UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, et al., Plaintiffs, -against- FAIRFIELD GREENWICH LTD., et al., Defendants.	09cv118-VM-FM

NEW GREENWICH LITIGATION TRUSTEE, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE FOR LIMITED PURPOSES AND FOR ENTRY OF ORDER UNSEALING CLASS CERTIFICATION MOTION PAPERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

MISCELLANEOUS

New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. Litigation Trusts, by its undersigned counsel, respectfully submits this memorandum in support of its motion (i) pursuant to Federal Rule of Civil Procedure 24(b), to intervene in this action for the limited purposes of this motion, and (ii) for entry of an Order unsealing the papers filed in support of and in opposition to the motion for class certification, which motion was granted by the Court by Decision and Order dated March 3, 2015 (ECF No. 1357, 2015 U.S. Dist. LEXIS 27050 (S.D.N.Y. Mar. 3, 2015) ("Class Certification Decision")).[1]

BACKGROUND

Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. (collectively, the "Domestic Funds") are among the Fairfield Greenwich Group ("FGG") family of funds that invested with Bernard L. Madoff Investment Securities LLC. In November 2010, the Domestic Funds filed petitions for relief under Chapter 11 of the United States bankruptcy code.[2] In connection with the bankruptcy, the Greenwich Sentry and Greenwich Sentry Partners Litigation Trusts were established, and litigation on behalf of the trusts was filed in New York State court.[3] New Greenwich Litigation Trustee, LLC has recently been appointed as Successor Trustee of the trusts.

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[1] To narrow any dispute, the Trustee does not seek to unseal materials reflecting discovery produced by the plaintiffs or depositions of the plaintiffs.

[2] *See In re Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P.*, Case No. 10-16229 (Bankr. S.D.N.Y.).

[3] *See Walker, Truesdell, Roth & Assocs., Inc. v. GlobeOp Fin. Servs. LLC*, Index Nos. 600469/2009 & 600498/2009 (Sup. Ct., NY Cnty. May 27, 2014) (dismissal motions granted), *notices of appeal filed* (Sup. Ct., NY Cnty., June 27, 2014). Discovery in the state cases has largely been coordinated with discovery in this action.

Defendants in the state cases -- who also are defendants in this action -- are (i) PricewaterhouseCoopers LLP and PricewaterhouseCoopers Accountants N.V. (collectively, "PwC"), who served as the Domestic Funds' outside auditors,[4] and (ii) Citco Fund Services (Europe) BV and Citco (Canada) Inc. (collectively, "Citco"), who served as administrators. As alleged in the state cases, the Domestic Funds sustained damages due to defendants' wrongful conduct including, *inter alia*, PwC's failure to audit the Funds' financial statements in accordance with generally accepted auditing standards, and Citco's concealment of material information from the Funds. According to defendants, the state cases are "substantially similar" to this case. *See Anwar v. Fairfield Greenwich Ltd.*, No. 15-792 (2d Cir. Mar. 17, 2015), Doc. 6-2, Citco Rule 23(f) Petition at 15 n.11; *see also id.*, Declaration of Walter Rieman, Esq., ¶ 6 (attaching state complaints).[5]

On March 3, 2015, this Court (Marrero, J.) issued the Class Certification Decision, certifying a plaintiff class of investors in the Domestic Funds and other FGG-sponsored funds. *See* ECF No. 1357, 2015 U.S. Dist. LEXIS 27050, *petition filed*, No. 15-792 (2d Cir Mar. 16, 2015). The Court found that "Plaintiffs have provided evidence that the Citco Defendants withheld the same material information from all of their clients or investors . . . ." ECF No. 1357 at 34-35, 2015 U.S. Dist. LEXIS 27050, at *77 (internal quotation marks and citation

[4] PricewaterhouseCoopers LLP was an auditor for both Domestic Funds, while PricewaterhouseCoopers Accountants N.V. was an auditor only for Greenwich Sentry, L.P.

[5] In fact, there are important differences between the state cases and this case. For example, the state cases are not subject to preclusion under the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101, 112 Stat. 3227 (1998) ("SLUSA"). SLUSA's applicability to this case, however, is sharply disputed by the parties. *See* ECF No. 1376. Additionally, defendants claim that the class members have no standing to assert some or all of their claims, arguing that only the funds (and not investors in the funds) were in privity with the defendants.

omitted). The Court also stated that, "among the material omissions Plaintiffs allege, and *support with common evidence*, are that Citco Defendants did not disclose that"

> (1) "its internal auditors had *grave doubts* about the veracity of the Funds' financial information and whether the Funds' assets existed"; (2) "*it was not following its own, or industry-standard procedures*, but was basing the NAV solely on unverified information from Madoff, never reconciling that information with an independent source"; (3) "*its attempts to verify that the Funds' assets existed failed* due to Madoff's lack of cooperation in meetings with Citco"; (4) "it was *doing nothing* to supervise Madoff as Citco's sub-custodian"; and (5) "Fairfield Sentry was on Citco's internal 'Watch List' as a 'high risk fund.'"

ECF No. 1357 at 33-34, 2015 U.S. Dist. LEXIS 27050, at *76 (emphasis supplied). *See also* ECF No. 1357 at 34 n.9, 2015 U.S. Dist. LEXIS 27050, at *77 n.9 ("Plaintiffs provide common evidence in the record to support each of these omissions."). Although the Class Certification Decision is publically filed, the parties filed their papers in connection with that motion (including briefs and exhibits) under seal.[6] As shown below, the Trustee and members of the public enjoy a presumptive right to access to those documents under both the common law and the First Amendment; accordingly, the papers should be unsealed forthwith.

ARGUMENT

A. The Trustee Should be Permitted to Intervene for Limited Purposes

A Rule 24(b) motion is the proper mechanism for a non-party seeking to intervene for the limited purpose of unsealing court records. *See Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979); *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 471 (S.D.N.Y. 1981), *aff'd*, 677 F.2d 230 (2d Cir. 1981). Rule 24(b) provides in pertinent part:

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[6] The Docket references various "sealed" documents (*see* ECF Nos. 1296, 1323, 1326 and 1327), which might include some of the materials at issue.

> (1) In General. On timely motion, the court may permit anyone to intervene who ... (B) has a claim or defense that shares with the main action a common question of law or fact.
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> * * *
>
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

Rule 24(b)'s requirements are easily satisfied here. First, the motion is timely, as the Trustee promptly requested, in accordance with Judge Marrero's individual rules, a pre-motion conference on April 13, 2015 -- *i.e.*, just weeks after the Court issued the Class Certification Decision (ECF No. 1366) -- and then filed the instant motion in accordance with the Court's April 30, 2015 scheduling order (ECF No. 1371).

Second, because the Trustee challenges the sealing of the class certification papers, its claim, as required by Rule 24(b)(1)(B), shares "a question of law or fact in common with the main action" -- namely, whether the papers should be sealed. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (internal quotation marks omitted); *see* Charles Wright, Arthur Miller & Mary Kane, 7C Federal Practice and Procedure 3d § 1911 at 468 (2007) ("[C]ourts generally have interpreted their discretion under the rule broadly and have held that it can be invoked by nonparties who seek to intervene for the sole purpose of challenging confidentiality orders.").

Finally, limited intervention will not "unduly delay or prejudice the adjudication of the original parties' rights," *see* Fed. R. Civ. P. 24(b)(3), as the Trustee does not seek to litigate the merits of this action. The parties have proposed a January 4, 2016 trial date (*see* ECF No. 1368

at 2, Letter of David Barrett, Esq. on behalf of the parties to the Court),[7] and the Trustee's limited intervention would not delay that date or create any prejudice.[8] Accordingly, the Trustee should be permitted to intervene for the limited purposes of this motion.[9]

B. The Class Certification Papers Should be Unsealed

1. There is a Presumptive Right of Access to the Papers

"The common law right of public access to judicial documents is firmly rooted in our nation's history." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Indeed, that right "is said to predate even the Constitution itself." *United States v. Erie County*, 763 F.3d 235, 239 (2d Cir. 2014) (citing *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")). As the Second Circuit has explained, the right "is based on the need for federal courts, although independent -- indeed particularly because they are independent -- to have a measure of accountability and for the public to have confidence in the administration of justice." *Lugosch*, 435 F.3d at 119 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*").

"Judicial documents" are court filings that are "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch*, 435 F.3d at 119 (quoting *Amodeo I*, 44

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[7] The letter's reference to a "January 4, 2015" trial date is a typographical error.

[8] The fact that the Trustee -- but not the parties -- has sought to unseal the papers shows that the Trustee's interest is not adequately represented by the parties, further warranting permissive intervention. *See Dorsett v. Cnty. of Nassau*, 283 F.R.D. 85, 90 (E.D.N.Y. 2012).

