

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, et al.,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, et al.,

Defendants.

Master File No. 09-cv-0118 (VM)

This Document Relates To: 09-cv-118(VM)

**DECLARATION OF MARK G. CUNHA, ESQ. IN PARTIAL OPPOSITION TO THE  
CLASS PLAINTIFFS' MOTION FOR DISTRIBUTION OF THE  
GLOBEOP NET SETTLEMENT FUND**

MARK G. CUNHA, of full age, declares under penalty of perjury as follows:

1. I am an attorney-at-law of the State of New York and a partner at Simpson Thatcher & Bartlett LLP and counsel to a number of defendants in this lawsuit. I have personal knowledge of the facts set forth herein, and I respectfully submit this declaration in partial opposition to the Class Plaintiffs' Motion for Distribution of the GlobeOp Net Settlement Fund. Specifically, I make this declaration in support of Sylvia Tucker's objection to the Class Plaintiffs' exclusion of her from the settlement class. I understand that the basis for her exclusion is that they deem her an "immediate family member" of defendant Jeffrey Tucker.

2. I was lead counsel for my clients, including defendants Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Ltd, in negotiating a partial settlement of this matter with Class Plaintiffs' counsel in 2012. That settlement is sometimes referred to as the "FG Settlement."

3. I negotiated the FG Settlement, including the Stipulation of Settlement (the “FG Stipulation of Settlement”), with David Barrett, one of the lawyers for the Class Plaintiffs. The FG Stipulation of Settlement was executed and filed on November 6, 2012. [Dkt. 996.]

4. The FG Stipulation of Settlement I negotiated with Mr. Barrett excluded, among others, “immediate family members” from the Settlement Class, but it did not define “immediate family members.” The stipulation defined the Settlement Class as follows:

all Persons who were Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 (whether as holders of record or traceable to a shareholder or limited partner account of record) and who suffered a Net Loss of principal invested in the Funds, excluding (i) Opt-Outs; (ii) any Persons who have been dismissed from this Action with prejudice; Fairfield Sigma Limited; (iv) Fairfield Lambda Limited; and (v) the FG Defendants<sup>1</sup> and any entity in which the FG Defendants have a controlling interest, and their officers, directors, affiliates, legal representatives, immediate family members, heirs, successors, subsidiaries and/or assigns of any such individual or entity in their capacity as such.

[FG Stipulation of Settlement, Dkt. 996, p. 18.]

5. The Court approved the FG Settlement, and the Second Circuit Court of Appeals recently affirmed that approval.

6. In negotiating the Stipulation of Settlement, Mr. Barrett and I never discussed the meaning of “immediate family members”, nor did we discuss whose claims would be precluded under that language. For my part, in agreeing to include that language, I had no intention of excluding any claim by Sylvia Tucker, whom I have never represented or even communicated with. In my thinking about whose claims would be excluded by the term “immediate family

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<sup>1</sup> The FG Defendants include Sylvia Tucker’s son, Jeffrey Tucker. (See Stipulation of Settlement, Dkt. 996, p. 10.) In the FG Settlement, defendants Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Limited settled the case with the Class Plaintiffs. Under the settlement, all the individual Fairfield Greenwich defendants, including Jeffrey Tucker, will be dismissed from the case.

members”, I had in mind spouses and children. Similarly, Mr. Barrett never expressed to me the intention to exclude parents in general, or Mrs. Tucker in particular, during our negotiations. I understand that Mrs. Tucker timely filed a claim under the FG Settlement in early 2013.

7. Documents indicate that on August 29, 2013, the representative plaintiffs entered into a Stipulation of Settlement (the “GlobeOp Stipulation of Settlement”) on their own behalf and on behalf of a “GlobeOp Settlement Class.” The GlobeOp Stipulation of Settlement on its face incorporates the same exclusion of “immediate family members” from the settlement class that Mr. Barrett and I negotiated for the FG Settlement. It defines the GlobeOp Settlement Class as follows:

all Persons who purchased or held interests in the Domestic Funds from October 31, 2003 through September 1, 2006, who were investors in the Domestic Funds as of December 10, 2008 and who suffered a Net Loss of principal invested in the Domestic Funds, excluding (i) those Persons who timely and validly requested exclusion from the GlobeOp Settlement Class and who did not validly revoke such exclusion; (ii) those Persons who have been dismissed from this Action with prejudice; and (iii) the FG Defendants, GlobeOp, and the Non-Settling Defendants, and any entity in which those Persons have a controlling interest, and their officers, directors, affiliates, employees, legal representatives, and immediate family members, and heirs, successors, subsidiaries and assigns of such Persons.

