendants would be faced with a very difficult choice of whether to blow up the settlement. From the perspective of both sides to the settlement, it was appropriate to have this limited jurisdictional provision.

The second provision that the nonsettling defendants attack is a provision which says that the identification and other aspects of the proofs of claim and the opt-outs will be maintained on a confidential basis. The reason for that is,

probably two equally important reasons. One is essentially the one that I just described to your Honor concerning the claw back litigation. The second, and this is something that based on our experience talking to class members is very real and very important, is that many of these people live in places where personal safety, particularly if you are relatively wealthy, is truly a concern. And they do not want to be making public the fact that they have certain large investments.

And let me address that provision first. As to that, the provision that was in the preliminary order and is in the final order provides that the information may be disclosed upon a showing of necessity. And as we said in our papers, we believe that the kinds of things that the defendants allude to in their objection, the reasons why they may need this information, such as if there is a damage claim against them in another jurisdiction or even in this court, they may need to know how much somebody has already received in terms of a payment from this settlement.

If it turns out that there are good reasons that constitute necessity under the terms of the order, that information can be made available to them. We don't think it's necessary to do it now, but that confidentiality provision has a necessity exception which we believe adequately protects these defendants.

The more general reason, though, that I think these

objections by the nonsettling defendants are not well taken is because if they were going to make them, they should made them before notice went out to the class members. The problem is that these are the same provisions that were in the preliminary approval order which they objected to, your Honor overruled the objection, and there was a period of about two or three weeks between that hearing and the time that the notice went out.

Once the notice went out and particularly once we started getting in proofs of claim, it is clear that the class members were entitled to, and I'm sure any number of them did rely on these two provisions, both the jurisdictional provision and the confidentiality provision. And for the reasons that I described to your Honor, those are important issues to some of those people. So class members would suffer real prejudice if the final order provided something different from what the preliminary order provided.

On the other hand, if the defendants had really considered this issue, these issues to be a problem, they had remedies available to them in early December of last year that they could have availed themselves of. They could have sought reconsideration from your Honor on a larger written record, they could have sought a stay of the notice that couldn't be adjudicated in time. I presume that they could have sought mandamus from the Court of Appeals. Again, it's the kind of issue, once the horse is out of the barn it's really too late

to do something about it, and so mandamus might very well have been appropriate. They didn't do anything, any of those things. They essentially sat on their hands until the time came for filing objections. And as to this particular objection, unlike, for example, the Morning Mist objection, where there is really prejudice on the other side, I think for that reason alone the objections ought to be denied. Essentially, it's a laches argument, as your Honor recognized laches in the preliminary injunction order earlier this week.

Finally, with respect to the jurisdictional provision, let me just say that I don't think the defendants have really failed to provide your Honor with any clear understandable reason why it makes any difference to them. There is some vague notion that somehow if somebody is subject to jurisdiction here, that might help them in litigation that they are defendants in in the Netherlands to make that argument. I think in our brief we showed that if you even read what the Dutch judge said, it doesn't really turn on whether the person is subject to jurisdiction or not.

In addition, really two things. All we are doing is we are leaving things as they were before. The fact that somebody is participating in this settlement, if that makes a difference, they can tell the Dutch court about that, but probably more important factor, defeating their argument is that your Honor, in the meantime, since they made the

objection, issued the class certification decision. And Netherlands and Belgium, where I believe these people are concerned about, are located, are both within the certified class.

So if there is an argument to be made that says these people are participating in a U.S. case and that that somehow helps these defendants in arguing their Dutch case, they have got a class certification order now. There is no more issue. To my mind, they have not made any showing at all as to why this provision of the settlement ought to be changed. As I said, in our view, it is helpful and important, from the plaintiffs' side and from the defendant's side in terms of encouraging participation in the settlement, which is entirely appropriate. And people have relied on it up to this point.

Your Honor, I think that is my principal presentation on the merits of the settlement. If you would like, at this point, there are a couple of changes that we requested in the final judgment, one having to do with the clarifying the definition of the settlement class. The other which I apologize, we just sent your Honor this morning, taking care of a typographical error in the proof of claim form. I would be happy to discuss those briefly, if your Honor would like. I also do need to talk about the fee request. And if you would want to hear about it from the objectors before that, I'm happy to sit down or I'm happy to continue.

THE COURT: Why don't you continue with the rest of your applications and for the record just indicate what the two amendments that you are making and the order.

MR. BARRETT: Yes, your Honor. Actually, the first one is not -- I am not sure if it is actually an amendment. It is a question that arose in the minds of some of the class members as a result of your Honor's decision on the class certification motion. In that decision, your Honor identified about 25 so-called excluded countries, countries where the Court was not able to find on the basis of the evidence before it that the courts of that country would recognize the res judicata effect of a litigated judgment in which our defendants prevailed. So you couldn't be certain that if the defendants won the case at trial, they wouldn't be subject to relitigation of the same claim in that particular country. I believe that's the principle that your Honor was applying. And on that basis you were unable to find or found that the plaintiffs hadn't adequately shown that with respect to those excluded countries, a class action was a superior method of adjudication.

The definition of the class in the settlement, which, of course, was agreed on before your Honor handed down the class certification decision, is and was intended by the parties, your Honor, to be an all encompassing to define a worldwide class. All persons who were beneficial owners as of December 10, 2008 and who suffered a net loss in principal in

the funds. That was the definition. It was intended to be brought. It was intended to cover all countries. And we believe that all of the settling parties believe that that is and continues to be for a settlement class the appropriate definition, even though with respect to the litigated class your Honor excluded a number of countries.

And in paragraph 6 of the proposed final judgment, I don't know if your Honor has it in front of you or I would be happy to hand up a copy.

THE COURT: We have it.

MR. BARRETT: And the parties requested some clarification. The Court entered a couple of orders which indicated that the class certification decision was not binding on the Fairfield Greenwich defendants, since all litigation against them had been stayed by the preliminary approval order. But in order to avoid any possible confusion among class members, we believe that it is appropriate to both describe those orders, which we do in the next to last sentence of paragraph 6, and to add a further sentence which says, accordingly, settlement class members in the excluded countries can make claims and shall be paid in accordance with the plan of allocation for the settlement. In other words, they are treated for purposes of the settlement and the settlement class the same way as all other class members from what I'll call the included countries. And we believe that the Court has the

power to enter that order and make that determination and that it is an appropriate exercise of your Honor's discretion to make that order.

There are a number of reasons. First of all, this issue of whether the class should incorporate all countries in the world or only certain countries, that issue, like a lot of other issues in this case, is a very hotly contested issue between the parties. There are lots of legal issues here. Each side has won some and each side has not been successful in some. And we believe that the issue of whether class certification can apply to a particular country, like the application of SLUSA or the application of Morrison decision or any number of other issues in this case, is a contested issue, legal and factual contested issue that as part of a comprehensive settlement the parties are entitled to resolve so that they don't have any further issues between them.

And I might also add that I certainly understand the logic of your Honor's decision. I believe that there are other district courts in this district that have resolved that superiority question in a different way. They have recognized that even though there may be countries that do not recognize the preclusive effect of a U.S. class judgment, nevertheless, the class action is still superior. That lack of recognition, I guess, is outweighed by other factors in their minds. And this is not an issue that has been, to my knowledge, decided

definitively at the appellate level. It's a litigated issue. It's a litigable issue and it's one that the parties have, as part of their settlement, agreed to resolve.

Secondly, the underlying principal or the underlying concern with respect to the excluded countries is the fact that the defendants can't be assured of preclusion if they win the case at trial. With respect to the settlement, in order for any party to participate in the settlement, they must submit a proof of claim. The proof of claim includes a release of all claims against the settling defendants. So even with respect to the so-called excluded countries, anyone who participates in the settlement gives the defendants essentially what the Court was concerned about, that is, a release or an inability to bring any further claims against them.

To the extent that there might be some small residual issue as to whether the bar provisions of the final judgment are or are not effective against people in those countries who have these claims but do not participate in the settlement, that is, in effect, an issue where the defendants are saying they will take that risk. I guess if anybody brought the case and litigated it, we would find out the answer to what the expert affidavits were addressing in the class certification motion. We might have a court decision in that country whether or not this Court's judgment is binding. But we believe, and I think the defendants believe, that is a very small number of

people. It is unlikely to occur. And, again, as part of this overall comprehensive settlement package, it is something that the parties on both sides consider beneficial.