[9] Even if the Trustee's request for limited intervention is denied, the Court should still unseal the documents for the reasons set forth in the following section. *See Eagle Star Ins. Co. v. Arrowood Indemn. Co.*, No. 13 CV 3410 (HB), 2013 U.S. Dist. LEXIS 135869, at *4 (S.D.N.Y. Sept. 13, 2013) (granting motion to unseal, but denying motion to intervene as moot, explaining: "The Court may *sua sponte* unseal the records at issue irrespective of a motion to intervene.").

F.3d at 145). Here, the class certification papers qualify as "judicial documents" because they were relevant to the class motion, and the Court considered them in ruling on the motion.

In addition to the common law right of access, the First Amendment provides the Trustee a presumptive right of access to the class certification motion papers. *See United States v. Green*, No. 12 CR 83S, 2015 U.S. Dist. LEXIS 48982, at *2 (W.D.N.Y. Apr. 14, 2015) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits, and establishes a presumption of public access that can only be overcome by specific, on-the-record findings that the public's interest in access to information is overcome by specific and compelling showings of harm.").

To obtain class certification, the *Anwar* plaintiffs needed to "establish the Fed. R. Civ. P. 23 requirements by a *preponderance of the evidence*." *Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 119 (2d Cir. 2014) (emphasis supplied). Reflecting that heavy burden, the parties filed voluminous briefs and supporting exhibits that no doubt presented an exhaustive presentation of their opposing positions on class certification.[10] Indeed, the *Anwar* plaintiffs' burden on the motion *exceeded* the burden that typically would be imposed on a plaintiff opposing a summary judgment motion. Unlike a class certification motion, on a summary judgment motion the plaintiff would need to present evidence merely showing the existence of a material issue of fact, *see Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 262 (2d Cir. 2001); it would not need to prove anything by a preponderance of the evidence.

[10] Citco's pending Rule 23(f) petition to the Second Circuit alone comprises some *12 volumes*. *See Anwar v. Fairfield Greenwich Ltd.*, No. 15-792 (2d Cir. Mar. 17, 2015), Doc. 6-2.

With respect to summary judgment motion papers, the Second Circuit has squarely held that "a presumption of immediate public access attaches under both the common law and the First Amendment." *Logusch*, 435 F.3d at 126. Given that holding, there can be no basis for refusing to recognize a First Amendment right of access to the class certification papers.

Additional factors warrant recognition of a First Amendment right of access here. First, this Court has actually *decided* the class certification motion, and thus has already engaged in extensive judicial decision-making in the context of an extraordinarily large record. *Compare with Logusch*, 435 F.3d at 120-21 (holding that First Amendment right of access applied to summary judgment motion papers, even though motion had not yet been decided); *Erie County*, 763 F.3d at 240-43 (holding that First Amendment right of access applied to court-filed compliance reports, even though court had not yet taken any action with respect to the reports).

Second, the Court issued its Class Certification Decision based solely on the papers without a public hearing. Had there been a hearing, it presumably would have been transcribed and open to the public. As the Second Circuit has instructed, "'access to written documents filed in connection with pretrial motions is particularly important in the situation . . . where no hearing is held and the court's ruling is based solely on the motion papers.'" *Logusch*, 435 F.3d at 124 (ellipsis in original, citation omitted).

Third, the critical importance of the Class Certification Decision in the overall context of this litigation warrants recognition of a First Amendment access right. "[D]enying or granting class certification is often the defining moment in class actions," *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (citation omitted); indeed, parties may seek interlocutory review of a class certification decision, *see* Fed. R. Civ. P. 23(f) -- something the defendants have successfully done once and are pursuing again.

Fourth, recognition of a First Amendment right of access here is supported by the "experience and logic" analytical approach sometimes employed by the courts. *See Erie County*, 763 F.3d at 241. The "experience" factor "focus[es] on whether the documents are ones that 'have historically been open to the press and general public.'" *Id.* (citation omitted). "[T]he notion of public access to judicial documents is a capacious one: the courts of this country have long recognized a 'general right to inspect and copy public records and documents, including judicial records and documents' in part because the public has an interest in 'keep[ing] a watchful eye on the workings of public agencies.'" *Id.* (second brackets in original) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978)).

Experience shows that class certification motion papers historically have been publicly filed. *See* Linda Mullinex, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 Geo. Wash. L. Rev. 606, 609 (May 2014) (describing "[t]he earlier era of drive-by class certifications or certifications based on the pleadings alone").[11] *See generally Erie County*, 763 F.3d at 241 (finding that First Amendment right of access applied to reports prepared by compliance monitors, where movant pointed to "several instances" where similar reports were publically accessible); *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002), *construed in Hartford Courant v. Pelligrino*, 371 F.3d 49, 58 (2d Cir. 2004) ("holding that the District of Rhode Island's blanket policy of refusing to file memoranda of law that counsel were required to submit in connection with motions violated the First Amendment").

"Logic" also supports unsealing the documents, as the issues in this case "are manifestly ones of public concern and therefore ones which the public has an interest in overseeing." *Erie County*, 763 F.3d at 242. Madoff's scheme obviously is the subject of enormous public

[11] Available at http://www.gwlr.org/wp-content/uploads/2014/07/Mullenix_82_3_Redacted.pdf.

attention, *see In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011), and has been described in this case as "the largest financial fraud yet witnessed in the record of human wrongdoing and tragedy." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 412 (S.D.N.Y. 2010) (Marrero, J.). Defendants themselves have emphasized "the broad public interest in the Madoff matter" and, specifically, the "broad public interest in full disclosure regarding Madoff's fraud so that the fraud cannot be repeated." Exhibit 1 hereto, Petition at 6;[12] *see id.* at 2 ("this [is] a matter of unique public interest"). PwC has even publically addressed the Madoff scheme in its marketing materials, calling it "the largest Ponzi scheme uncovered to date" with an estimated $50 billion in losses suffered by victims including "individual investors and sophisticated institutions alike." *See* PricewaterhouseCoopers LLP, "Ponzi schemes: a classic scam," *Forensic eye opener, Exploring today's hottest issues in economic crime* 10, 12 (Summer 2013).[13]

Moreover, the evidence of Citco's "grave doubts" about the funds' assets and its failure to "follow[] its own, or industry-standard procedures" (ECF No. 1357 at 33-34, 2015 U.S. Dist. LEXIS 27050, at *76) directly implicates defendants' due diligence and monitoring activities -- clearly among the "critical issues" in this case. *See generally* Exhibit 1 hereto, Mills Letter at 2 ("Among the critical issues in this case is whether Plaintiffs can prove that the Defendants

[12] Exhibit 1 hereto is a copy of the August 19, 2013 Letter of Carl Mills, Esq. on behalf of defendants to The Honorable Frank Maas ("Mills Letter"). Exhibit A to the Mills Letter is a June 21, 2013 letter to the SEC and the Petition for Review of Decision to Deny Defendants' Request to Depose Nine Current and Former Securities and Exchange Commission Employees ("Petition"), excluding exhibits thereto, filed in *In re Subpoenas Served in Anwar v. Fairfield Greenwich Ltd.*

[13] Available at http://www.pwc.com/en_CA/ca/risk/forensic-services/publications/pwc-forensic-eye-opener-summer-2013-en.pdf. *See also id.* ("[A]rming investors with the right tools and education to appropriately understand and evaluate investment opportunities will greatly reduce the impact of these schemes.").

should have reasonably foreseen that the Fairfield defendants would fail to perform the expected due diligence and monitoring of the Funds' investments held by BLMIS . . . .").

Additionally, defendants' roles with respect to the FGG-sponsored funds have attracted significant public attention. *See, e.g.*, Halah Touryalai, *Protection Racket*, Forbes.com (Apr. 6, 2011) ("[A]mong [Citco's] mix of clients have been tainted funds, including Fairfield Greenwich Group, which funneled $7 billion into Bernard L. Madoff Investment Securities.");[14] *The Madoff Affair*, Frontline (May 12, 2009) (referencing Citco);[15] Michael J. de la Merced, *In Madoff's Wake, Scrutiny of Accounting Firms*, N.Y. Times (Dec. 21, 2008) ("PricewaterhouseCoopers was the main auditor for Sentry, the largest fund run by Fairfield Greenwich Group, the $14.1 billion investment manager that has lost the most money so far in the Madoff scandal. The accounting firm was tasked with minding Sentry, which had about $7.5 billion invested in Mr. Madoff's firm.").[16]

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[14] Available at http://www.forbes.com/forbes/2011/0425/features-citco-hedge-fund-keunen-protection-racket.html.

[15] Available at http://www.pbs.org/wgbh/pages/frontline/madoff/interviews/cohen.html#1.

