

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

ANWAR, *et al.*

Plaintiffs,

v.

FAIRFIELD GREENWICH LTD., *et al.*,

Defendants.

MASTER FILE NO.

09-CV-00118 (VM)

**PwC DEFENDANTS' MEMORANDUM OF LAW  
IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE*  
NO. 4 TO EXCLUDE EVIDENCE OF DEFENDANTS' FEES**

**FILED UNDER SEAL PURSUANT TO CONFIDENTIALITY ORDER**

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Defendants PricewaterhouseCoopers Accountants N.V. and PricewaterhouseCoopers LLP (collectively, the “PwC Defendants”) respectfully submit this memorandum of law in opposition to Plaintiffs’ Motion *in Limine* No. 4 To Exclude Evidence of Defendants’ Fees.

### **PRELIMINARY STATEMENT**

Through their motion *in limine*, Plaintiffs seek to keep the jury from knowing basic facts about the Funds that were well known to everyone (including Plaintiffs) at the time and that Plaintiffs describe in their pleading: that the Fairfield Greenwich Group (“FGG”) was paid *over a billion* dollars for purportedly conducting “extensive due diligence” on BLMIS and that Citco was paid millions of dollars per year more for, among other things, acting as custodian of the Funds’ assets and monitoring BLMIS as sub-custodian. The PwC Defendants audited the Funds’ financial statements for a fraction of the compensation paid to FGG and Citco.

There is no basis to keep these facts from the jury. Evidence of the fees paid to the PwC Defendants on the one hand and to FGG and Citco on the other is necessary for a full and accurate understanding of the nature and scope of the roles performed by the Funds’ service providers. This is relevant to both the scope of the duty the PwC Defendants undertook and to the comparative fault of FGG and Citco, which Plaintiffs do not dispute the jury must determine. FGG, not the PwC Defendants, represented to the Plaintiffs that they were doing extensive due diligence on BLMIS. Citco, not the PwC Defendants, represented to the Plaintiffs that they had custody of the Funds’ assets and had verified their existence. Plaintiffs knew that FGG and Citco collected enormous sums of money for these services – services that Plaintiffs have alleged FGG and Citco did not perform.

Given their settlements with FGG and Citco, Plaintiffs now want to minimize the key roles played by FGG and Citco, but the jury simply cannot adequately assess the parties’ relative fault without knowing the full picture about the parties’ respective roles, including the amounts

they were paid for their services. Indeed, excluding this evidence would unfairly prejudice the PwC Defendants and lead to unnecessary speculation and confusion about facts that are readily available and undisputed.

## ARGUMENT

### **I. Evidence Of The Fees Paid To The PwC Defendants And To The Funds' Managers And Citco Is Relevant To A Proper Evaluation Of The PwC Defendants' Role And To The Issue Of Comparative Fault.**

Plaintiffs recognize that, in the event the jury concludes that the PwC Defendants were negligent, it must determine the liability to be apportioned to FGG and Citco. (*See* Pls.' Mot. at 1; Proposed Special Verdict Form.) Evidence concerning the amounts paid to the PwC Defendants and to FGG and Citco is critical to a fair exploration of this issue.

In fact, Plaintiffs themselves have already acknowledged that the compensation paid to FGG and Citco is relevant to an assessment of their culpability. According to Plaintiffs, FGG was “motivated to commit wrongful acts by the hundreds of millions of dollars in fees they received based on Plaintiffs’ investments and the illusory profits from those investments.” (SCAC ¶ 372.) Plaintiffs plead in detail the “enormous fees” – over three quarters of a billion dollars – paid to FGG for “services ostensibly provided.” (*Id.* ¶¶ 236-49.)<sup>1</sup> FGG represented that its services included “extensive due diligence” on and “daily monitoring” of Madoff and BLMIS that provided “full transparency” into Madoff’s operations. (*Id.* ¶¶ 182, 193, 196.) The services included supposedly imposing “strict risk management principles” over the Funds’ investments with Madoff, including regular site visits to BLMIS by FGG’s risk and operations teams. (*Id.* ¶¶ 190, 197.) In reality, FGG failed to conduct any of the services it was paid for and, instead, participated in a scheme to funnel Plaintiffs’ money to Madoff. *See Anwar v.*

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1. (*See* Joint Decl. of Lead Counsel in Supp. of the Proposed Partial Settlement and Fee and Expense Requests ¶ 27 Feb. 4, 2013 (ECF No. 1038) (FGG were paid fees and compensation totaling approximately \$1.3 billion).)

*Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 407 (S.D.N.Y. 2010) (Plaintiffs alleged that FGG Defendants “benefitted in a concrete and personal way from essentially perpetrating Madoff’s fraud.”).

Similarly, Plaintiffs alleged that, in exchange for “millions of dollars in fees” (SCAC ¶ 343), Citco “undertook responsibilities beyond that of a typical Fund administrator” or “typical fund custodian.” (*Id.* ¶¶ 327-28.) These services included independently reconciling the Funds’ holdings and calculating the Funds’ net asset value for Plaintiffs, and preparing monthly financial statements. (*Id.* ¶ 327.) Citco’s services also included monitoring BLMIS, the sub-custodian of the Funds’ assets. (*Id.* ¶ 328.) According to Plaintiffs, Citco failed to perform the services it was paid for and, instead, provided substantial assistance to the fraud being perpetrated by FGG. (*Id.* ¶¶ 341-43.)

In allocating fault, the jury is entitled to know that FGG and Citco were highly compensated for the due diligence and monitoring services that they represented they were performing with respect to BLMIS. *See Williams v. Niske*, 81 N.Y.2d 437, 440 n.1 (1993) (“Even though a defendant in a multidefendant suit settles, proof as to the settler’s fault may still be presented at trial and the settler’s equitable share determined.”). The enormous compensation that FGG and Citco were paid for these purported services reflects the scope and significance of the obligations they claimed to have undertaken and makes their failure to have fulfilled their obligations all the more culpable.

Equally relevant is the relatively modest amount of fees paid to the PwC Defendants. Unlike FGG or Citco, the PwC Defendants did not undertake, and were not engaged or paid, to conduct due diligence, verification, or monitoring of BLMIS. Rather, the PwC Defendants were compensated for performing an audit of the financial statements of the Funds. The fact that the

PwC Defendants' fees were a fraction of the compensation paid to FGG and Citco reflects the far different nature of the services performed.

Indeed, the amount of fees paid to the PwC Defendants is relevant because the auditing standards make clear that, while an auditor must have a sufficient basis to express an opinion on the financial statements under audit, “an auditor typically works within economic limits; the auditor’s opinion, to be economically useful, must be formed within a reasonable length of time and at reasonable cost.” AU § 326.23; *see also* AU § 326.24 (“As a guiding rule, there should be a rational relationship between the cost of obtaining evidence and the usefulness of the information obtained. The matter of difficulty and expense involved in testing a particular item is not in itself a valid basis for omitting the test.”); International Framework for Assurance Standards ¶ 52 (“‘Reasonable assurance’ is less than absolute assurance. Reducing assurance engagement risk to zero is very rarely attainable or cost beneficial as a result of factors . . . .”); ISA § 200.A48 (2009) (“[T]here is an expectation by users of financial statements that the auditor will form an opinion on the financial statements within a reasonable period of time and at a reasonable cost, recognizing that it is impracticable to address all information that may exist or to pursue every matter exhaustively on the assumption that information is in error or fraudulent until proved otherwise.”).

In seeking to exclude evidence of the amount of fees paid to the PwC Defendants, Plaintiffs are attempting to keep the jury in the dark about the concept of reasonable cost. There is no basis for providing the jury such a misleading and incomplete understanding of the PwC Defendants’ role.<sup>2</sup>

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2. Plaintiffs cite three entirely irrelevant cases in support of their attempt to keep these relevant and readily available facts from the jury. (Pls.’ Mot. at 2.) In *Gardner v. Federal Express Corp.*, No. 14-cv- 01082, 2015 WL 5821428 (N.D. Cal. Oct. 6, 2015), the court excluded evidence about the income earned by plaintiff’s spouse in a wrongful discharge case. *Id.* at \*4. Of course, that case did not involve allocation of fault to the

## **II. Excluding Evidence Of The Defendants' Fees Would Encourage Jury Speculation And Cause Unfair Prejudice To The PwC Defendants.**

Plaintiffs also invoke Federal Rule of Evidence 403 but that rule provides no basis to exclude this relevant evidence.