Finally, your Honor, I think that's the third reason why it is appropriate to say that settlement class members in excluded countries can make claims and participate in the settlement. The very principle that courts favor the settlement of these kinds of complex class actions. It's an arm's length settlement. This is one of the terms. And in a number of other cases, we cited them on page 2 of our letter to your Honor on March 4, it is clear that settlement classes are regularly certified, which include class members in the excluded countries. Indeed, I don't think the issue was probably brought to your Honor's -- I take that back. There was a case that was part of the Anwar complex of consolidated cases where the defendant was EFG Capital, which was settled last summer. And in that settlement, there had been class certification briefing and it did raise this issue of the res judicata preclusion.

And the parties, nevertheless, reached a settlement before class certification was decided and that settlement covered all of the relevant countries, and your Honor did approve that settlement. Again, I am not sure that the issue was brought directly to your attention in that case, but I think it is illustrative of the fact that in the settlement

context, not in the litigation context, but in the settlement context, this kind of broad coverage of the worldwide coverage of the settlement is appropriate.

I guess I would also say that the notion here, when we brought this case, was that we should include as many people as possible to give them the opportunity to recover some of the terrible losses that they had suffered. And the basic underlying goal that we have as class counsel is to make sure that as many people who have legitimate claims as possible are compensated if we are successful. And so I think it's consistent with not only the fundamental goal of settlement, but the fundamental goal of the class action procedure that where you do not have a defendant who is making the argument that Switzerland shouldn't be included because they won't recognize a class action judgment. When you have a defendant that's not making that argument, that defendant ought to be able to turn around and say, I'm willing to have people from Switzerland participate, give me releases and get paid. That's really the basis, but I certainly wanted to point out to your Honor that last sentence which very explicitly says that settlement class members in excluded countries can make claims on the same basis as all other settlement class members.

The final item hopefully is not controversial. We added new paragraphs 30 and 31 to the final judgment to deal with, as I mentioned, a typographical error in the proof of

claim form. The reference to the release of the Fairfield defendants is contained in paragraph 24 of the stipulation of settlement. Unfortunately, the proof of claim, there was some editing at the last minute and it referred to paragraph 25, which is actually the release going the other way. It doesn't make any sense. But the provision that we are talking about, which is paragraph 3 on the proof of claim form, was very clear and nevertheless saying that you're releasing the EFG defendants and so we don't believe that any class member was acting under a misimpression.

Nevertheless, we asked the Court, as set forth in paragraphs 30 and 31, to clarify that the proper reference is to paragraph 24. We have already changed the proof of claim form on the settlement website and hopefully the claims that we get going forward will have the correct reference. But because we have some claims that have the incorrect reference, the parties have agreed that the simplest way to solve the problem is to, at the stage when payment is made under the settlement, be sure that the notice which goes out with that payment says clearly to the class member that by accepting payment of the claim the class member is agreeing to the terms of the release as they correctly release the settling defendants, the Fairfield defendants. It's a little like putting a notation on a check that says payment in full. And if you sign the check, endorse it and deposit it, you're accepting that as payment in

full. It's essentially applying the same principle. Again, we don't think that that would be any surprise to the people who were participating in the settlement. But we think it's appropriate that the record be documented in that way so it's as clear as possible.

I think the next topic, your Honor, is the request for award of attorneys fees and expenses, as well as incentive awards to the seven representative plaintiffs. As your Honor knows, plaintiffs at this point, with respect to the $50 million settlement fund only, are seeking attorneys fees of 25 percent of that settlement amount, as well as reimbursement of close to a $1,280,000 in expenses.

With respect to the expenses, to take that first, as I mentioned at the earlier hearing, first of all, all of these numbers are as of July 31, 2012, which is a couple of days before we signed the initial memorandum of understanding for the settlement. So we are only talking about work of counsel and expenses incurred up until the end of last July. Needless to say, since that time plaintiffs' counsel have continued to work very hard on this case, not the least of which has been work on the settlement, as well as to pursue the case against the other defendants, so we have incurred several million. I think it's 5 or $6 million more in lodestar fees and several hundred thousand dollars more in expenses, and we are not even addressing those here. We are looking only through July 31,

2012.

And those expenses, to the extent we could, the 1.28 million, exclude any expenses that are directly attributable to the nonsettling defendants, such as consultation with accounting and auditing experts. And I believe in the declarations that counsel submitted we provided the Court with a great deal of detail and backup for those expenses. If the Court has any questions about them, of course, we would be happy to address those.

THE COURT: Mr. Barrett, can you clarify what is the status of the fees and expenses that occurred after July of last year? Are those essentially going to be foregone by these counsel or are they going to be tacked on to future settlements?

MR. BARRETT: Your Honor, what we would anticipate is, if we are fortunate enough to prevail at trial or to achieve settlements with the other defendants that we would make a further fee application. And that application, certainly in presenting the lodestar to your Honor, I think we would probably go back to day one and say, well, this is the total lodestar, this is how much we have been paid to date, this is how much we are asking for now, in addition to that. I think that's really the only practical way to address a case like this where the resolution is inevitably going to be on a piecemeal basis. But we will certainly present the information

in as clear a way as possible so your Honor understands what we are doing. But certainly I would expect, you know, if there were a settlement next month and we were coming back, yes, we would say that, you know, this has been our lodestar to date, we are asking for this percentage for the following reasons, and this is how much we have been paid and this is how much additional we are asking to be paid. It would be the same thing with respect to expenses.

THE COURT: Bottom line understanding is that there is no provision to go back to these defendants, no fine prints anywhere in the agreement saying that you reserve the right to come back to these defendants and claim more of those fees.

MR. BARRETT: Well, I want to be clear there may be two questions there. With respect to these defendants, the settlement is effective whether or not there is a fee award and whatever the amount of the fee award is. The fee award is not something that the Fairfield Greenwich defendants are taking any position on or, in the legal sense, have any interest in. So they are not paying the fee. This fee is coming out of a common fund.

THE COURT: Technically, I understand. I'm saying, you don't have the ability under the settlement to go back to any part of the fund, the settlement fund, the 50 or the 30.

MR. BARRETT: Certainly with respect to the 50 million, this is the sole, only request that we are going to

make for payment of fees and expenses with respect to the $50,250,000. With respect to the 30 million, your Honor, I believe what is appropriate is to hold that in abeyance. We are not asking for a fee now, based on the 30 million. If you buy Mr. Picard's theory, if he gets that 30 million, if he wins against Mr. Cunha's clients and is able to use that 30 million for his benefit, in theory we are actually giving a benefit to the class. It's a tiny, tiny benefit because it gets put through Picard's allocation process and the Century funds have relatively very small allowed claims in the Madoff bankruptcy. But some small part of that 30 million would actually come back to benefit our class. Notwithstanding that, certainly at this time we are not asking for any fee based on the 30 million.

On the other hand, if some time several years ago down the road that 30 million is not used to pay other claims that are allowed for it under the settlement agreement, if that 30 million comes back and is available for distribution to the class, I would expect at that time, based on whatever the circumstances are at that time, that we may make a request for fees, based on the fact that we have brought $30 million into the class. But that is a decision or an issue that is, as I say, several years down the road, but I don't want to leave the Court with the impression that we are waiving for all time any right to make a fee request based on the recovery of the 30 million. But I think we would only do so in a situation where

the class was actually getting the direct benefit of the 30 million or some portion of it. It's also possible that some of the 30 million will be used to pay other claims, but some of it will still be available for the class. I think that answers your Honor's question.

You had asked the question at the last hearing, what about other settlements or judgments. Again, I think, really, we would have to look at that when it happened and see what the situation was. If we got a settlement, I don't think this is going to happen, next month, that might be very different analysis than if we get a judgment after trial. Looking at the fee award cases, in some ways it seems like they are all over the lot. Sometimes when you get a very large recovery, the percentage that goes to lawyers seems to go higher. Sometimes it seems to go lower. I think all of these things really depend on the particular circumstances at the time.