[16] Available at http://www.nytimes.com/2008/12/22/business/22accounting.html?_r=0. Also publically available are charges filed by the Institute of Chartered Accountants of Ontario's Professional Conduct Committee against PricewaterhouseCoopers LLP's engagement partner in charge of the Fairfield Sentry Limited audit, including charges that he "failed to obtain sufficient and appropriate audit evidence of the operating effectiveness of the internal controls of Bernard L. Madoff Investment Securities, LLC . . . ." *See* Institute of Chartered Accountants of Ontario, Allegations of Professional Misconduct against Stephen Wall (Oct. 12, 2012), http://www.cpaontario.ca/Public/CurrentHearings/HearingInfo/1011page16369.pdf, at ¶¶ 1(vi), 2(vi). *See also* Francine McKenna, *PwC Partner At MF Global Has Long, And Mixed, Track Record*, Forbes.com (June 7, 2013), http://www.forbes.com/sites/francinemckenna/2013/06/07/pwc-partner-at-mf-global-has-long-and-mixed-track-record/) ("An independent review of Bernie Madoff Ponzi scheme litigation will show that PwC also audited the Kingate Global Funds, the Fairfield Greenwich Group of funds – the largest Madoff feeder fund family – and several other funds that invested in Madoff."); Stephen Gandel, *The Madoff Fraud: How Culpable Were the Auditors?*, Time.com (Dec. 17, 2008), http://content.time.com/time/business/article/0,8599,1867092,00.html) ("[I]t now appears KPMG, along with the other auditors of the Madoff

Footnote continued

Defendants' involvement in *this litigation itself* has attracted press reporting. *See* Chad Bray, *Fairfield Greenwich Founders to Settle Madoff Suit*, Wall St. J. (Nov. 6, 2012) (noting that FGG settlement "doesn't resolve claims against several firms that acted as the Sentry funds' auditor, custodian or administrator, including PricewaterhouseCoopers LLP and Citco Group Ltd.").[17] Even the Class Certification Decision has drawn public attention, further underscoring the public interest in this case.[18] Thus, a First Amendment right of access is amply supported by "experience and logic."

In sum, the Trustee has a common law and First Amendment presumptive right of access to the class certification documents.

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feeder funds, did very little to ensure investors weren't being ripped off.").

[17] Available at http://www.wsj.com/articles/SB10001424127887324894104578103620671495216. *See also* Ianthe Dugan & David Crawford, *Accounting Firms That Missed Fraud at Madoff May Be Liable*, Wall St. J. (Feb. 18, 2009), http://www.wsj.com/articles/SB123491638561904323 ("PricewaterhouseCoopers's Canadian affiliate has dismissed claims that it was negligent in its audit of Madoff feeder fund Fairfield Greenwich Group. . . . 'PwC was not the auditor for Bernard Madoff Investments where the alleged fraud occurred,' the Canadian affiliate said in a statement.").

[18] *See* Joe Van Acker, *Madoff Investors Win Class Cert. In Suit Against PwC, Citco*, Law360 (Mar. 4, 2015), http://www.law360.com/articles/627511/madoff-investors-win-class-cert-in-suit-against-pwc-citco; Christine Vargas Colmey & Jonathan Sablone, *Back in the saddle again: Madoff feeder fund plaintiffs closer to recovery from fund service providers Citco and PricewaterhouseCoopers*, Nixon Peabody LLP (Mar. 17, 2015), http://www.nixonpeabody.com/files/174229_Private_Fund_Disputes_Alert_17MAR2015.pdf; Stephen R. Hernick & Matthew C. Blickensderfer, *Madoff lawsuit shows that individual issues of reliance will not doom class certification of fraud claims in securities cases*, Lexology (Apr. 24. 2015), http://www.lexology.com/library/detail.aspx?g=482b656b-ffe1-4a40-bbcf-c1dba1f5e973.

2. The *Anwar* Parties Bear the Heavy Burden to Overcome the Presumptive Right of Access

Because a presumptive right of access attaches to the class certification documents, the *Anwar* parties bear the burden to overcome the presumption. To overcome the First Amendment presumptive right of access, the *Anwar* parties must demonstrate -- on a document-by-document, redaction-by-redaction basis -- "the most compelling reasons" warranting the continued sealing of the documents. *See Lugosch,* 435 F.3d at 121, 123 (citation omitted); *see also Doe v. Ashcroft*, 317 F. Supp. 2d 488, 492 (S.D.N.Y. 2004) (Marrero, J.) (in case implicating national security concerns, noting Government's burden to show "the specific and compelling reasons" for "each particular redaction," citing "exacting First Amendment standards"). Continued sealing "may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Logusch*, 435 F.3d at 124. *See Green*, 2015 U.S. Dist. LEXIS 48982, at *3-4 (granting motion to restrict access to hearing transcript that identified government witnesses in criminal case, where detective's affidavit provided specific information showing that witnesses "have been subjected to intimidating behavior" and one witness had been "shot three times by unknown assailants").

The First Amendment presumption is "stronger" than the common law presumption, *Erie County*, 763 F.3d at 241; nonetheless, the common law presumption is still heavy, given "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* at 239 (quoting *Amodeo II*, 71 F.3d at 1049).

As Judge Marrero has explained, the burden to overcome the presumption of access is "at its peak" when the documents at issue are "submitted to and used by the Court":

> Judicial records presumptively are to be made available to the public. *See United States v. Amodeo*, 71 F.3d 1044, 1047-51 (2d

> Cir. 1995). *The weight of the presumption varies according to the document at issue and "is at its strongest when the document in question, as here, has been submitted as a basis for judicial decision making."* By contrast, the presumption is particularly weak if the document plays "no role in the performance of Article III functions, such as those passed between the parties in discovery." The party requesting that a matter be filed and kept under seal bears the burden of showing why the material should be kept from public view. *Here, the presumption in favor of public access is at its peak because the documents at issue were submitted to and used by the Court in rendering this Decision.*"

United States ex rel. Alcohol Foundation, Inc. v. Kalmanovitz Charitable Foundation, Inc., 186 F. Supp. 2d 458, 465 (S.D.N.Y. 2002) (emphasis supplied, various internal citations omitted). *See also Eagle Star Ins. Co. v. Arrowood Indem. Co.*, No. 13 Civ. 3410 (HB), 2013 U.S. Dist. LEXIS 135869, at *7 (S.D.N.Y. Sept. 23, 2013) (because sealed materials "constitute 'the heart of what the Court is asked to act upon," "[t]he weight of the presumption of access therefore is correspondingly high") (citation omitted); *In re "Agent Orange" Prod. Liability Litig.*, 104 F.R.D. 559, 572-73 (E.D.N.Y. 1985) ("Once a court has relied on material, that material should be disclosed."), *aff'd*, 821 F.2d 139 (2d Cir. 1987); *Manchanda v. Bose*, No. 25 Civ. 9658 (LGS), 2015 U.S. Dist. LEXIS 965, at *5-6 (S.D.N.Y. Jan. 6, 2015) (denying motion to seal various documents, including complaint and information revealed in motion to dismiss and accompanying exhibits, stating: "the circumstances here are not sufficiently extraordinary to outweigh the presumption in favor of public access.").[19]

[19] In *Cochran v. Volvo Group North Am., LLC*, 931 F. Supp. 2d 735 (M.D.N.C. 2013), which involved a "potential class action," *see id.* at 731, the court recognized a common law (but not a First Amendment) presumptive right of access to class certification papers. *Id.* at 728-29. Even then, the presumption of access could be rebutted "only if countervailing interests 'heavily outweigh the public interest in access . . . .'" *Id.* at 731 (citation omitted). *See generally id.* at 730 ("Because lawsuits filed on behalf of a class potentially affect the rights of persons who are not parties to the case, transparency has heightened value in class actions."); *In re "Agent Orange,"* 104 F.R.D. at 572-73.