[GlobeOp Stipulation of Settlement, Dkt. 1184, p. 11.]

8. On April 15, 2014, at Mr. Tucker’s request, I emailed Robert C. Finkel, Esq., another lawyer for the Class Plaintiffs, to inquire about the status of Mrs. Tucker’s claim on the FG Settlement. Mr. Finkel and I then exchanged a series of emails concerning Mrs. Tucker’s status under both the FG and GlobeOp Settlements through May 15, 2014. A copy of this email thread is attached as Exhibit A.

9. In an April 24, 2014 email, Mr. Finkel indicated, to my knowledge for the first time since the beginning of this lawsuit, that Class Plaintiffs’ counsel intended to exclude Mrs.

Tucker from participating in either settlement. He invoked a definition of “immediate family member” found in an SEC regulation. Neither of the settlement stipulations incorporates that definition of “immediate family member”, and no one discussed or mentioned that definition or any other definition with Mr. Finkel’s colleague David Barrett in our negotiation of the FG Stipulation of Settlement. Accordingly, there clearly was no agreement or any meeting of the minds between the parties to use that definition to define the scope of the term “immediate family member.”

10. In that same email exchange, Mr. Finkel advised me that Class Plaintiffs intended to seek the Court’s approval to exclude Mrs. Tucker from the GlobeOp Settlement Class in Class Plaintiffs’ motion to distribute the GlobeOp settlement funds – *i.e.*, in the instant motion.

11. It was never my intention that Mrs. Tucker or any other innocent parent of a defendant, who are similarly situated to the rest of the class of plaintiffs, be excluded from the settlement classes or barred from recovering a portion of their lost investments through these settlements.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 28, 2014

  
\_\_\_\_\_  
MARK G. CUNHA

# **EXHIBIT A**

**From:** Robert C. Finkel [<mailto:RFinkel@wolfpopper.com>]  
**Sent:** Thursday, May 15, 2014 1:46 PM  
**To:** Cunha, Mark G  
**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); David Barrett; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon; Natalie M. Mackiel  
**Subject:** FG Settlement Fund

Mark -- Since Ms. Tucker did not submit a GlobeOp claim, we did not send her a notice of rejection, although we intend to do so with respect to the FG settlement when, as we hope, it becomes final.

The recommendation by Plaintiffs' Counsel to the Court as to identity of appropriate Settlement Class members will be part of the motion for distribution of the GlobeOp settlement fund. We hope to file the motion this month. Please confirm that you are disputing the exclusion of Ms. Tucker so that we can apprise the Court of our disagreement in the motion.

Robert C. Finkel, Esq.  
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Facsimile: (212) 486-2093

Privileged and Confidential Attorney-Client Communication.

**From:** Cunha, Mark G [<mailto:mcunha@stblaw.com>]  
**Sent:** Thursday, May 15, 2014 1:08 PM  
**To:** Robert C. Finkel  
**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); David Barrett; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon  
**Subject:** RE: FG Settlement Fund

Rob, further to the below, it is stated in the Notice of Proposed Partial Settlement of Class Action that was mailed to the prospective class members, under the section "Membership in the Settlement Class",

"... Plaintiffs' Lead Counsel, with the assistance of the Claims Administrator, will in the first instance determine, and make recommendations to the Court, as to the identity of investors who file claim forms who are appropriately Settlement Class Members. Determinations as to membership in the Settlement Class will be reviewable by the Court."

What plans do Plaintiffs Lead Counsel have for making recommendations to the Court as to who are appropriately Settlement Class Members? Can you give me some idea of when you plan to submit such recommendations to the Court?