I think with respect to our request for 25 percent, first of all, considering the difficulty of this case, which your Honor, again, is well aware of from the opinions that you have written, considering all of the risks that the plaintiffs faced in terms of getting to the point in the litigation where we are, and I point out, for example, that there are a number of other Madoff feeder fund class actions in this district that have either been dismissed outright or pared back very substantially. We have had substantially more success than in

a number of these other potentially comparable cases. It has been over four years since these cases were filed. This is the first opportunity, the first time that counsel is requesting payment. And, to me, maybe the most important thing in terms of the so-called lodestar check is that this requested 25 percent fee that applied to the 50 plus million dollar settlement fund represents only about 46 percent, less than half of lead counsel's lodestar, which, as of July 31, 2012, was $27.3 million.

In many other cases, including one or two in which I've been before your Honor, awards generally in these kinds of cases are multiples, 1 point something, 2 point something multiples of lodestar. Here what we are asking for is less than a .5 multiple and that only takes account of lead counsel. There are other lawyers who work on the case who have a few million dollars in lodestar. And as I said, even in terms of, you know, what we are getting today or whenever the settlement becomes final, if the Court approves it, we have continued to incur millions of dollars of fees and hundreds of thousands in expenses.

So I think in any way that one might look at this, either a percentage fee, multiple lodestar, what we have been able to accomplish in the case, the fact that we have very viable claims against all of the defendants, that we have now, subject to appeal, a certified class, that we have laid out

literally close to today $2 million, but as of July 31, almost $1.3 million in expenses, entirely on a contingent fee basis. We believe that this fee and expense request is reasonable.

In addition, your Honor, we are, as the Court is aware, requesting incentive fee awards for the class plaintiffs. The requests range in amount from 25,000 to 50,000 per plaintiff for the seven plaintiffs. I believe the total of all of the incentive award requests is $225,000. We submit that these requests are, again, reasonable in light of the effort and the contribution that the representative plaintiffs have made to the litigation of this case.

According to the affidavits that have been filed with your Honor, every one of the representative plaintiffs has spent 100 to over 200 hours of personal time involved in this litigation working with counsel, monitoring the litigation. All of the representative plaintiffs were deposed by the defendants. In some cases, for example, securities and investment company Bahrain, four employees actually came to New York for depositions, including the CEO. I don't know that it's relevant, but one of them actually passed out during his deposition because he was dehydrated by his long flight and sitting there for the deposition.

THE COURT: As long as it was not by the questioning.

MR. BARRETT: I don't think it was in this case, your Honor.

One of our plaintiffs, Martin Bach, who is an individual whose family trust lost almost $1.4 million, spent about 200 hours on litigation. He is 89 years old. He was deposed for two days, albeit at -- he lives in Arizona. The defendants did come out to Arizona to do that. But he actually continues to be a licensed New York CPA. I don't think he practices, but he's a licensed CPA who estimates that if he were working his time would be worth $2 or 300 an hour. He is asking for $25,000. We are requesting that for him.

Those are a couple of examples. But this case, again, has been very, very heavily litigated on the defendants' side. The class certification discovery was extensive, as your Honor saw from the record. And these representative plaintiffs did everything that was asked of them. In addition, of course, they produced significant amounts of documents, at least in the case of the corporate plaintiffs. One of them, St. Stephen's, Mr. Stewart's client is a school. These are not people who are looking to make money from this. This is really, I think, a fair cooperation for significant time and effort that they have put into this litigation.

THE COURT: Thank you. Before the court reporter passes out, let's take a break, ten minutes.

(Recess)

(Continued on next page)

THE COURT: Thank you, be seated.

Mr. Cunha, did you wish -- or any of the other defendants -- to address the settlement issue?

MR. CUNHA: Your Honor, yes.

Mark Cunha, here on behalf of the settling defendants, and many of the entities and individuals affiliated with Fairfield Greenwich, and with authority for all of the Fairfield Greenwich defendants whose interests are affected by the settlement today.

My remarks are very brief, your Honor.

We support the settlement. All Fairfield Greenwich defendants support the settlement. I would like to thank, in public, my colleague, Jeff Roether, who did superb work on the case and who was instrumental in the getting us to the point where we got today, along with my colleagues Jeff Baldwin and Nick Davis who are back in the office.

I think the cogency and comprehensiveness of Mr. Barrett's presentation speak to the superb representation the plaintiff class has had here today. Not only Mr. Barrett, but his colleagues, Robert Finkel, Jim Harrod, Victor Stewart, Natalie Makiel, Howard Vikery have been formidable opponents.

This has been a very much arms-length, very tough negotiations between the plaintiffs and the defendants here that lasted over many months. And I think that the detail and stipulation of settlement shows the detail and thoroughness of

those negotiations.

I would like to just address the Court's question about the security. The settlement has been fully funded by the defendants. There is only one piece left. It's a piece of the 30 million-dollar back end of the settlement. It would not be scheduled, in any event, to be paid out in the earliest until 2016.

The settling defendants have sent over the instruments for the security interests which are provided for in the stipulation of settlement. So the plaintiff's counsel do have those instruments in hand. It has identified the security. It's just a little bit of lawyering and wordsmithing to get to the final form, your Honor. And I can represent to the Court that those instruments will get done. They will get done promptly. We'll not drag our feet. And I'll represent to the Court that those properties will not be alienated, they will be there, and those interests will be --

We would, on that basis, your Honor, suggest to the Court that there is no basis to delay final approval of the settlement. We think it's in everyone's interest that the Court enter the final judgment promptly. The deadline for filing claims is April 17th. We believe that entry of the order would facilitate and stimulate the claim that's out there, to make claims rather than delay and wait to see what the Court is going to do. So we would support entry of the

final judgment promptly.

And, finally, we do support entry of that final judgment in the form submitted by Mr. Barrett to the Court today.

With that, your Honor, we're happy to answer any questions that the Court may have, but that's our presentation.

THE COURT: Concerning the lawyering and wordsmith work that remains, Mr. Cunha, how long do you think would be your best guess that it would take?

MR. CUNHA: We have turned around documents very, very quickly in this case. We had hoped to have it done by today. I think that Mr. Barrett was perhaps busy for a day or so preparing his very extensive remarks for today. It is in their court, so I can speak for them. But, if history is a guide, I think they'll turn those documents around within a day or so, a business day or two or so. We will address them promptly. And I don't think it will take as much as a week, but I guess we would ask for a week.

THE COURT: Thank you.

Any other defendants wish to address the court?

MS. CRAWFORD: Yes, your Honor. Amy Crawford, Kirkland & Ellis, LLP, on behalf of PriceWaterhouseCoopers, LLP, PWC Canada.

THE COURT: Proceed.

MS. CRAWFORD: Good afternoon, your Honor.

The PWC defendants objected to two specific paragraphs of the preliminary approval order, as Mr. Barrett alluded to, one dealing with jurisdiction, and the other dealing with confidentiality.

On the jurisdictional issue, the problem with what is paragraph 28 of the final judgment, is that it purports TO provide the Court with jurisdiction over the claimants to this specific settlement, while indicating that they are not subject to the Court's jurisdiction for purposes of the rest of the case.

It allows the class members to go back to their jurisdictions and say that they're not subject to this Court's jurisdiction. And class members can't have that kind of cafeteria-style jurisdiction.

It's not just a hypothetical issue, as Mr. Barrett suggested. If, for example, the plaintiffs in the Netherlands case against the PWC defendants participate in this settlement, but they opt out from the litigation class, they can go back to the Netherlands court and assert that there never was jurisdiction over them here, with respect to the nonsettling defendants. And it's not true, they purposefully availed themselves of the benefits and privileges of this forum. And the settlement judgement should not reflect otherwise.

There is a couple of paragraphs from the final judgment that --

THE COURT: Let me address a question.

MS. CRAWFORD: Go ahead.

THE COURT: To extent that that is an issue as to which the PWC defendants are concerned, is it one that the parties might be able to address in whatever negotiations, discussions, and ultimate dispositions come out of the resolution of the plaintiff's claims against PWC?

MS. CRAWFORD: Well, that's hypothetical, that's down the road, your Honor. You know, we're --

THE COURT: You are also suggesting that the claims that you are concerned about, is also hypothetical. The concern that you have also expressed with regards to the plaintiffs going back to some of these countries and raising claims are also hypothetical.