In this case, because actual evidence was "submitted to and used by the Court," the presumption of access "is at its peak," *Alcohol Foundation,* 186 F. Supp. 2d at 465, even with respect to the materials that were *not* referenced in the Class Certification Decision. *See Logusch*, 435 F.3d at 123 ("'If the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision . . . documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision.' Moreover, 'once those submissions come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberation.'"). (emphasis in original, citations omitted)

3. The *Anwar* Parties Cannot Satisfy their Burden

For several reasons, the *Anwar* parties cannot satisfy their burden to overcome the presumptive right of access.[20]

First, this case concerns events of many years ago -- *i.e.*, prior to Madoff's arrest in December 2008 -- including PwC's and Citco's activities in 2002 and 2003, respectively. *See Anwar*, 728 F. Supp. 2d at 393 n.4, 395. Instructive here is Judge Kaplan's recent decision in *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, No 12-md-2355 (LAK) (S.D.N.Y. Apr. 30, 2015) (Exhibit 2 hereto), granting a motion to remove the defendant bank's confidentiality designations with respect to emails that were "old" -- *i.e.*, dating from 1997 to 2010. *See id.* at 1. As the Court explained, "from a competitive point of view, [the documents]

[20] Because the class certification materials are subject to the First Amendment right of access, the Court need not determine whether the *Anwar* parties have overcome the common law right of access. *See Erie County*, 763 F.3d at 241 ("Since we find that the compliance reports are subject to a First Amendment right of access, which is stronger and can only be overcome under more stringent circumstances than the common law presumption, . . . we need not, and do not, engage in such a common law analysis."). In any event, the *Anwar* parties cannot satisfy the lower (albeit still heavy) burden to overcome the common law right of access.

appear quite stale in light of the events of the last several years relating to the matters here in controversy." *Id.*[21] *See also In re "Agent Orange,"* 104 F.R.D. at 575 ("An important factor in determining whether disclosure will cause competitive harm is whether the information that the party seeks to protect is current or stale."); *United States v. Int'l Bus. Machines Corp.,* 67 F.R.D. 39, 48-49 (S.D.N.Y. 1975).

Second, the "broad public interest in the Madoff matter" (defendants' phrase, *see* page 9 above) and the public interest in the Class Certification Decision itself weigh heavily in favor of unsealing the papers. *See In re "Agent Orange,"* 104 F.R.D. at 573-74; *United States v. Gen. Motors Corp.*, 99 F.R.D. 610, 612 (D.D.C. 1983) (unsealing documents where case was "of some public significance and has, in fact, already received considerable publicity," explaining that "the greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings").

Third, any possibility that disclosure of the documents may embarrass the defendants (or, more accurately, *add* to any embarrassment already caused by the description of the evidence in the Class Certification Order) would not warrant maintaining the seal. *See Joy v. North*, 692 F.2d 880, 884 (2d Cir. 1982) ("[A] naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal."); *Bank of New York Mellon*, Exhibit 2 hereto at 1 (unsealing emails even though some or all of them were "probably . . . embarrassing" to the defendant); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv.*

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[21] Judge Kaplan found that the bank had not demonstrated "good cause" under the confidentiality order, and that its arguments "approach the outer limit of responsibility." *See id.* at 1-2. Here, of course, the *Anwar* parties need to do much more than merely show "good cause" to maintain the documents under seal.

Sec. LLC, Adv. Pro. No. 08-01789 (BRL), 2011 Bankr. LEXIS 1390, at *7 (Bankr. S.D.N.Y. Apr. 12, 2011) ("the Defendants have not adequately established any harm beyond merely 'embarrassing or prejudicial' association with these Ponzi scheme proceedings, which is not sufficient cause for sealing").

Fourth, the parties anticipate a January 2016 trial date, at which time all of the evidence of defendants' alleged misconduct will likely become public. Merely delaying the inevitable public disclosure serves no "higher values" sufficient to overcome the right of access at this juncture. *See Logusch,* 435 F.3d at 124.

Fifth, the *Anwar* parties cannot meet their burden by relying on the outstanding confidentiality stipulation and order. *See generally* Second Amended Stipulation and Order Governing Confidentiality of Discovery Material, ECF No. 591 ("Discovery Order"). Under the Discovery Order, defendants could designate a document as confidential so long as it contained "non-public information." *Id.*, ¶ 2. But simply because something is "non-public" does not come close to satisfying the stringent standard necessary to overcome the presumptive right of access here.[22] Indeed, the right of access *assumes* that the judicial documents contain nonpublic information but still should be unsealed. Moreover, the Discovery Order contemplates challenges to the confidentiality designations (*id.*, ¶ 9), thus eliminating any "reliance" argument that the *Anwar* parties might assert.[23] *See Lugosch*, 435 F.3d at 126 ("[T]he mere existence of a

[22] The Discovery Order's standard is even weaker than Rule 26(c)'s standard for a protective order. *See* Fed. R. Civ. P. 26(c)(1); *In re "Agent Orange" Prod. Liability Litig.*, 821 F.2d 139, 147-48 (2d Cir. 1987) (noting that protective order in that case permitted parties to designate materials as confidential, even though they "never were required to show good cause as mandated by Rule 26(c)").

[23] The Discovery Order provides that, in the event of a challenge, the party seeking confidential treatment bears "the burden of demonstrating that the designated material should be protected under . . . the applicable law." *Id.* ¶ 9.

confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable."); *Eagle Star*, 2013 U.S. Dist. LEXIS 135869, at *8-9.

In sum, the *Anwar* parties cannot satisfy their burden to overcome the presumptive right of access.

CONCLUSION

For the foregoing reasons, the Court should grant the Trustee's motion for permissive intervention, and enter an order unsealing the class certification papers.

Dated: New York, New York
May 11, 2015

Respectfully submitted,

MILBERG LLP

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Attorneys for Proposed Intervenor New Greenwich Litigation Trustee, LLC, as Successor Trustee of Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. Litigation Trusts

704361v1

EXHIBIT 1

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Hubbard

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August 19, 2013

BY HAND

The Honorable Frank Maas
United States Magistrate Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Anwar v. Fairfield Greenwich Limited*,
Master File No. 09-CV -00118 (VM) (FM)

Dear Judge Maas:

We write on behalf of defendants PricewaterhouseCoopers Accountants N.V., PricewaterhouseCoopers LLP, and The Citco Group Limited and related entities (collectively, "Defendants") pursuant to your Honor's Individual Practice Rule 1.A. and Local Civil Rule 37.2 to request an informal conference to address the Security and Exchange Commission's (the "Commission" or "SEC") refusal to comply with Rule 45 subpoenas issued in this action and served on current and former SEC employees (the "Witnesses").

Procedural History

On February 27, 2013, Defendants served subpoenas requesting the deposition testimony of nine current and former SEC employees who participated in the SEC's examinations and investigations into Madoff and BLMIS. Defendants and the SEC then engaged in a series of correspondence and calls, during which the SEC requested additional details regarding the information sought from the Witnesses, and Defendants provided information regarding the scope and purpose of the requested testimony. Among other things, Defendants informed the SEC that the Witnesses have direct knowledge of communications between Madoff, Fairfield individuals, and the SEC, and that the Witnesses' testimony regarding that knowledge is important to understanding the nature and extent of Madoff's deception, and Fairfield's involvement therein. Fairfield's conduct is critically important to defending against Plaintiffs' claims and assessing comparative fault. Additionally, Defendants stated that the Witnesses' personal knowledge is a source of evidence relevant to evaluating Plaintiffs' allegations regarding the potential effectiveness of any additional diligence that Plaintiffs allege Defendants should have performed.

Additionally, the parties discussed a number of alternative arrangements, and Defendants offered to limit the number of depositions to four in order to lessen any perceived

burden on the SEC. Following these discussions, on June 7, 2013, SEC Associate General Counsel Richard M. Humes sent Defendants a decision refusing to authorize any of the requested depositions on the grounds that preparing for such depositions was unduly burdensome (the "June 7 Decision," attached as Exhibit 7 to Exhibit A). On June 14, Defendants timely submitted a Notice of Intent to Petition for Review of the Decision in accordance with SEC regulations. (Exhibit 7 to Exhibit A.) On June 21, 2013, Defendants filed their Petition for Review (the "Petition," attached as Exhibit A), which the SEC denied on August 5, 2013 (the "Aug. 5 Decision", attached as Exhibit B, together with the June 7 Decision, the "Decisions").

The Testimony is Relevant

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." This Court, not the SEC, is the tribunal best suited to make determinations regarding whether the requested testimony is relevant. Indeed, this Court has already made determinations in this action regarding document and witness challenges, and is familiar with the various claims and defenses of the parties. The SEC should therefore not preempt the authority of this Court to establish the parameters of discovery in this case.

The proposed testimony is critical to Defendants' ability to present their defenses. Under New York law, "a negligent tortfeasor is liable for any reasonably foreseeable risk that is proximately caused by its action." *Kosymnka v. Polaris Indus., Inc.*; 462 F.3d 74, 79 (2d Cir. 2006). Among the critical issues in this case is whether Plaintiffs can prove that the Defendants should have reasonably foreseen that the Fairfield defendants would fail to perform the expected due diligence and monitoring of the Funds' investments held by BLMIS, or that the broker-dealer regulatory regime, of which the SEC was a fundamental component, would exhibit the unprecedented breakdown and failure to uncover the Madoff fraud that is recounted in detail in the SEC's Office of Inspector General's Report entitled "Investigation of the Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme." Two of the Witnesses spent more than two and a half months at BLMIS's offices, interacting with Madoff on a near-daily basis, and inquiring regarding many of the so-called "red flags" that the *Anwar* Plaintiffs allege should have alerted the Defendants that something was amiss at BLMIS. All of the Witnesses had some interactions with Madoff, BLMIS employees, and/or FGG.