Thanks,

Mark

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**From:** Cunha, Mark G  
**Sent:** Thursday, May 15, 2014 12:42 PM  
**To:** Robert C. Finkel  
**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); David Barrett; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon  
**Subject:** RE: FG Settlement Fund

Rob, thanks for getting back to me. Do you and your colleagues intend to send Sylvia Tucker a notice of rejection of her claim, or do you regard your emails to me below as sufficient notice? Also, have you set up any mechanism for challenging claim rejections? I do not see anything in that regard set forth in the Plan of Allocation referred to in paragraphs 1ff and 31-33 of the Stipulation of Settlement.

Regards,

Mark

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**From:** Robert C. Finkel [<mailto:RFinkel@wolfpopper.com>]  
**Sent:** Wednesday, May 14, 2014 3:33 PM  
**To:** Cunha, Mark G  
**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); David Barrett; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon  
**Subject:** RE: FG Settlement Fund

Mark,

In the absence of a contrary definition of the phrase "immediate family member" in the settlement stipulation or class notice, we believe that its plain meaning is consistent with the definition used in the SEC regulations enforcing the Securities acts. See 17 C.F.R. §229.404(a), Instructions; 17 C.F.R. 240.16a-1(e); *In re Longtop Fin. Techs. Secs. Litig.*, 2013 U.S. Dist. LEXIS 98330 (S.D.N.Y. July 11, 2013) (class settlement notice expressly incorporating definition in §229.404).

Contrary to my initial recollection, upon review of the GlobeOp mailing list with Rust Consulting, it appears that Rust did not mail the notice and claim form to Sylvia Tucker. I believe that we did not mail to Ms. Tucker based on our understanding that she was an excluded party. Accordingly, if it were to be determined by the Court that Ms. Tucker is not an "immediate family member" of Jeffrey Tucker, and should be included in the settlement classes, we would recommend that an otherwise appropriate claim be accepted by the Court.

rcf  
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**From:** Cunha, Mark G [<mailto:mcunha@stblaw.com>]

**Sent:** Friday, May 02, 2014 5:31 PM

**To:** Robert C. Finkel

**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); David Barrett; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon

**Subject:** RE: FG Settlement Fund

Rob, I'm puzzled by your response because the SEC regulations that you reference were not incorporated into the Stipulation of Settlement, nor do I recall them even being mentioned by either side in the negotiation of that Stipulation. There are varying definitions of "family", including "the spouse and children of one person" which is set forth in the dictionary behind my desk. Especially given that the term has no set meaning, its definition and application here should turn on the intent of the parties. For my part, in negotiating and agreeing to this language, I did not intend to exclude Sylvia Tucker from the settlement class.

Regarding the GlobeOp settlement, could you confirm whether Sylvia was sent the GlobeOp Notice and Claim Form?

Regards,

Mark

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**From:** Robert C. Finkel [<mailto:RFinkel@wolfpopper.com>]

**Sent:** Thursday, April 24, 2014 2:26 PM

**To:** Cunha, Mark G

**Cc:** [dfetterman@kasowitz.com](mailto:dfetterman@kasowitz.com); 'David Barrett'; 'Victor E. Stewart ([victorj@ix.netcom.com](mailto:victorj@ix.netcom.com))'; Sandra Vidal-Pellon

**Subject:** FG Settlement Fund

Mark – SEC regulations define an "immediate family member" to include a parent (as well as a sister and brother-in-law). 17 C.F.R. §229.404, Instructions, and 17 C.F.R. 240.16a-1.

We intend to follow that definition in excluding persons from the Settlement Class.

In any event, I was in error when I assumed that Sylvia Tucker filed a claim in the GlobeOp settlement. I reviewed Rust's workpapers and they have no record of Sylvia Tucker filing a claim in the GlobeOp settlement – although she did file a claim in the FG settlement.

Rob.

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**From:** Cunha, Mark G [<mailto:mcunha@stblaw.com>]

**Sent:** Tuesday, April 15, 2014 3:50 PM

**To:** Robert C. Finkel

**Subject:** FG Settlement Fund

Rob, have plaintiffs decided whether they will honor or reject the claim on the FG settlement fund made by Sylvia Tucker, Jeffrey Tucker's mother? If so, please advise as to what was decided, and if the claim was rejected, the basis for that decision.

Thanks,

Mark

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