MS. CRAWFORD: Well, it's not hypothetical, your Honor, because they actually are suing the PWC defendants in the Netherlands. So you know they are maintaining that there is jurisdiction over the defendants there.

We have filed a motion arguing that we're not subject to jurisdiction there but, you know, we should be entitled to insist that there is jurisdiction over them here in this court, because they have taken advantage of this forum in either opting out or in filing claims in this lawsuit.

So the final judgment contains language that is appropriate with respect to the Court's jurisdiction. But,

then, pairs it back with respect to paragraph 28. So paragraph 2 says: This court has jurisdiction over the subject matter of the action and over all parties to the action, including all settlement class members, subject to paragraph 28 herein.

It's not clear what that means. On the one hand, the paragraph appropriately reflects the Court's jurisdiction over the class members, now that they have been given notice and an opportunity to opt out. But, then, sneaks in a reference to paragraph 28. So it's saying the Court has jurisdiction over this entire action over all of the parties, but subject to paragraph 28, not so.

Paragraph 31 talks about Court's exclusive jurisdiction over all of the parties to this action. It says: Without affecting the finality of this final judgment in any way, exclusive jurisdiction is hereby retained over the settling parties, the Fairfield, the FG defendants, and settlement class members, subject to paragraph 28, for all matters relating to this action.

So the Court's got exclusive jurisdiction over the class members, except that subject to paragraph 28 the class members can come back later and argue that this Court has no jurisdiction over them at all. And that's prejudicial to the nonsettling defendants. The Court either has jurisdiction over the class members or not. The Court can't have jurisdiction

over the class members for one half of one action. The Court has jurisdiction over them in the entire action.

Now, with respect to the confidentiality issue -- and this is in paragraph 29 of the final judgment -- the nonsettling defendants don't take issue with protecting the confidentiality of the class members' identity or other private to financial information, except to the extent it restricts the nonsettling defendants ability to obtain discovery of who these claimants are, and the amount of their claims, and so forth.

So it's fine for this information to be confidential as to the world, but not confidential as to the nonsettling defendants who are being sued by these people. That information would be protected under the confidentiality order. So there is no issue with respect to the privacy of this information, as Mr. Barrett indicated.

And he also mentioned that the class members have issues with respect to revealing this information because of clawback actions. And, again, that is not a concern that applies to the provision of this information pursuant to the confidentiality order, to the nonsettling defendants.

And again he indicated, well, this is somewhat hypothetical, because the final judgment gives the nonsettling defendants the right to come back later, maybe before Judge Maas and move for an order to obtain this information, if there is a showing of necessity.

Well, there are damages claims, in fact, against the nonsettling defendants, obviously. And the standard for providing this information, like all information that's relevant to the action is just that, relevancy.

So the notion that we should have to come back later and move for an order to obtain this discovery, when it is already discoverable, as a matter of the discovery rules, is improper.

THE COURT: But if it was discoverable, why was it not sought during the discovery period. Or why hasn't it been.

MS. CRAWFORD: The plaintiffs -- no, this information is being sought in discovery, it's my understanding.

THE COURT: All right. So if it's being sought in discovery, then maybe you're objection here may be premature.

MS. CRAWFORD: Well, it may be that we have sought certain financial information, but I think the real issue is with respect to beneficial owners, for example. We have sought information, and are working to obtain it from record owners. But, you know, behind the record owners are beneficial owners who have information that they may provide as part of the claims process. So, I think that's partly the issue here.

THE COURT: But what you are suggesting is a kind of a back door way of obtaining this information if it's being worked on before Judge Maas, for example, in some other procedures.

MS. CRAWFORD: No, it's the opposite, your Honor.

It is that this settlement agreement purports to impose a higher bar to getting this information necessity, when it's also simply not necessary, it's totally superfluous to this settlement agreement. I don't believe that there is any provision of confidentiality in the class notice. The class members are not relying on any assertion that this information would be protected with respect to the nonsettling defendants.

So, again, not an issue to protect this information from the rest of the world, but the part of the final judgment that indicates that this discovery should only be provided subject to a separate showing is improper, and it should just be taken out.

And then, finally, Mr. Barrett indicated that somehow the PWC defendants' objections are untimely. And in fact, the PWC defendants asserted an objection at the November 30th preliminary approval hearing. The Court, of course, overruled the objection. But the preliminary approval order provided the timing for objecting. So of course any objections were due 35 days before this hearing. So that order said anyone that doesn't object on by that deadline shall be deemed to have waived that objection. Of course, we objected before notice went out, we objected after notice went out, in a timely manner on February 15.

The PWC defendants followed the prescribed timeline

for objecting, and the settling parties can't now play gotcha by asserting that objections that were made back in November and then reasserted in February prior to the Court-imposed deadline are somehow untimely.

THE COURT: Thank you.

MR. GORDON: Good afternoon, Andrew Gordon from Paul Weiss.

I thought I should, at the very least, get up and introduce myself since, as Mr. Barrett noted, we're new to the proceedings. Our counsel, for reasons having nothing to do with the merits, have asked us to take over the representation of this case. And I hope we can fill the big shoes left by Simpson Thacher, and keep Mr. Barrett's life interesting in light of what he said before.

I just wanted to get up here. We join the objections the PWC had. But I wanted to address something you had said in your questions. This is a very real problem for my clients. Since approximately 700 members of this class have sued my client in the Netherlands. And so we're being, in effect, whipsawed. And, unfortunately, the settlement, the final judgment, allows that whipsawing to be a little bit easier in those two respects.

First, your Honor, going back to Phillips Petroleum and other cases, it has always been the law that if you are an absent member of the class, you get notice, and you don't opt

out. The Court has jurisdiction. That is just plain vanilla law. And what this final judgment is attempting to do is to allow a class member here to pick and choose when he or she, or it, is subject to jurisdiction of this Court.

The problem is, they then argue in the Netherlands, against us, that this class action means nothing, they are not a member of the class, they are not a party, they're not subject to jurisdiction, and they are apparently going to come here and collect money. And so that is a very real problem for us, number 1.

Number 2, with regard to the list --

THE COURT: Let me ask you, is this litigation in the Netherlands limited to the 700 folks that you are talking about who are also parties here, or is this 700 a portion of a much larger class.

MR. GORDON: No. As I understand the Netherlands action, a foundation -- and this was in our papers -- called the Stichtin Fairfield Compensation Foundation, as well as some other investors who purport to represent about 690 investors, have brought claims against us. And that case is proceeding. And we move to dismiss. And that motion was based on the presence of this action, and their being potential class members in this action was denied.

So that case is going forward. And our answer is due in a couple of weeks there. But I don't think, at least with

regard to those 690 investors, or anybody who brings a claim elsewhere, should be able to argue that they're going to come into this Court, accept the benefits of this Court's jurisdiction, i.e. the money, and not be subject to the Court's jurisdiction for other purposes.

THE COURT: But you heard Mr. Barrett's presentation, some of these class members, collectively, may have lost literally billions of dollars. And, here, they may be getting 50 million, so what is unreasonable about some of those folks saying, well, I got $5 from New York, now let's see where I'm going to get the other 999 billion, or million, I don't know.

MR. GORDON: There is nothing unreasonable about it. We all make choices. But when we make choices, they come with certain consequences, your Honor. And for these people, they can come --

THE COURT: You're saying the choice for them is take $5 in New York, and give up the other thousand or 2,000 or whatever.

MR. GORDON: No, your Honor. I'm saying they take $5 here, they subject themselves to the jurisdiction here. They shouldn't be permitted to then argue they are not subject to the jurisdiction over there. That seems patently unfair to my client who also should have a right to defend itself. I appreciate these people lost a lot of money, but it's obviously our view we didn't cause that loss.

THE COURT: What is the effect of your argument, then, in the Netherlands as to the plaintiffs who choose to take their $5 here, that they effectively should not claim the balance of their money anywhere else?

MR. GORDON: I think that's for the Court in the Netherlands to decide. But I don't think they should be permitted to argue that they are not subject to jurisdiction here. And this is going to help them make that argument. They should not.