Defendants' Petition stressed the Witnesses' central roles, noting that "Madoff's ability to conceal the fraud from even the most determined investigators and examiners is highly relevant to whether the Defendants could or should have uncovered Madoff's scheme." (Petition at 10.) Defendants further noted that the Witnesses' testimony "is important to understanding the nature and extent of Madoff's deception and Fairfield's involvement therein. Fairfield's conduct is critically important to the Defendants in defending against Plaintiffs' claims and assessing comparative fault." (Petition at 5.) The Witnesses' firsthand knowledge regarding the SEC's examinations and investigations is entirely relevant to Defendants in defending against Plaintiffs' claims, and the Witnesses should be required to testify. *See In re Us. Bioscience Sec. Litig.*, 150 F.R.D. 80 (E.D. Pa. 1993) (requiring FDA employees with firsthand factual knowledge to testify).

The Depositions Will Not Impose An Undue Burden On The SEC

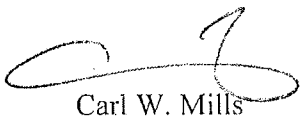
Under Federal Rules of Civil Procedure 26 and 45, district courts consider whether discovery requests would impose an undue burden on the recipient, and further consider a number of factors relevant to the question of undue burden, including: whether the discovery is "unreasonably cumulative or duplicative"; whether the discovery sought is "obtainable from some other source that is more convenient, less burdensome, or less expensive"; and whether "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. (June 7 Decision at 2-3 (quoting *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007)).

While the testimony the Defendants seek will not unduly burden the SEC, it will significantly aid in the full and fair resolution of *Anwar*. The Decisions overstate the burden on the SEC of allowing the depositions. Defendants' Petition noted that the requested depositions are narrow in scope. In correspondence with the SEC, the Defendants listed specific topics about which each witness would be examined. (Exhibit 4 to Exhibit A, Appendix A; Exhibit 5 to Exhibit A, Appendix A.) Such targeted discovery, propounded upon a limited number of deponents, regarding specified areas of examination, is not unduly burdensome. *See Jones v. McMahon*, No. 5:98-CV-0374, 2007 WL 2027910 (N.D.N.Y. July 11, 2007) (permitting nonparty depositions of 19 of 32 specifically identified non-party New York State Troopers).

Contrary to the SEC's objections, the fact that agency attorneys would have to prepare the Witnesses for their deposition does not constitute an undue burden. *See Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D.D.C. 1991) ("The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden."); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299 (S.D.N.Y. 1982) (incurring some burden or expense is "not a valid objection where the information sought is relevant and material"). Furthermore, only three of the Witnesses are still employed by the SEC. Defendants have expressed willingness to accommodate the Witnesses' schedules so that the depositions are as minimally disruptive as possible, even offering to reduce the number of depositions to minimize any impact on the SEC's resources and avoid taking cumulative or duplicative testimony. Such a compromise is the proper approach to minimizing the potential burden on the agency, rather than refusing to allow any depositions at all. *See Bridgeport Music Inc. v. UMG Recordings, Inc.*, No. 05 Civ. 6430 (VM)(JCF), 2007 WL 4410405 (S.D.N.Y. Dec. 17, 2007) ("discovery should not simply be denied on the ground that the person or entity from whom it is sought is not a party to the action... A better approach is for the court to take steps to relieve a nonparty of the burden of compliance even when such accommodations might not be provided to a party.").

Under the direction of this Court, the parties have successfully taken scores of depositions, including those of third-parties. The protocol that has been established has worked well to ensure that depositions are conducted fairly and efficiently. There is no reason to expect otherwise in this instance.

Respectfully submitted,



Carl W. Mills

cc: All *Anwar* counsel of record (via e-mail)
Richard M. Humes, Esq.

EXHIBIT A

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June 21, 2013

VIA FACSIMILE AND FEDERAL EXPRESS

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-9612

Re: Subpoenas issued in *Anwar v. Fairfield Greenwich Limited*
No. 09 Civ. 00118 (VM)(FM) (S.D.N.Y.)

Dear Secretary Murphy:

We represent GlobeOp Financial Services LLC ("GlobeOp") and write on behalf of GlobeOp, PricewaterhouseCoopers Accountants N.V. ("PwC Netherlands"), PricewaterhouseCoopers LLP ("PwC Canada"), and The Citco Group Limited and related entities ("Citco") (collectively, "Defendants") in the above-referenced action.

On June 7, 2013, the Securities and Exchange Commission ("SEC") denied Defendants' request to depose nine current or former SEC employees. On June 14, 2013, pursuant to Rule 430(b)(1) of the SEC's Rules of Practice, Defendants filed a notice of our intention to petition for review this decision. Pursuant to Rule 430(b)(2), we enclose our Petition for Review of the SEC's June 7 decision.

Sincerely,

Jonathan D. Cogan
Justin Sommers
+1 212 488 1200

cc: All *Anwar* Counsel

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In re Subpoenas Served in ANWAR, *et al.* v. FAIRFIELD GREENWICH LIMITED, *et al.*	Master File No. 09-cv-118 (VM) (S.D.N.Y.)

PETITION FOR REVIEW OF DECISION TO DENY DEFENDANTS' REQUEST TO DEPOSE NINE CURRENT AND FORMER SECURITIES AND EXCHANGE COMMISSION EMPLOYEES

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Attorneys for Defendant
GlobeOp Financial Services LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Other Authorities

Defendants GlobeOp Financial Services LLC, Citco Group Limited and related entities,[1] PricewaterhouseCoopers Accountants N.V. ("PwC Netherlands"), PricewaterhouseCoopers LLP (PwC Canada), (collectively, "Defendants"), pursuant to 17 C.F.R. § 201.430(b)(2), hereby respectfully petition for review of the June 7, 2013 decision (the "Decision") of the United States Securities and Exchange Commission ("SEC" or "Commission") refusing to authorize SEC employees Simona Suh, Meaghan Cheung, Peter Lamore, Mark Donohue, John Gentile, John McCarthy, William Ostrow, Eric Swanson, and Demetrios Vasilakis (the "Witnesses") to provide the testimony requested pursuant to subpoenas served on the SEC (the "Subpoenas").[2]

The Decision should be reversed for several reasons. First, there is a compelling public interest in having the Witnesses testify. The *Anwar* Defendants provided services to Fairfield Sentry Limited and affiliated Fairfield funds[3] (the "Funds"), which were Bernard L. Madoff Investment Securities, LLC's ("BLMIS") largest investment advisory clients, alleged to have held more than $5 billion with Madoff as of December 2008. The *Anwar* case is about whether the Defendants could have and should have uncovered and prevented Bernard Madoff's "Madoff") scheme. The SEC investigated and examined BLMIS and Madoff a number of times during the period that the Defendants provided services to the Funds. Each of the Witnesses was directly involved in at least one of the investigations or examinations. In the course of the SEC's investigations and examinations, each of the Witnesses had direct contact with Bernard Madoff

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1. The Citco Group Limited, Citco Fund Services (Europe) B.V., Citco (Canada) Inc., Citco Global Custody N.V., Citco Fund Services (Bermuda) Limited, and Citco Bank Nederland N.V. Dublin Branch (collectively, the "Citco Defendants").

2. Enclosed as Exhibit 1 are copies of the deposition subpoenas issued in *Anwar v. Fairfield Greenwich Limited*, No. 09 Civ. 00118 (VM)(FM) (S.D.N.Y.) and *Walker, Truesdell, Roth & Assocs., Inc. v. GlobeOp Fin. Servs. LLC, et al.*, Index Nos. 600469/2009, 600498/2009 (N.Y. Sup. Ct.).

3. The Funds include Fairfield Sentry Limited, Greenwich Sentry Limited, and Greenwich Sentry Partners L.P.

or other BLMIS employees. Fairfield personnel were also a focus of the SEC's attention – both during its later examinations and investigations, as well as during the Office of Inspector General's investigation into the SEC's failure to uncover Madoff's fraud – and certain of the Witnesses were personally involved in gathering information from Fairfield personnel. The Witnesses thus have firsthand knowledge regarding the world's largest-ever Ponzi scheme, the SEC's investigations and examinations of Madoff and BLMIS, BLMIS's operations, and Fairfield's potential involvement in Madoff's scheme that is not available from any other source.