Plaintiffs do not explain what unfair prejudice or confusion would be created by providing the jury with the undisputed truth about the fees paid to the PwC Defendants and to FGG and Citco. Instead, Plaintiffs make the remarkable assertion that proving the jury the actual facts “can encourage the jury to draw improper inferences that PwC was not able to conduct a proper audit because its fees were less than the fees and compensation” of FGG or Citco. (Pls.’ Mot. at 3.) This concern is baseless as the PwC Defendants have no intention of arguing that the modest level of their fees prevented them from performing an appropriate audit.

It is excluding the evidence that would mislead the jury to make improper inferences and speculation. Plaintiffs want the jury to know that the PwC Defendants were paid but to keep the jury from knowing the amount of fees. In effect, Plaintiffs want the jury to speculate about how much the PwC Defendants were paid (and about how much FGG and Citco were paid) rather than knowing the easily ascertainable facts. There is no reason to deprive the jury of the full picture; an incomplete picture would create the danger that the jury will draw incorrect inferences about the how much was paid and why. *See Sara Lee Corp. v. Sycamore Family Bakery, Inc.*, No. 2:09CV523DAK, 2011 WL 3439933, at \*5 (D. Utah Aug. 5, 2011) (“Requiring the jury to assess and weigh Defendants’ conduct absent any reference or

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spouse, nor did it involve a question about professional services. Similarly irrelevant is *L&M Beverage Co. v. Guinness Impo Co.*, No. CIV. A. 94-cv-4492, 1996 WL 368327 (E.D. Pa. June 24, 1996), where the court determined that the plaintiff could not seek damages for lost profits under Pennsylvania law because it had not establish that such damages were caused by the defendant. *Id.* at \*3. Finally, Plaintiffs’ reliance on *Schuster v. Shepard Chevrolet, Inc.*, No. 99 C 8326, 2002 WL 507130 (N.D. Ill. Apr. 3, 2002), is unavailing. In that age discrimination case, the court relied on the collateral source rule to exclude evidence the plaintiff received Social Security and unemployment benefits. *Id.* at \*7.

understanding of the original purchase price would give the jury an incomplete picture of the parties relationship and rights.”).

The case Plaintiffs cite in support of their Rule 403 argument, *Hart v. RCI Hospitality Holdings, Inc.*, 90 F. Supp. 3d 250 (S.D.N.Y. 2015), is not to the contrary. *Hart* involved a collective action by exotic dancers who alleged that they were improperly categorized as independent contractors and should have been paid a minimum wage. The court had already ruled that the defendant club was liable to pay minimum wages to the dancers, leaving discrete factual issues to be tried. *Id.* at 260. Nonetheless, the court did not exclude all evidence regarding the so-called performance fees paid to the dancers, concluding that exclusion of all such evidence “would be grossly misleading” and “would leave the jury with an impermissibly distorted understanding of the big picture.” *Id.* at 258.

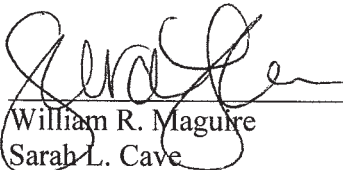
The same is true here. The jury should know the truth about the fees paid to the PwC Defendants and to FGG and Citco.

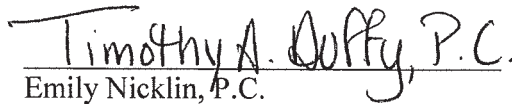
### CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion *in Limine* No. 4 should be denied.

Dated: New York, New York  
November 20, 2015

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, Carl W. Mills, hereby certify that on November 20, 2015, I caused the foregoing document to be served via email upon the following:

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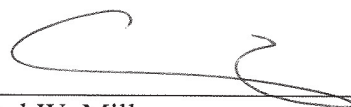
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