This Court shouldn't be putting its imprimatur on their argument. They should be -- if they come here, they are subject to jurisdiction, that is black letter law. They are subject to jurisdiction. And then we can all argue in the Netherlands what we're going to argue. I agree with Mr. Barrett there. But what I don't agree with is that this Court should be helping them make the argument by excusing them from jurisdiction, explicitly. That is our view.

With regard to the proof of claim issue and your questioning on discovery, the proof of claims have not been filed yet so, of course, we can't, and it would be unusual I think in the class context, to serve the discovery request even if the Court let you, given the untimely nature, to ask for the proof of claims.

I think all we're looking for is, again, with regard to those 690 investors, or anybody else who brings a claim, we

want to know if, A, they filed the proof of claim and, B, what that proof of claim is so we can make the appropriate arguments overseas again, I don't think we should have to be whipsawed where people overseas are going to be arguing they're entitled to X, without us knowing what they got here, whether it is $5 or something less, or something more.

So I think an easier fix -- I mean I appreciate the security concerns. Of course Citco is not going to broadcast this information, and we can I think deal with confidentiality concerns in the appropriate way. But I just, I don't want to be arguing for that information on some standard of necessity. I think we should be entitled to that information. And, you know, with regard to anybody else who has not filed a claim elsewhere, we don't really need it. From Citco's perspective, we're not going to ask for it. But if somebody has filed a claim elsewhere, and they're going to get money here, whatever that amount is, we need to defend ourselves over there, to know that.

THE COURT: Are the 690 claimants in the Netherlands actions actually identified?

MR. GORDON: No. They are not. We've asked for that information from the Court over there. And it's unclear whether the Court will -- you know, when the Court will have that happen. I have been told by counsel, I don't practice in the Netherlands, that we'll get that information at some point.

THE COURT: All right. Well, let's posit that you get the information at some point. Your interest is in knowing how much of these 690 people have been compensated here, so that of course you don't have them double dip.

MR. GORDON: Yes, your Honor.

THE COURT: If you get the list, then, what would be wrong with your coming back to Mr. Barrett and saying, okay, here are 690 individuals, tell me how many -- how much did each of these folks get in your settlement.

MR. GORDON: Nothing would be wrong if Mr. Barrett commits to giving me that information.

THE COURT: All right, well that's Mr. Barrett --

MR. GORDON: I don't think, necessarily, the final judgment needs to be monkeyed. If we can have an agreement that, with regard to those 690 investors, or any other investor, I mean PWC has different lawsuit against it. And I don't know what the overlap is. But if we can get an agreement that, with regard to any class member who files a claim elsewhere the defendants can find out whether that class member has filed the proof of claim, and ultimately learn what the recovery is, I think that would solve the problem. But I don't think that, you know, I -- I would like to address the necessity issue for that, now, rather than having to, later down the line, get some argument in front of the magistrate and then having somebody come to you as to whether or not that

information is truly necessary to the parties.

THE COURT: Wouldn't a possible standard of necessity be that you don't want to subject your clients to double dipping.

MR. GORDON: I would hope so. But I think we can deal with -- that's why I would like to deal with the issue now. I mean I think it -- I think that would be necessary, but I think it would be easier either, A, if Mr. Barrett said, all right, we'll take care of it or, B, this Court said with regard to anybody who has brought a lawsuit, that the defendant in that lawsuit is entitled to that information to prevent exactly the problem that you're highlighting, your Honor, which is double dipping.

THE COURT: All right. Anything else?

MR. GORDON: With that, I have nothing else.

Thank you.

THE COURT: All right, thank you.

Any other speakers? If not -- I'm sorry, yes.

A VOICE: May I speak, I'm an objector.

THE COURT: Yes.

A VOICE: As am I, but I'll wait for counsel.

THE COURT: All right.

MR. WALLNER: Good afternoon, your Honor, my name is Robert Wallner, from Milberg. I represent the Morning Mist objectors.

Your Honor should reject this settlement, because it violates the fundamental underpinnings of National Super Spuds, a Second Circuit decision.

This settlement cannot pass muster under Super Spuds, because it purports to do what Mr. Barrett could not do if he won the trial, and that is get a release of the derivative claims.

As the Court knows, because your Honor at the beginning, or towards the beginning of this case, granted our motion to remand our derivative case back to the state court, there are fundamental differences between the direct claims that Mr. Barrett, on behalf of the Anwar class is asserting, and the claims that I'm asserting, derivatively, in the Morning Mist case on behalf of Fairfield Century.

And very recently, your Honor, in your ruling withdrawing the reference from the bankruptcy court with respect to Mr. Picard's motion to enjoin this settlement and to void this settlement ab initio, your Honor reiterated the fact that you had struck from this action the derivative claims and only permitted the Anwar plaintiffs to assert the class action claims, the so-called direct claims.

What this settlement does, in a way that is not apparent to the uninitiated, unless you spend a lot of time reading through these sections and putting them together, is give Mr. Cunha's clients a release of claims that I am

asserting on behalf of Century in the Morning Mist case.

And the problem here, your Honor, is not only does it violate the Second Circuit's rule in Super Spuds, and Judge Kaplan's rulings in Auction Houses, the Auction Houses litigation, but it does so in a way that is so far more pernicious than even the Second Circuit had to deal with in Super Spuds, or that Judge Kaplan addressed in Auction Houses.

In Super Spuds, the issue involves commodities contracts involving potatoes. And the settlement provided money to people who had liquidated their potatoes contracts. But some of the same class members had direct claims, as well, for unliquidated contracts. And the Second Circuit said, the settlement, which gives money to the liquidated potato purchaser contract parties, cannot release the claims of those same class members, insofar as they also had unliquidated potatoes contracts.

Judge Kaplan, in Auction Houses, wrestled with a situation where there was an antitrust price fixing conspiracy involving the Auction Houses, and the class members transacted here in the United States, through various Auction Houses, and many of them had also transactions abroad. And the settlement there said, look, we're gonna release the claim of the domestic transactions. However, if you also transacted abroad, you will have to sue abroad to vindicate your antitrust fixing claim, but you can't use the U.S. courts. It was a venue release to

describe it in vernacular. And Judge Kaplan said that violates Super Spuds.

So what do we have here? We have the Anwar counsel effectively helping out Mr. Cunha's client by getting a release, not simply of the direct claims, and that is what Super Spuds dealt with in Auction Houses, but of the derivative claims. And the reason that is so far worse than what we had in Super Spuds, of course that in and of itself violates superspuds. But the derivative claims here, your Honor, are so much more valuable than the Anwar class's claims.

If you look at the joint declaration that Mr. Barrett, and Mr. Finkel, and Mr. Stuart provided this court where they set forth the justifications for the settlement, they described things like the following: They said, your Honor, you should approve the settlement because we have significant risks. One of which was, according to the defendants a, quote conflict, close quote, between the derivative and the direct claims. And, yet, what this settlement does, is it in effect gives way to that conflict by permitting the Anwar class plaintiffs to use this as a vehicle to help Mr. Cunha get a release on the derivative side.

The joint declaration also recited other justifications for the settlement. For example, the Anwar class plaintiffs noted that there are SLUSA problems with the class action here. That there are Morrison actions; that is

the Supreme Court case Morrison versus National Australia. But those problems don't apply to the derivative case. Indeed, the risks that Mr. Barrett highlighted in seeking justification under score, not simply the weakness of the Anwar case, but the strengths of the derivative case. We don't have a SLUSA problem, we don't have a Morrison problem.

You heard Mr. Barrett also say, well, Mr. Walner can't assert these claims because, in effect, they have been assigned to Mr. Picard.

There is an agreement between Fairfield Century and Mr. Picard that provides for an assignment of Century's claims against the Fairfield management. But that assignment is a future assignment. There is nothing in the record to suggest that an assignment actually has been made at this time. And we have challenged that and have a petition, or a motion pending before Judge Jones in this honorable court to withdraw the bankruptcy reference with respect to that issue. But more importantly, your Honor, Mr. Barrett, on behalf of the Anwar plaintiffs, agrees that that assignment is invalid.