Second, the requested testimony will not impose an undue burden on the Commission or the Witnesses. The ordinary burden of preparing witnesses for testimony is not "undue," even where the proposed deponent is a nonparty. Here, nearly half of the Witnesses are no longer SEC employees, and any time these Witnesses expend preparing for their depositions will not have any material impact on the SEC's ability to carry out its business. The Decision makes no reference to the compromise offered by the Defendants of deposing only four of the nine Witnesses who were the subject of the Subpoenas. Furthermore, the Decision does not indicate that the SEC has been inundated with Madoff-related requests for testimony. And, in general, the same factors that make this a matter of unique public interest make it unlikely that allowing the Witnesses to testify will set a precedent that would overwhelm the SEC with similar requests for testimony in the future. There is only one largest-ever Ponzi scheme, BLMIS had only one largest client, and there is only one relevant, related, pending litigation – the *Anwar* action in which the Witnesses were subpoenaed.

I. BACKGROUND

A. The *Anwar* Action and SEC Investigations

The *Anwar* Plaintiffs purport to represent a class of investors in certain Funds established by the Fairfield Greenwich Group ("Fairfield" or "FGG"), some of which entrusted

substantially all of their assets to BLMIS. As the world now knows, Madoff was using BLMIS to run the largest Ponzi scheme in history. When Madoff confessed to the fraud in December 2008, it was revealed that the FGG funds did not possess the assets purportedly held by BLMIS, and the value of Plaintiffs' investments in the funds was allegedly reduced to zero.

Plaintiffs thereafter brought the *Anwar* putative class action against not only the directors and officers of the FGG funds, but also against third parties hired by those funds at various points in time to perform administrative services (certain Citco defendants and GlobeOp), custodial services (certain Citco defendants), and auditing services (PwC Netherlands and PwC Canada). (*Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 00118 (VM)(FM) (S.D.N.Y. filed Jan 7, 2009).)[4] Central to Plaintiffs' case is the issue of whether the Defendants were negligent for having failed to uncover Madoff's fraud. (Second Consol. Am. Compl., Sept. 29, 2008, ECF No. 273 ("SCAC" or "Complaint") ¶¶ 1, 433-445, 505-508, 554-557.) Plaintiffs allege that the Defendants ignored or failed to investigate "red flags" that cast doubt on the legitimacy of BLMIS and the returns generated for the Funds, and that additional diligence regarding Madoff and/or site visits to BLMIS would have uncovered Madoff's fraud. (SCAC ¶¶ 301, 302, 315.)

Plaintiffs' Complaint also puts the SEC's investigations squarely at issue. As the Defendants noted in an April 25, 2013 letter to the Commission, the Complaint makes specific reference to one of the SEC's BLMIS investigations, as well as to interviews that certain Witnesses conducted with individuals from Fairfield. (Ex. 4.) The Complaint alleges that certain "Fairfield Defendants sought and followed Madoff's instructions on how to approach their upcoming [SEC] testimony," and that "Madoff . . . instruct[ed] the Fairfield Defendants in

4. All docket citations refer to entries in *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 0118 (VM) (S.D.N.Y.).

what to say and what not to say to the SEC." (SCAC ¶ 234.) The Complaint further alleges that the Fairfield individuals thereby "aided Madoff in deceiving the SEC." *Id.* The Complaint goes on to allege that this deception had ripple effects beyond the SEC investigation, as "[t]he Fairfield Defendants . . . cit[ed] to the inconclusive result of the SEC investigation in their public statements to Fund investors as proof that Madoff and B[L]MIS could be trusted as [a] faithful manager and custodian of the Funds' assets." *Id.* The *Anwar* plaintiffs' allegations therefore put at issue the purpose, scope, conduct and resolution of the SEC's investigation.

Each of the Witnesses participated in one of the SEC's investigations or examinations of Madoff and/or BLMIS. For example, as part of the 1992 cause examination, investigators Gentile and Vasilakis spoke with Madoff on the phone, sent document requests to BLMIS, and spent at least one day at BLMIS's offices. (OIG Report[5] Ex. 100 at 5, 15, OIG Report Ex. 101 at 5.) During the SEC's 2004-2005 investigation, Lamore and Ostrow sent document requests to BLMIS and reviewed the documents BLMIS provided in response. Both Lamore and Ostrow spent more than two and a half months on-site at BLMIS, interacting daily with Madoff himself. In connection with the investigation, Lamore and Ostrow specifically questioned Madoff about the consistency of the split strike conversion strategy's returns and Madoff's incredible ability to time the market. (OIG Report Ex. 48 at 42:25-44:1; 65:16-22.) As part of the 2005-2006 investigation, Lamore, Suh and Cheung interviewed FGG officers, including Amit Vijayvergiya (OIG Report at 276), and took the depositions of Bernard Madoff, Frank DiPascali, and FGG CEO Jeffrey Tucker. (*See* OIG Report at 290, 293, 310.) The investigators directly inquired about the purported "red flags" that the *Anwar* Plaintiffs allege.

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5. All citations to the "OIG Report" and any exhibits thereto refer to the public version of the SEC Office of Inspector General report "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme." Report No. OIG-509.

including the volume of Madoff's options trading, and made inquiries regarding Madoff's accounts at the Depository Trust Company. (*See, e.g.*, OIG Report Ex. 48 at 238:4-8; 242:7-10.) The investigators also contacted at least one individual at the Chicago Board Options Exchange. (OIG Report Ex. 48 at 240:9-10.) Suh and Cheung sent document requests to both BLMIS and Fairfield, and reviewed the documents produced in response. (OIG Report at 280, 284.) As a result of these activities, including their frequent and substantive contact with Madoff, the Witnesses obtained firsthand knowledge regarding Madoff and BLMIS's operations, and Fairfield's involvement therein.

B. The Subpoenas and Decision

On February 27, 2013, Defendants served the Subpoenas requesting the deposition testimony of nine former and current SEC employees who participated in the SEC's examinations and investigations into Madoff and BLMIS. (Ex. 2.) On March 4, SEC Assistant General Counsel Melinda Hardy requested additional information regarding the information sought from the proposed Witnesses. (Ex. 3.) On April 25, Defendants provided Ms. Hardy with additional information regarding the scope and purpose of the requested testimony. (Ex. 4.) Among other things, the Defendants stated that the Witnesses have direct knowledge of what Madoff and the Fairfield individuals said to the SEC, and that the Witnesses' testimony regarding that knowledge is important to understanding the nature and extent of Madoff's deception and Fairfield's involvement therein. Fairfield's conduct is critically important to the Defendants in defending against Plaintiffs' claims and assessing comparative fault. (*Id.* at 2.) Additionally, the letter stated that the Witnesses' personal knowledge is a source of evidence relevant to evaluating Plaintiffs' allegations regarding the potential effectiveness of any additional diligence that Plaintiffs now contend the Defendants should have performed. (*Id.*)

A series of conference calls followed to discuss the depositions during which the parties discussed a number of alternative arrangements. As demonstrated in Defendants' letter dated May 31, Defendants offered to limit the number of depositions to four witnesses (Simona Suh, Peter Lamore, Mark Donohue and John Gentile) in order to lessen any purported burden on the SEC. (Ex. 5.) The SEC also produced a small number of documents to Defendants that had already been made public pursuant to a FOIA request. Following these discussions, on June 7 SEC Associate General Counsel Richard M. Humes sent Defendants the Decision, refusing to authorize the requested depositions on the grounds that preparing for such depositions was unduly burdensome. (Ex. 6.) On June 14, Defendants timely submitted a Notice of Intent to Petition for Review of the Decision. (Ex. 7.)

II. ARGUMENT

As the Decision notes, SEC witnesses should be allowed to testify in response to a valid subpoena if disclosure is consistent with the public interest. The Decision asserts that the testimony the Defendants seek is contrary to the public interest because the testimony's relevance is outweighed by the burden the testimony would impose on the SEC. (Ex. 6 at 2.) The Decision's rationale (1) fails to take into account the broad public interest in the Madoff matter, (2) unduly minimizes the relevance of the testimony, and (3) overstates the burden on the Commission.

A. The Subject Matter of the Subpoenas is of Broad Public Interest

There is broad public interest in full disclosure regarding Madoff's fraud so that the fraud cannot be repeated. Madoff's deception is unparalleled in scope and scale.

