

N.Y.S.D. Case #
09-cv-0118(VM)

13-1581

Lomeli v. Fairfield Greenwich

MANDATE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 26th day of November, two thousand thirteen.

5
6 PRESENT: DENNIS JACOBS,
7 BARRINGTON D. PARKER,
8 DENNY CHIN,
9 Circuit Judges.

10
11 - - - - -X
12 MIGUEL LOMELI, MORNING MIST HOLDINGS
13 LIMITED,
14 Plaintiffs-Appellants,
15
16 AXA PRIVATE MANAGEMENT,
17 Lead Plaintiff,
18

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: December 20, 2013

19 PASHA S. ANWAR, ON BEHALF OF
20 THEMSELVES AND ALL OTHERS SIMILARLY
21 SITUATED INVESTORS IN THE GREENWICH
22 SENTRY, L.P. PRIVATE INVESTMENT
23 LIMITED PARTNERSHIP, JULIA ANWAR, ON
24 BEHALF OF THEMSELVES AND ALL OTHERS
25 SIMILARLY SITUATED INVESTORS IN THE
26 GREENWICH SENTRY, L.P. PRIVATE
27 INVESTMENT LIMITED PARTNERSHIP, ET
28 AL.,

Plaintiffs,

SHIMON LAOR, ET AL.,
Consolidated Plaintiffs,

ARJAN MOHANDAS BHATIA, ET AL.,
All Plaintiffs,

-v.-

13-1581

SECURITIES & INVESTMENT COMPANY
BAHRAIN, ET AL.,
Plaintiff-Appellees,

-v.-

FAIRFIELD GREENWICH LIMITED, A CAYMAN
ISLAND COMPANY, ET AL.,
Defendants-Appellees,

FAIRFIELD GREENWICH ADVISORS L.L.C.,
AMIT VIGAYVERGIA, CITCO FUND SERVICES
(EUROPE) B.V.,
Defendants - Consolidated
Defendants - Appellees,

YANKO DELLAW SCHIAVA, ET AL.,
Consolidated Defendants -
Appellees,

FAIRFIELD GREENWICH CORP.,
Consolidated Counter
Defendant - Appellee,

1-20 JOHN DOES,
Defendants,

- - - - -X

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28 Cornelis Boele.
29

30 Appeal from a judgment of the United States District
31 Court for the Southern District of New York (Marrero, J.).
32

33 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
34 **AND DECREED** that the judgment of the district court be
35 **AFFIRMED**.
36

37 Miguel Lomeli and Morning Mist Holdings Limited appeal
38 from the judgment of the United States District Court for
39 the Southern District of New York (Marrero, J.), approving a
40 partial class action settlement. The underlying class

1 action (the "Anwar action") alleges that the defendants made
2 material misstatements concerning their due diligence while
3 investing with Bernard L. Madoff Investment Securities LLC.
4 During the district court proceedings, the plaintiffs and
5 the Fairfield Greenwich defendants settled on a basis that
6 requires the plaintiffs to release any derivative claims on
7 behalf of the Fairfield Greenwich funds. The appellants
8 filed a derivative claim in New York state court on behalf
9 of one of the funds, Fairfield Sentry Limited ("Sentry")
10 (the "Morning Mist action"). That action was removed to the
11 Southern District of New York and then remanded back to
12 state court. Sentry is undergoing a liquidation proceeding
13 in the British Virgin Islands, however, and the Morning Mist
14 action therefore has been stayed by the Bankruptcy Court for
15 the Southern district of New York. Additionally, Sentry has
16 filed a direct action against the Fairfield Greenwich
17 defendants, also in the Bankruptcy Court for the Southern
18 District of New York. See Fairfield Sentry Ltd. V.
19 Fairfield Greenwich Grp., Adv. Pro. No. 10-03800 (Bankr.
20 S.D.N.Y. Oct. 27, 2011). The appellants object to the
21 settlement insofar as it requires them to release their
22 derivative claims, and cites deficiencies in the settlement

1 notice. They also appeal the district court's decision not
2 to reconsider the approval in light of the Supreme Court's
3 decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426
4 (2013). We assume the parties' familiarity with the
5 underlying facts, the procedural history, and the issues
6 presented for review.

7 We review the approval of a class action settlement for
8 abuse of discretion. Charron v. Wiener, 731 F.3d 241, 247
9 (2d Cir. 2013). "A district court abuses its discretion
10 when its decision rests on an error of law or a clearly
11 erroneous factual finding, or when its decision cannot be
12 located within the range of permissible decisions." Id.
13 "We review factual findings relating to the settlement for
14 clear error and issues of law *de novo*." Id. A district
15 court's denial of a motion for reconsideration is also
16 reviewed for abuse of discretion. RJE Corp. v. Northville
17 Indus. Corp., 329 F.3d 310, 316 (2d Cir. 2003).