Mr. Picard cannot take an assignment of the claims against the management, because Mr. Barrett says in his letter to your Honor dated February 28th, 2013, which is docket number 1060, at page 3. And this is a letter relating to Mr. Picard's request to intervene here. Mr. Barrett, on behalf of Anwar plaintiff, cites the case Picard vs. HSBC, 454 Bankruptcy

Reporter 25, for the proposition that Mr. Picard, quote, lacks standing to bring assigned customer claims, close quote.

So Mr. Barrett agrees with the Morning Mist plaintiffs, that these claims of Century against Century's management, cannot be properly assigned to Mr. Picard.

So what happens? At the end of the day, my colleague, Mr. Cunha, gets us blocked from pursuing these claims, the far more valuable claims, against his clients in a context where Picard can't assert them because we believe, like Mr. Barrett believes, that he has no standing. This is a terrible, improper exercise by the settling parties to destroy the most valuable claims that are around, which are the derivative claims on behalf of Century.

And let me just add one other comment. Mr. Barrett stated during his presentation that under the proposed settlement here, the money will be allocated under what he calls the net loss measure. That is you look at investors who put in money, how much they took out, that's their net loss. And that becomes their numerator over the denominator of all net losses for the whole class.

And Mr. Barrett then said if Century gets money -- keep in mind, the purpose of the derivative case is to get money to Century -- if Century gets money, he says we don't know how Century is going to distribute that money.

Maybe century would use a net loss measure, maybe they

would use the number of shares that people had. There may be also be creditors of Century. Mr. Picard would view himself probably as a creditor of Century. So if we get the recovery, derivatively, for Century, it is not correct to say that that money would simply flow back to these class members because this class only consists of people who meet the criteria of net losers. And as your Honor has ruled on the class certification decision, investors in many countries are not even part of this class.

So your Honor, I would say that while the number of hours that my colleagues have put into this class is certainly large, and no doubt they have worked hard, they have structured a settlement with Mr. Cunha's colleagues that violates Second Circuit principles, and should be rejected outright.

We have also proposed, your Honor, that to the extent that the Court is prepared to carve out the derivative release, that would go far to ameliorating the problem we have here. But without a carve-out, the settlement must be rejected.

Thank you.

THE COURT: Thank you.

Yes, sir.

MR. MESTRE: Your Honor, we filed our objection and, essentially, we said that there was inadequate consideration, but I want to focus on something different.

I want to bring to this Court's attention, a filing

that I received yesterday close to the close of business which is a notice. It was a notice of Rule 23 statement that states that settling defendants recently entered into a settlement with certain class members.

Now, your Honor, I read this. And it's a very opaque notice. But I read this to say that they're stilling with some unnamed party, secretly.

Now, there are only two options. They are either settling with class members, which is improper on its face, or these are sweetheart deals, as the case law refers to them, with parties that opted out. And I think we don't have to check our common sense at the door. I think we can assume that if they have settled with parties that opted out, I think we can assume that the deals were for more money, not less.

And that's very significant, your Honor, because it goes directly to the adequacy of class counsel, and the adequacy of the settlement agreement itself, which is what we raised in our objection.

Now, as Mr. Barrett mentioned, and this Court knows, opt-outs, in and of themselves, may signal the fairness, or not, of an overall class settlement. But when you combine opt-outs plus secret, opaque deals with either class members or parties that have opted out, I think it's almost an admission of the inadequacy of the agreement.

Your Honor, I'm not aware of a case where a settling

defendant strikes a preferential deal with an unidentified putative class member the day before a classwide settlement is gonna be heard for approval. And they don't give any information about the amount, who it is with. I think it's unfair. It could have -- it could have affected -- had this been disclosed earlier, it might have affected how many folks opted out in the first place, which is one of the factors that this Court needs to consider.

So, given that notice, I think at a minimum we ought to be permitted to get more information about those settlements, whether or not they are favorable, preferential, than what the rest of the class is getting.

So what we would request, and in our objection we set forth why this is an unfair, and reasonable, and inadequate settlement. But given this notice now, I don't even think we're in a position, or this Court's in a position, to determine that without knowing what these settlements are for.

Thank you, your Honor.

THE COURT: Okay, thank you.

All right, Mr. Barrett, and Mr. Cunha, perhaps you can address some of the issues raised by the objectors.

MR. BARRETT: Yes thank you, your Honor. Let me start with the objections that were raised by the by PWC. And by Citco. And I think -- I think the most interesting thing about those objections is you take a step back and you think about

what they're really saying to your Honor. What they're really saying is they're asking you to make decisions that, in first place, in the first place, they are asking you to make decisions to change the deal, to change the notice that went out to class members starting on December 16th of last year. And I don't know how she knows, but counsel for PWC said, oh, well, that wasn't important to the class members in deciding whether or not to make, submit proofs of claim. I'm just reading here from page 12, the class notice, which was approved by your Honor on November 30th, it didn't go out until December 17th. What you just heard was a fantastic example of accountant bean counting. She said the reason that their objection was timely, was because the deadline that the Court set for making objections was February 15th, and they filed on February 15th. Your Honor, that could only be an accountant's way of looking at the world. The real way of looking at the world is that this notice, which I'll read to your Honor in a minute, went out on December 17th. They had, from November 30th to December 17th, to take some action if they really thought that there was a serious problem here with the terms of the notice, with the two issues that they're raising now.

Your Honor's deadline of February 15th, simply didn't address the situation that we're faced with here, which is that a very clear, specific notice that relied on these provisions

was going out on December 17th, and they knew it. They knew it, and they could understand. They could see what the prejudice was.

So this is what it -- this is what it says. And but she somehow knows that nobody relied on it.

Any class member who submits a request for an exclusion has not subjected themselves to the jurisdiction of the United States at all. I don't think they take issue with that, maybe they do, I don't know. But that's a person who is -- who, by their own standard isn't even participating in this case, they have excluded themselves.

And any settlement class member who submits a proof of claim thereby submits to the jurisdiction of the Court, with respect only to the subject matter of such proof of claim, and all determinations made by this Court thereon, and shall not be deemed to have submitted to the jurisdiction of this Court, or of any Court in the United States, for any other matter on account of such submission.

That is what your Honor approved. That is what they knew on November 30th your Honor approved. And they let that go out and to say under the circumstances that you have heard, relating to this class, that that didn't mean anything to anybody who submitted a claim, just doesn't make any sense. And it certainly isn't supported by anything in the record.

Similarly, they knew, on November 30th, that on

December 17th, the proofs of claim were going out that said: All information submitted in a request for exclusion or proof of claim shall be treated as confidential protected information, and may not be disclosed by the claims administrator, or the settling parties, Fairfield and the plaintiffs, to any third party absent further order of this Court upon a showing of necessity.

And that is what people were told, that's what they relied on, that's why I think everything else aside, the latches argument against this objection being made after people that relied on the notice is overwhelming.

But secondly, your Honor, what they're really asking you to do here, is they're asking you to make decisions that really belong to the Dutch Court. You know, for example, the names and the amounts that the settlement class members may receive.

Mr. Gordon told you, they can get that as whatever the Dutch call it, the functional equivalent of discovery in the Dutch action. How do you find out what the litigant in the Dutch action received for other claims relating to Fairfield Century? You ask them that question in the Dutch action. If it is an appropriate question in the Dutch action, then I am sure that the Dutch court will allow them, or will order the plaintiffs to give them that information. If it's not appropriate, that's a problem that defendants have.

But the one thing that they shouldn't, absolutely shouldn't be doing, is trying to use this Court as a mechanism to get discovery that they're not -- they may not be entitled to in the Netherlands. It's an issue for the Dutch judge. And they don't need to ask me how much a particular class member got, they ask a class member. Just like they have asked the class members that are the representative plaintiffs and the other class members they have deposed in this case how much money have you gotten on account of your claims based on Fairfield. In fact, we have had a couple of plaintiffs who have dropped out of the case because, for one reason or another, they got, for example, an arbitration recovery against a broker that, basically, compensated them for all of their losses. So we dismissed their claim. That is the way it works, your Honor. It is not your job to worry about the discovery that they're entitled to in the Dutch court. And it's certainly not appropriate for them to go around the back door to get discovery that they may not be entitled to in the Dutch case.