Congressional testimony and hearings described Madoff's fraud as "extraordinary,"[6] and in *Anwar*, Judge Marrero described the fraud as "the largest financial fraud yet witnessed in the record of human wrongdoing and tragedy." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 412 (S.D.N.Y. 2010).[7] Although the Decision asserts that the SEC, in conducting its investigations and examinations of BLMIS, did not focus on verifying that BLMIS's customers' assets were safe (Decision at 3), protection of broker-dealer customers' assets is certainly within the scope of the SEC's jurisdiction. *See* Exchange Act Release No. 9856, Impact and Monitoring ("Rule 15c3-3 represents the first comprehensive program undertaken by the Commission to provide regulatory safeguards over customers' funds and securities held by broker-dealers."); *see also SIPC v. Barbour*, 421 U.S. 412 (1975) (the SEC has "plenary authority" to supervise SIPC). Although the SEC's work is of unquestioned importance to the securities markets and the public at large, that does not relieve SEC employees of the responsibility to provide testimony when they have firsthand knowledge relevant to an action. *See United States v. Bryan*, 339 U.S. 323, 331 (1950) ("the public . . . has a right to every man's evidence") (quoting Wigmore, Evidence § 2192 (3d ed.).); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (exceptions "to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (holding that even "men of the first rank and consideration . . . men in

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6. How the Securities Regulatory System Failed to Detect the Madoff Investment Securities Fraud, the Extent to Which Securities Insurance will Assist Defrauded Victims, and the Need for Reform: Hearing before the S. Comm. on Banking, Housing and Urban Affairs, 111th Cong. (2009) (statement of Sen. Christopher J. Dodd, Chairman, S. Comm. on Banking, Housing, and Urban Affairs).

7. Congress opined that Madoff's fraud was "a case study to guide the work of the Financial Services Committee in reshaping and reforming our Nation's financial services regulatory system." Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Rep. Paul E. Knajorski, Chairman, Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.).

high office" must provide testimony) (quoting 4 *The Works of Jeremy Bentham* 320-21 (J. Browning ed. 1843)).

B. The Witnesses' Testimony Is Relevant To The *Anwar* Action And Cannot Be Obtained From Any Other Source

The Decision expresses doubt that the testimony the Defendants seek to elicit is relevant in *Anwar* and describes the potential relevance of the testimony as that it "may show what may have happened if Defendants made certain inquiries." (Ex. 6 at 3.) First, relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401, and discovery requests need only be reasonably calculated to lead to the discovery of admissible evidence, Fed. R. Civ. P. 26(b)(1). Second, whether the testimony is ultimately relevant is a determination left to the district court. *See Comprehensive Habilitation Servs., Inv. v. Commerce Funding Corp.*, 240 F.R.D. 78, 83-84 (S.D.N.Y. 2006); *Lent v. Signature Truck Sys., Inc.*, No. 06-CV-569S, 2010 WL 1707998, at *3 (W.D.N.Y. Apr. 26, 2010).[8] This is especially true where, as here, the district court is very familiar with the various claims and defenses of the parties, having supervised the case for more than four years, including addressing numerous motions to dismiss and reconsider, a motion for class certification, and numerous discovery matters.

Notably, the Decision does not assert that any of the Witnesses lack personal knowledge regarding the events at issue, or that they will be unable to provide adequate testimony. *See Eugenia VI Venture Holdings, Ltd. v. Chabra*, No. 05 Civ. 5277, 2006 WL 1293118 (S.D.N.Y. May 10, 2006) (holding that defendant could not seek discovery from

[8] Moreover, while relevance is one factor a court may consider, it "is not the controlling factor in an undue burden analysis." *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 300 (S.D.N.Y. 2009).

individual who had no personal knowledge). To the contrary, the Defendants served subpoenas only on those SEC personnel from each investigation or examination who have firsthand knowledge regarding how Madoff was able to carry out the fraud, and the lengths to which he went to conceal it. Defendants seek testimony regarding the Witnesses' personal knowledge of communications with third parties, including Madoff, other BLMIS employees, and individuals from Fairfield, in connection with the SEC's BLMIS investigations and examinations. Madoff's deception, and the Witnesses' firsthand knowledge thereof, is not only relevant, it is a critical issue in *Anwar*. *See Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept.") (citations omitted).

This is not a case where the Defendants are seeking to elicit "expert" testimony regarding the SEC's practices with respect to broker-dealer or investment advisor examinations or investigations.[9] Rather, courts have required agency witnesses to testify where they had unique, firsthand knowledge of facts relevant to the case, which is the case here. *See In re U.S. Bioscience Sec. Litig.*, 150 F.R.D. 80 (E.D. Pa. 1993) (requiring FDA employees with firsthand factual knowledge to testify).

In asserting that the Witnesses' testimony is not relevant in *Anwar*, the Decision focuses on one line of inquiry suggested in Defendants' May 31 letter, related to the fact that Madoff told SEC investigators that he was no longer trading options as part of his split strike conversion strategy. (Ex. 6 at 4.) The Decision suggests that because the Defendants were aware that Madoff was purporting to continue to trade options on behalf of the Fairfield funds,

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9. The Decision's citation of, for example, *Moran v. Pfizer*, No. 99 civ. 9969, 2000 WL 1099884, at *3 (S.D.N.Y. Aug. 4, 2000), is therefore inapposite. In that case the court found that the plaintiff was "attempting to use the FDA Witnesses as a free source of expert testimony that is available to plaintiff elsewhere." *Id.*

Madoff could not have misled the Defendants as he misled the investigators. *Id.* The Decision misses the point, which is that for every audience, Madoff had a story, and for every story, Madoff had supporting facts, arguments and documents. Madoff's ability to conceal the fraud from even the most determined investigators and examiners is highly relevant to whether *the Defendants* could or should have uncovered Madoff's scheme.

Furthermore, the issue of Madoff's lies regarding options trading was only one example of what the Defendants seek to cover during the Witnesses' depositions. To clarify the scope of the subpoenas, the Defendants provided specific topics for proposed deponent Peter Lamore, who, as discussed above, spent more than two and a half months at BLMIS's offices, interacting with Madoff on a near-daily basis. (Even the fact that Madoff was the investigators' primary contact is relevant in *Anwar*, where the Defendants might have been met with a similar personal reception had they undertaken procedures at BLMIS.) During his time at BLMIS, Lamore made inquiries regarding many of the so-called "red flags" that the *Anwar* Plaintiffs now allege should have alerted the Defendants to the fact that something was amiss at BLMIS. For example, Lamore made inquiries regarding the consistency of the split-strike strategy's returns, Madoff's ability to time the market to generate positive returns, and Madoff's ability to enter and exit the split-strike strategy without affecting the market. (Ex. 5, Appendix A.) Even if, as the Decision asserts, the SEC had a different "focus" than the Defendants (Ex. 6 at 3), the Witnesses were still privy to details about BLMIS's operations. The Witnesses monitored BLMIS during several critical periods, questioned BLMIS regarding the "red flags," and still did not uncover Madoff's fraud.

Moreover, the proposed testimony is relevant because of the role that FGG, a named defendant in this action, played in the OIG's Investigation of the Failure of the SEC to

Uncover Bernard Madoff's Ponzi Scheme. Not only did the SEC communicate with FGG in its earlier examinations and investigations, but the OIG reached out to FGG in 2009 for an onsite examination and information requests. Having sought information, testimony and documents from FGG and its personnel in the past, the SEC cannot now protest that its actions have no relevance to this case.

In order to allow Defendants a full and fair opportunity to gather evidence to present their defenses, it is necessary to obtain the deposition testimony of the Witnesses regarding the outward-facing aspects of the SEC's examinations and investigations.

C. The Depositions Will Not Impose an Undue Burden on the SEC

The Decision notes that under Federal Rules of Civil Procedure 26 and 45, district courts consider whether discovery requests would impose an undue burden on the recipient, and further consider a number of factors relevant to the question of undue burden, including: whether the discovery is "unreasonably cumulative or duplicative"; whether the discovery sought is "obtainable from some other source that is more convenient, less burdensome, or less expensive"; and whether "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. (Ex. 6 at 2-3 (quoting *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007)).)

The discovery sought here is not "unreasonably cumulative or duplicative," nor is the Witnesses' testimony as to their interactions with Madoff, others at BLMIS, and Fairfield available from any other source. *See* Fed. R. Civ. P. 26. The Decision asserts that the information the Defendants seek is available in the OIG Report, as well as various transcripts and

other documents that the SEC has produced. The Decision does not address, however, Defendants' concerns regarding the admissibility of the OIG Report and other documents. Courts have noted that the potential inadmissibility of documents and prior testimony may be taken into account when considering whether to allow deposition testimony. *See Davis Enters. v. U.S. Env. Protection Agency*, 877 F.2d 1181, 1183 (3d Cir. 1989) (considering admissibility of documentary evidence in deciding whether district court abused its discretion in denying EPA depositions). Furthermore, the discovery sought here will significantly benefit the full and fair resolution of the *Anwar* case.

