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**VIA FAX**

The Honorable Victor Marrero  
United States District Judge  
Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street  
New York, New York 10007

Re: *Anwar v. Fairfield Greenwich Ltd.*, 09-CV-118 (VM)

Dear Judge Marrero:

We represent New Greenwich Litigation Trustee, LLC, as Successor Trustee (“Trustee”) of the Greenwich Sentry and Greenwich Sentry Partners Litigation Trusts. We write pursuant to Your Honor’s local rules to request a pre-motion conference regarding the Trustee’s proposed motion to intervene, pursuant to Fed. R. Civ. P. 24, for the limited purpose of objecting to the *Anwar* plaintiffs’ settlement with the Citco Defendants. The deadline for objections is October 16, 2015, and a fairness hearing is scheduled for November 20, 2015. See Order Preliminarily Approving Settlement and Providing for Notice for Proposed Settlement, dated August 13, 2015, Doc. No. 1402, ¶¶ 6, 23.

The Trustee is prosecuting actions in New York state court against Citco Fund Services (Europe) BV, Citco (Canada) Inc., and other entities who are also defendants in *Anwar*.<sup>1</sup> Although not a party to the *Anwar* action, the Trustee has number of objections to the proposed settlement and, accordingly, seeks to intervene in order to present its objections. See generally *Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 130-33 (2d Cir. 2001).

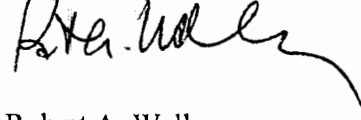
For example, the [Proposed] Final Judgment and Order of Dismissal with Prejudice, Doc. No. 1398-5, ¶ 19, states in part: “Nothing in this paragraph precludes the Citco Defendants from arguing that the settlement proceeds in this case are an offset against claims that may be made against them in other proceedings.” This provision is objectionable insofar as, *inter alia*, it may

<sup>1</sup> See New York County Clerk’s Index Nos. 600469/2009 and 600498/2009. The actions were dismissed by the lower court, and the Trustee has appealed those dismissals to the First Department.

imply that this Court has determined that Citco has colorable rights to offset the Trustee's claims. Moreover, the settlement documents, including the proposed class notice, fail to articulate (i) the basis of any offset, and (ii) how any offset would be calculated from the gross *and* net settlement amounts and allocated among the various proceedings. To make matters worse (and confusing), Citco has represented that "discovery has confirmed that any alleged Citco misconduct injured *the Funds*, and injured Fund investors (if at all) only derivatively . . . ." *see* Citco Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, dated September 15, 2014, at 18 n.24 (emphasis in original; excerpt attached as Exhibit A hereto)); *see generally* *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 17 (2d Cir. 1981), while the *Anwar* plaintiffs have represented that they sued "to recover their *own* losses . . ." *See Anwar v. Fairfield Greenwich Ltd.*, Case No. 13-936-cv, Opposition to Rule 23(f) Petition of the Citco Group Defendants, Doc. 38, at 18 (2d Cir. Apr. 15, 2013) (emphasis in original).

We have unsuccessfully attempted to resolve fully our objections with the settling parties. Accordingly, we seek intervention at this time in order to avoid any dispute concerning the timeliness of an intervention request. *See generally* Order dated March 7, 2013, Doc. No. 1071, at 3 (denying intervention request on timeliness grounds where, *inter alia*, request was made "less than one month prior to the final fairness hearing").

Respectfully,




Robert A. Wallner

Attachment

cc (via email):

- David A. Barrett, Esq.
- Sarah L. Cave, Esq.
- Timothy A. Duffy, Esq.
- Robert C. Finkel, Esq.
- Andrew G. Gordon, Esq.
- Victor E. Stewart, Esq.

The parties are directed to respond by 9-3-15, by letters not to exceed three (3) pages to the matter set forth above by the New Greenwich Litigation Trustee	
SO ORDERED.	
8-28-15	
DATE	VICTOR MARRERO, U.S.D.J.

# **EXHIBIT A**

645, 648 (2d Cir. 2009) (same).

## **II. A Class Action Is Not A Superior Method Of Adjudicating Plaintiffs' Holder Claims Because Those Claims Are Derivative, Not Direct, In Nature**

If purportedly direct claims asserted in a putative class action are derivative in nature, a class action is not “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).<sup>22</sup> Instead, a derivative action or a direct action by the entity is more appropriate.<sup>23</sup> Here, plaintiffs’ common-law holder claims are derivative in nature.<sup>24</sup> Accordingly, those claims do not satisfy the superiority requirement.<sup>25</sup>

### **A. The Direct/Derivative Issue Is Governed by Delaware Law for the Onshore Funds and British Virgin Islands Law for the Offshore Funds**

Under the applicable New York choice-of-law principles, *see, e.g., Licci ex rel.*

*Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 157 (2d Cir. 2012), whether plaintiffs’

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<sup>22</sup> *See In re Sonus Networks, Inc. Sec. Litig.*, 247 F.R.D. 244, 253 (D. Mass. 2007); *City P’ship Co. v. Jones Intercable, Inc.*, 213 F.R.D. 576, 589-91 (D. Colo. 2002); *Farrie v. Charles Town Races, Inc.*, 901 F. Supp. 1101, 1110-11 (N.D. W. Va. 1995).

<sup>23</sup> In fact, actions brought on behalf of the Funds that are substantially similar to this one are pending in other forums. A bankruptcy trustee for the Onshore Funds sued Citco and PwC, among others, in state court in New York (Exs. 115-16); those cases were originally brought as derivative actions. Investors in one of the Offshore Funds brought a derivative action against Citco and PwC that was later transferred to bankruptcy court in New York. (Ex. 110.) The liquidator for the Offshore Funds has sued PwC Canada in the Ontario courts for the same claims. (Ex. 118). The same liquidator for the Offshore Funds has also sued PwC Netherlands in Amsterdam. *See* Rb. Amsterdam 30 mei 2012 (Krys / PricewaterhouseCoopers Accountants) (Neth.).

<sup>24</sup> In ruling on defendants’ motions to dismiss, this Court stated that whether plaintiffs’ common-law claims were direct or derivative was “ripe for further factual development” and thus “more properly decided at the class certification or summary judgment stage of this proceeding” and that further factual development could “change the premise for the Court’s ruling on” this issue. *Anwar II*, 728 F. Supp. 2d at 402. Although Citco maintains that the question of whether plaintiffs’ holder claims are direct or derivative is a legal one, *see Buckley v. Control Data Corp.*, 923 F.2d 96, 98 (8th Cir. 1991), discovery has confirmed that any alleged Citco misconduct injured *the Funds*, and injured Fund investors (if at all) only derivatively, as explained below. *See infra* 21 n. 30.

<sup>25</sup> Plaintiffs are wrong to suggest that this Court is somehow precluded from considering whether the superiority requirement of Rule is satisfied. (*See* PB 25 n.23.) That requirement must be met to certify any class. Furthermore, the Second Circuit remanded for further proceedings consistent with the Court’s order and with the developed record, and stated that this Court should consider “any facts revealed by discovery that has taken place since the original certification order.” *St. Stephen’s School*, 2014 WL 2766174, at \*2. Nothing in the Court’s opinion limits the scope of further proceedings in this Court, and certainly the opinion cannot be fairly read to suggest that plaintiffs are relieved of their obligation to satisfy all of the requirements of Rule 23.