If they're entitled to it in this case, if it goes to trial, it may become relevant. If it is that relevant, we'll deal with it as a discovery matter. We can deal with it under the necessity standard. I don't really see what the difference is. But I do know that this notice went out to people and they and they relied on it.

The other argument that is completely unsupported, your Honor, is that they say that if you show up in this court and you make a claim for money that the Fairfield defendants are providing as part of the settlement, then you have subjected yourself to the jurisdiction of this Court and, I don't know, maybe of the United States, for all purposes. And they have no support from that. He is talking about broad general language in the Phillips Petroleum case.

In fact, as we as we cited in our reply brief, it is document 1073 at page 8, that's not the right citation. It is document 1075 at page 3: New York long-arm jurisdiction does not, by any means, clearly subject someone to the jurisdiction of this Court simply because they come in here and make a claim for one narrow part of the settlement. And they don't have any cases that say that. All they have is general language and, but more importantly, your Honor, their position would be different if the entire case were being settled, if the case against them were being settled, if any of the money from the settlement was coming from them. Yeah, then, it would make sense. Then you would say, well, you're taking money from us through this settlement mechanism, but you're not -- but then you're saying that doesn't really count, that's, you know, for purposes of jurisdiction. That's not what's happening here, your Honor.

All the money that is being paid is coming from the

Fairfield defendants, from the settling defendants. These people are not contributing a penny to that. Why should they get the benefit in their Dutch litigation of the settlement funds that are being contributed by the Fairfield defendants.

We thought about it, your Honor, when we presented the settlement originally. We looked very carefully at the issue of whether we could ask class members not just to opt in or out of this piece of the case, this settlement. But whether we could ask them to decide once and for all, are you in Anwar or are you out of Anwar. In other words, that an opt-out would be for the entire Anwar case, including the claims against these nonsettling defendants. And we did some research and we thought about it. And the answer, whether you look at the law or you think about it as a matter of common sense, is very simple, your Honor. It is just -- it is just not fair to ask people to -- we would have liked it, Mr. Cunha certainly would have liked it, if we had told people they had to opt in or out of the entire case. Because it would have been tremendous pressure on class members not to opt out. And, you know, that's advantageous of the defendants, advantageous of the plaintiff. We wanted a settlement, we wanted it to go through. We concluded that I simply wouldn't be proper to do that. And the reason it wouldn't be proper, is you're asking people to buy a pig in a poke. They don't know if there is gonna be a class action. They don't know if there is gonna be a

settlement with one of these defendants, how much it is, whether they'll consider it a good settlement, or whether they'll prefer to pursue their case in the Netherlands. Those are all things they don't know.

So the opt-out was limited to the Fairfield settlement. And we'll get to the issue of notice and opt-out with respect to the litigated settlement class that your Honor has now certified. But at the time that we did this, at the time that we gave this notice, the question was entirely open whether people were gonna be participating in the remainder of the case or not. And we didn't think that it was appropriate to make them make that decision.

Again, if they had made that decision at that time, if that had been proper, then there might be some weight to the defendant's argument that they have, in effect, accepted the jurisdiction of this Court, and all of the benefits that go with it.

(Continued on next page)

MR. BARRETT: But where we have a settlement like this, and we raised this before, it's in effect only a piece of the case. That is the difference. That's the distinction between where we are now in this case and the kinds of situations that they're talking about.

Finally, your Honor -- and we talked about this in our brief -- if you actually read the Dutch decision that they're referring to, the reason that the Dutch judge didn't grant their motion to dismiss had nothing to do with this case with submission to jurisdiction here or not. They're just, again, trying to use this Court to get some sort of advantage in litigation in another court. They can make all the arguments they want about the facts, about your class certification order, about the fact that 690 people, by the way, didn't opt out and not vote in favor of the settlement, didn't opt out of this case. So it's all there. They have got all the facts that they need. Again, I come back to the latches point, they didn't make this argument when they should have made it, and you shouldn't change the rules of the game for the plaintiffs now.

With respect to Mr. Wallner's objection, basically, your Honor, it doesn't sound like he read our brief. Everything he said was something that he said in his original objection. We responded to it at length. The *Super Spuds* case is on its face distinguishable. The Court said that it would

not, quote, permit the uncompensated release of claims resting on a separate factual predicate from that settled in the class action. That, your Honor, is the difference between that case and this case. The cases subsequent to *Super Spuds*, in particular *Wal-Mart v. Visa* and *TBK Partners v. Western Union*, which we cite and quote from in our brief, explain that exact distinction.

And as the *TBK* court said, the concern in *Super Spuds* was the danger that a class representative not sharing common interests with other class members would endeavor to obtain a better settlement personally for themselves at no cost. That problem simply does not exist here. All the class members are in the same position with respect to their ownership, whatever that position is, with respect to their ownership in the funds, as every other class member is.

And for that reason, and because the claims that only claims that are being released are claims that arise from exactly the same factual predicate. In the *Auction Houses* case it was the same thing, there were people who had domestic claims and people who had overseas claim, it was a whole different situation. Here everybody is in the same boat.

And again, as I said, your Honor, and I don't think Mr. Wallner disagrees, there's no release of the fund's claims, of the fund's ability to bring these claims, and it's just sort of losing all sight. A derivative action is brought -- the

theory of a derivative action is that the management or those in control of the corporation are failing to act in the corporation's best interest in asserting claims against former managers. That's the theory of a derivative case. That's the theory of Mr. Wallner's case.

Here we do have the funds under now new management, if you will. There is a trustee or liquidator appointed for each of the funds. So those claims are capable of being pursued. And in Mr. Wallner's case, the release would have released the substance of the claim for all time. That was not a claim that was in common with the class. Here, it's not releasing the substance of the claim at all, it's describing who, in effect, has standing to bring that claim. And it's saying that individual shareholders who are going to benefit from the class settlement no longer have standing to bring claims based on the same facts against the same defendants. The fund claims themselves can still proceed.

Now with respect to -- Mr. Wallner is very good at taking snippets of language out of context and making it sound like something nefarious is going on. With respect to the claims that for the moment that are assigned to Picard, which he may or may not be able to pursue in that capacity, what those agreements say is if Picard is unable to pursue those claims, they go back to the funds.

So the funds, which have liquidators, and I can tell

you from my experience that Mr. Krys, the liquidator of Fairfield Century and BBI, is also as aggressive as Mr. Picard in pursuing potential claims. If Picard can't pursue the claim that is Fairfield Century's claim against management, the claim reverts to Krys.

So these claims are not going to disappear, the defendants are not trying to wipe out the claims. They understand that. They understand that risk. It's one reason they wanted a global settlement but weren't able to get it. But it's entirely proper to include this release, and certainly Mr. Wallner's request to void the entire settlement on the basis of release language of about three words that your Honor could just cross out makes no sense at all. We don't think that you should cross it out, it's a legitimate part of a negotiated settlement, but it certainly doesn't call the entire settlement into question.

Finally, with respect to Mr. Mestre's claim, I don't know that he read what Mr. Cunha's Rule 23 disclosure said. I don't have the exact language in front of me, but something to the effect of that this is not a release having to do -- it says that the agreements that are being disclosed here are separate from and do not modify the terms of the stipulation of settlement. And I'll let -- since I don't know what those terms are, as I understand it, they're confidential, I will let Mr. Cunha address the issue further.

THE COURT: Mr. Cunha?

MR. CUNHA: Thank you, your Honor.

Just one final word with respect to Mr. Wallner's argument. Not only does the release in the final judgment not release the fund's claims, it doesn't even release derivative claims. All it does is say that if a class member wants to participate in the settlement and make a recovery, that class member can no longer litigate those claims based on the same factual predicate against Fairfield Greenwich with whatever hat person might be wearing.

But to the extent that such a person wanted to opt out, that person could still pursue derivative claims, or to the extent there are other opt outs who decide to pursue derivative claims, they could do so. So to be clear, the derivative claims on behalf of the funds are not dismissed. The claims by the funds are not dismissed and released. It is simply that, as is absolutely usual in agreements of this kind, if a claimant and a class member wants to pursue a claim and make a recovery, they give up their right to sue the defendants under whatever theory or whatever guise they may decide to do so.