The Decision overstates the burden on the SEC of allowing the depositions. The Defendants requested depositions that are narrow in scope. In correspondence with the SEC, the Defendants listed specific topics about which each witness would be examined. (Ex. 4, Appendix A; Ex. 5, Appendix A.) Such targeted discovery, propounded in advance on a limited number of deponents, regarding specified areas of examination, is not unduly burdensome. *See Jones v. McMahon*, No. 5:98-CV-0374, 2007 WL 2027910, at *17 (N.D.N.Y. July 11, 2007) (permitting nonparty depositions of 19 of 32 specifically identified non-party New York State Troopers).[10] Given the narrow scope of the requested testimony, the Decision's citation to *Moore v. Amour Pharmaceutical Co.*, 129 F.R.D. 551 (N.D. Ga. 1990), (Ex. 6 at 3 n.2), is inapposite. The *Moore* decision was appealed to the Eleventh Circuit, which upheld the district court's grant of a motion to quash subpoenas for the depositions of two CDC doctors. 927 F.2d 1194, 1198 (11th Cir. 1991). The doctors were central to the CDC's AIDS research at the height

10. Courts have previously ordered the SEC to comply with subpoenas. *United States v. Peitz*, No. 01 CR 852, 2002 WL 453601, at *5 (N.D. Ill. March 22, 2002) (denying the SEC's motion to quash a subpoenas duces tecum served on SEC attorneys for documents where the SEC had information pertinent to criminal allegations against defendant.)

of the AIDS epidemic, and the court noted that the subject matter about which the doctors' testimony was sought was overbroad, such that allowing their depositions "would be similar to asking a Federal Aviation Administration employee, in an airline crash case, to detail the evolution of airline safety since the Wright brothers." *Id.* This is hardly the case here.

Moreover, the fact that agency attorneys would have to prepare the Witnesses for their deposition does not constitute an undue burden. *See Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D.D.C. 1991) ("The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden."); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 308 (S.D.N.Y. 1982) (incurring some burden or expense is "not a valid objection where the information sought is relevant and material") (citation omitted).

As the Decision acknowledges, fewer than half of the Witnesses still work at the SEC. Defendants have expressed willingness to accommodate the Witnesses' schedules so that the depositions are as minimally disruptive as possible.

Furthermore, the Defendants offered to reduce the number of depositions from nine to four in order to minimize any impact on the Commission's resources and operations and avoid taking any cumulative or duplicative testimony. The reduction in the number of depositions would reduce any burden on the agency in preparing the Witnesses, would mitigate any potential impact on the SEC's ongoing operations, and would decrease the likelihood that any of the testimony would be cumulative. Such a compromise is the proper approach to minimizing the potential burden on the agency, rather than refusing to allow any depositions at all. *See Bridgeport Music Inc. v. UMG Recordings, Inc.*, No. 05 Civ. 6430, at *3 (VM)(JCF), 2007 WL 4410405 (S.D.N.Y. Dec. 17, 2007) ("[D]iscovery should not simply be denied on the ground that the person or entity from whom it is sought is not a party to the action. . . A better

approach is for the court to take steps to relieve a nonparty of the burden of compliance even when such accommodations might not be provided to a party.") (citation omitted).

While courts recognize the interest of agencies to protect their employees, this is not the sort of case that will lead to a flood of private litigants seeking testimony from SEC employees. The Decision gives no indication that the SEC has been inundated with requests for its employees to testify in Madoff-related matters. Notably, the SEC has successfully rebuffed attempts by private litigants to sue it for its failure to uncover Madoff's fraud. *See Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013) (holding that the discretionary function exception to the Federal Torts Claims Act barred investor's claims against the government based on the SEC's failure to discover Madoff's Ponzi scheme); *Dichter–Mad Family Partners, LLP v. United States*, 709 F.3d 749 (9th Cir. 2013), *petition for cert. filed*, May 21, 2013 (No. 12-1391); *Donahue v. United States*, 870 F. Supp. 2d 97 (D.D.C. 2012) (same); *Baer v. United States*, No. 11–1277, 2011 WL 6131789 (D.N.J. Dec. 8, 2011), *mot. to amend denied*, 2012 WL 296120 (D.N.J Feb. 1, 2012). Nor would allowing testimony to be taken in *Anwar* set a precedent that would force the Commission to allow testimony to be taken in all manner of other matters. *Anwar* is unique in that it involves the world's largest-ever Ponzi scheme, and BLMIS's single largest client by far. Allowing the Defendants to depose the Witnesses will not create precedent for depositions to be taken in future cases. Rarely, if ever, will the SEC staff have had such frequent, intimate contact with the mastermind of a fraud.

Here, unlike in the vast majority of cases, the SEC's BLMIS investigations and examinations were chronicled in a 400 page report issued by the Commission Office of the Inspector General that was based on 140 depositions and interviews of 122 individuals.

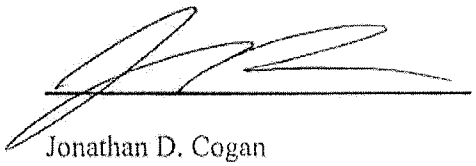
Finally, the Decision does not take into account the amount in controversy in *Anwar*. Plaintiffs allege that their class-wide losses amount to more than $5 billion. (Pls.' Class Cert. Mem. at 2, 1/11/12, ECF No. 776.) The importance of the issues at stake necessitate full discovery to explore Defendants' defenses and gain first-hand testimony regarding the BLMIS operations.[11]

III. CONCLUSION

For the above reasons, Defendants respectfully request that the SEC reverse the Decision and authorize the Witnesses to provide deposition testimony.

Dated: June 21, 2013

Respectfully Submitted,



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11. *See Lent v. Signature Truck Systems, Inc.*, No. 06-CV-569S, 2010 WL 1707998 (W.D.N.Y. April 26, 2010), at *4 (allowing additional nonparty deposition in light of the complex issues, amount in controversy, and multiple defendants in the case and the importance of the proposed discovery in resolving issues related to plaintiffs' theory of liability).

CERTIFICATE OF SERVICE

I, Justin Sommers, counsel for GlobeOp Financial Services LLC, hereby certify that on June 21, 2013, I filed the foregoing Petition for Review with the Secretary of the United States Securities and Exchange Commission by facsimile ((202) 772-9324) and Federal Express. A copy was also served on Assistant General Counsel Richard M. Humes via facsimile, Federal Express, and electronic mail.

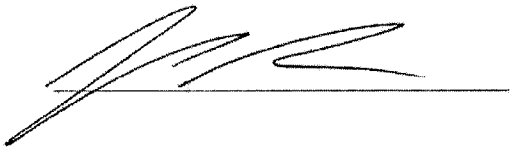

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION

12-md-2335 (LAK)

This Document Relates to:

Louisiana Municipal Police Employees' Retirement System v. The Bank of New York Mellon Corp., 11 Civ. 9175 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

This is a securities class action brought on behalf of persons who purchased Bank of New York Mellon ("BNYM") common stock during part of the period 2008 through 2011. The claim, which in substantial part underlies also a civil action by the United States as well as actions against BNYM by customers, turns in major part on the assertion that BNYM's standing instruction foreign exchange ("FX") service was marketed as providing its customers with "best execution" for FX transactions when, in truth and in fact, it did not – it provided BNYM with exceptional profits, allegedly at customer expense. The government and customer cases, subject in some cases to court approval, have been settled for more than $700 million in the course of which BNYM in substance admitted the assertion regarding the standing instruction service and "best execution." This case, which claims that BNYM common stock purchasers were misled by BNYM's actions, remains. It is before the Court on a motion by the Lead Plaintiff to eliminate confidentiality protection for a handful of the millions of documents that BNYM designated as confidential pursuant to the Confidentiality Order entered in this action on June 20, 2012 (DI 104).

The eight documents in question consist of emails between and among BNYM personnel concerning a variety of matters relating to the standing instruction program and the pricing of FX services thereunder. The Court has reviewed each of them. Some or all probably are embarrassing to BNYM. But they are old – the earliest dates in part to 1997 and the most recent to 2010 – and, from a competitive point of view, appear quite stale in light of the events of the last several years relating to the matters here in controversy. Parts of two of the emails in question have been made public by one or another state attorney general. One comments tersely on a *Reuters* news story concerning another bank. All appear to relate to the fraud alleged in this case and, in some respects at least, admitted in cases that are pending settlement approval proceedings.

In the circumstances, the Court concludes that BNYM has not demonstrated good cause for maintaining these documents in confidence. Indeed, its arguments approach the outer limit

of responsibility.

Lead Plaintiff's motion to de-designate certain documents marked as confidential by BNYM [12-md-2335, DI 593] is granted in all respects.

SO ORDERED.

Dated: April 30, 2015

Lewis A. Kaplan
United States District Judge