18 1. Scope of the Release

19 "[I]n order to achieve a comprehensive settlement that
20 would prevent relitigation of settled questions at the core
21 of a class action, a court may permit the release of a claim
22 . . . even though the claim was not presented and might not

1 have been presentable in the class action." TBK Partners,
2 Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir.
3 1982). The "[p]laintiffs' authority to release claims is
4 limited by the 'identical factual predicate' and 'adequacy
5 of representation' doctrines." Wal-Mart Stores, Inc. v.
6 Visa U.S.A., Inc., 396 F.3d 96, 106 (2d Cir. 2005); see also
7 TBK Partners, 675 F.2d at 460-62.

8 The claims in the Anwar action and the derivative
9 claims in the Morning Mist action share a single factual
10 predicate: the alleged misconduct of the Fairfield Greenwich
11 defendants in failing to conduct adequate due diligence, and
12 misrepresentations regarding their due diligence. The
13 district court recognized this identity when it initially
14 agreed to consolidate the two actions. See Anwar v.
15 Fairfield Greenwich Grp., No. 1:09-cv-00118, (S.D.N.Y. June
16 9, 2009, ECF No. 167). The appellants do not contest this
17 identity.

18 "Adequate representation of a particular claim is
19 established mainly by showing an alignment of interests
20 between class members." Wal-Mart Stores, 396 F.3d at 106-
21 07. Since the plaintiff class is composed of equity holders
22 in the Fairfield Greenwich funds (including Sentry), every

1 member of the class has an interest in claims that may be
2 made derivatively on behalf of the funds. Nor do the
3 appellants claim that the release disproportionately affects
4 them relative to other class members. Therefore, adequate
5 representation exists to release derivative claims that may
6 be pursued by the settling class.

7 We are unpersuaded that Sentry's absence from the class
8 nullifies the settlement. The settlement only limits the
9 settling class from bringing a derivative action, an action
10 that belongs to the corporation. See Scalisi v. Fund Asset
11 Mgmt., L.P., 380 F.3d 133, 138 (2d Cir. 2004). Nothing in
12 the settlement limits the ability of Sentry to pursue an
13 action for its benefit or the ability of class members who
14 opt out to pursue derivative claims. Furthermore, the
15 appellants' reliance on National Super Spuds, Inc. v. New
16 York Mercantile Exchange is misplaced: in that case, the
17 factual predicate and adequate representation tests were not
18 satisfied. 660 F.2d 9, 18 n.7, 19 (2d Cir. 1981); see also
19 Wal-Mart Stores, 396 F.3d at 110-11.

20 2. The Settlement Notice

21 A settlement notice must be reasonable. Fed. R. Civ.
22 P. 23(e)(2). "There are no rigid rules to determine whether

1 a settlement notice to the class satisfies constitutional or
2 Rule 23(e) requirements." Masters v. Wilhelmina Model
3 Agency, Inc., 473 F.3d 423, 438 (2d Cir. 2007) (quoting Wal-
4 Mart Stores, 396 F.3d at 114). "[T]he settlement notice
5 must 'fairly apprise the prospective members of the class of
6 the terms of the proposed settlement and of the options that
7 are open to them in connection with the proceedings.'" Id.

8 This notice informed the class members that they would
9 not be able to participate in any other proceeding against
10 the Fairfield Greenwich defendants in any forum. The notice
11 warned class members to seek counsel if they were involved
12 in any litigation against the defendants, directed them to
13 the stipulation, and explained how to opt out if they wanted
14 to preserve their claims.

15 The settlement notice here did not specifically refer
16 to the Morning Mist derivative action. While this Court
17 encourages settlement notices to include "specific
18 reference[s] to pending actions," we have never held this to
19 be a requirement. Wal-Mart Stores, 396 F.3d at 116 n.22.
20 The settlement notice was reasonable and could be
21 "understood by the average class member." Id. at 114.

22

3. Reconsideration of the Settlement Approval

The appellants sought reconsideration of the district court's settlement approval in light of the Supreme Court's decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). We conclude that the district court did not abuse its discretion in denying reconsideration for the reasons articulated in its decision and order. See Anwar v. Fairfield Greenwich Ltd., No. 1:09-cv-00118 (S.D.N.Y. Apr. 4, 2013, ECF No. 1104).

For the foregoing reasons, and finding no merit in the appellants' other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