And again, Mr. Barrett cited in his papers several cases in which exactly this kind of release was given. It's common and it's usual. And as Mr. Barrett pointed out, this issue is not governed by the *Super Spuds* case. That's an older

case. There are more recent cases in the Second Circuit which do govern this situation, and that's the *Wal-Mart* case and it's the *TDK* case which are cited in Mr. Barrett's reply brief on behalf of the plaintiffs in support of entry of the final judgment.

We would note here, your Honor, that Mr. Wallner's clients did have the ability to opt out if they wanted to if they thought their derivative claim was so valuable and they wanted to preserve their right to continue to sue, they could have opted out, and they did not. And frankly, they made a good judgment here. Because as Mr. Barrett points out, the funds are already pursuing claims against the Fairfield Greenwich defendant.

Maybe the assignment has become effective, maybe it hasn't become effective, but whether the assignment is effective or not, those funds have sued, those claims are outstanding, those claims are not being released. So it seems hard to imagine a scenario where, once the issue is litigated, that Mr. Wallner and his derivative clients could maintain their derivative claims on behalf of funds when the funds now are controlled by independent liquidators who have no conflict of interest and who are now pursuing those claims, or where they have assigned those claims to the trustee, which again is independent and has no conflict of interest and will pursue those claims.

So in that circumstance, it's hard to see how -- and I don't believe a demand was ever actually even made here on the funds to pursue these claims. If such a demand were made, the response by the funds would be: We're already pursuing the claims, thank you very much. And it is just really almost impossible to see how those claims could be sustained once that issue is litigated. In another Madoff-related case exactly such a situation occurred, and the court had no problem dismissing the derivative claim.

So again, this is done, your Honor, not to extinguish a claim. No claims are extinguished. The reason it has been done is to prevent the continued litigation by settling parties as against Fairfield Greenwich and to save substantial legal fees, and that's what it is about. It's very much a part of the deal that was heavily negotiated between the defendants and the plaintiffs, it's usual, and it should remain in the case. It should remain in the final judgment.

With respect to Mr. Mestre's comments, we note, your Honor, that he doesn't cite any authority for his position. And there is a case in the First Circuit in which the court discusses exactly this issue. It is a fairly long opinion, it is very persuasive, it is very well reasoned, it's the *Duhaime* case, it's 183 F.3d 1. And what the *Duhaime* court basically says is this: First, this isn't the class settlement, this is a separate settlement. They were invited and asked there to

have the court approve the separate settlements, and the *Duhaime* court had no problem saying this is outside the jurisdiction of the court, this is not part of the class settlement, there is no authority that would give us the authority to even consider whether we need to approve. It is simply not something that is to be before the court for approval. Second, the court went into the reasons why it was not going to grant the objection that was made there. And the court said look, what we're concerned about with these kinds of settlements is the possibility of collusion or breach of fiduciary duty on the part of representative plaintiffs or on the part of class counsel representing the class.

In this case, there is no such possibility, your Honor. These agreements were negotiated with completely separate counsel for these class members. Plaintiffs' lawyers were not involved in any -- plaintiffs' counsel for the class were not involved in any way, shape or form. They have not seen the agreements. The agreements are confidential. They did not participate in any of the discussions with respect to it. It was completely separate counsel. Second, they're not with representative plaintiffs. They are with non-representative plaintiffs, simply class members who are out there. And again, they're separate agreements.

They're confidential, your Honor. If your Honor thinks it's appropriate and wants to inquire further into those

agreements, we would be prepared, in camera, to discuss the agreements with your Honor, answer whatever questions your Honor has about them, give your Honor whatever information your Honor wants about them. We are obligated under the agreements to keep them confidential, and to the extent that the Court wants information to do so in a way that protects that confidentiality, we're prepared do that. But in any event, we think this is a tempest in a teapot. The authority is this is not something for the Court to consider in connection with what brings us here today.

Thank you.

THE COURT: With regard to that matter, Mr. Cunha, perhaps you can submit to the Court some summary of who the other settling plaintiffs are, how they came about, and in general terms what is being settled, and submit that on a confidential basis.

MR. CUNHA: Yes, your Honor. Would you like us to submit that to your Honor directly or file under seal? What's your Honor's preference?

THE COURT: File under seal.

MR. CUNHA: Yes, your Honor. We would be happy to do so.

MR. MESTRE: May I respond to one moment?

THE COURT: Very briefly, because we have dragged on much longer than expected.

MR. MESTRE: Your Honor, what is just been said is precisely what our concern was. This goes to the adequacy of class counsel. It goes to the adequacy of the agreement.

If these are favorable settlements, which we can only assume they must be, then there's no reason why we ought be told what they are, whether they have agreed to the confidentiality or not. Whatever agreement they have with whoever they're settling with, there's no way to evaluate whether or not the global agreement is fair and adequate if we don't know whether or not the way to get more money was to opt out and cut a deal on the side and get a sweetheart deal.

So I request that we be permitted to see whatever they file and also to be permitted to file a response. Of course, I don't have a case. This notice of Rule 23 statement was filed near the close of business yesterday and I traveled up from Miami. So to then suggest: Where is your response? I would like to make a response, your Honor, thank you.

THE COURT: All right. Thank you.

All right. I'm going to close this hearing, and thank the parties for exhaustive, very helpful, and thorough and professional presentation on all scores, both on behalf of the settling parties and on behalf of the objectors.

On the basis of the record such as it exists before this Court, the terms of the proposal, the discussions and arguments made here by both the settling parties and by the

objectors, I am inclined to grant approval of the settlement. I find under the *Grinnell* factors that the parties, plaintiffs particularly, have satisfied the standards on the burden to indicate that the settlement overall, in light of all the circumstances, is fair and reasonable, in light of the complexity of the case, which as Mr. Barrett so repeatedly pointed out, this Court is well aware of, the costs involved, the costs of further litigation, the risks entailed of further litigation, the time of pursuing further disputes in litigation, the merits and the various issues that remain unclear and conceivably compel against a decision in favor upon the plaintiff.

The amount of the settlement, which has been questioned by some of the objectors, although as Mr. Barrett indicates, is modest in the scheme of the totality of this litigation, the Court considers to be fair in that the funds are coming from individuals who, just as a matter of common sense, are unlikely to have the kinds of resources to mount settlement of a total claims that are involved in the overall litigation of the Madoff losses.

Concerning the class response, the fact that there have been so many favorable indicators, the total number of potential claimants, the total number who have filed claims as of this point, even though the period has not yet concluded, the number of opt outs, as Mr. Barrett indicated, ten, only

three of which are valid, the number of overall objections, just the three that surfaced here, or four.

I believe in all of the circumstances the plaintiffs have met their burden to establish that this settlement is fair and reasonable. I have taken into account the objections by the non-settling defendants, questions concerning their challenge to the issue of jurisdiction that's in the settlement, and the confidentiality. I believe that those issues can be addressed in the context of the language of necessity that is in the settlement agreement. If at some point it becomes necessary for that information to be released, the circumstances should be examined at that time and the Court could make a determination as to whether or not, for the purposes for which it is sought, a disclosure is necessary.

And I have taken into account as well the objections from the Morning Mist. I am persuaded by the plaintiffs' and defendants' arguments that the circumstances here are not comparable to those present in the *Super Spuds* and the case cited by the objectors insofar as the underlying facts here arise out of the same predicate events, and that distinguishes *Super Spuds* sufficiently, in this Court's view, and the matter would be controlled by subsequent case law.

With regards to the objections raised by Headway, the Court believes that this settlement should be viewed on its own merits. If there are other settlements, the Court will examine

those as they arise to the extent that they are brought to the Court for approval, and I am persuaded that that should not affect the terms and conditions that are presented by these parties for this settlement.

Now I am going to grant the approval, but I am going to make the approval contingent upon the resolution of the outstanding issues that remain with regards to the 30 million. In other words, the settlement is approved, but the effective date of it will be upon submission by the parties of -- a filing by the parties of notice indicating that those remaining issues concerning the 30 million have been resolved. So if that could be done in two days, then the approval will be going into effect in two days. If it take two months, it will take two months. If it takes three years, by that time we'll see whether or not those funds are still there.

All right. Thank you. Have a good day.

MR. BARRETT: Thank you, your Honor.

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