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. 5 TO EXCLUDE REFERENCE TO COLLATERAL SOURCE PAYMENTS

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. 5 seeking to exclude references to collateral source payments made to Plaintiffs.

ARGUMENT

As an initial matter, the PwC Defendants do not intend to introduce evidence regarding either the fact of the prior settlements in this case involving the Fairfield Greenwich Group ("FGG") Defendants, GlobeOp, or the Citco Defendants or any amounts Plaintiffs have received, or are likely to receive, as a result of those settlements. As is commonly done in litigation of this sort, the jury should simply be told that any claims Plaintiffs may have against others are being handled separately. The jury will be asked to apportion any liability, and may assign a percentage responsibility to the FGG Defendants and/or the Citco Defendants. As per the Court's prior orders in connection with those settlements and settled law, the PwC Defendants will then be entitled to a set-off from any verdict rendered by the greater of the aggregate of those percentages of the total damages found by the jury or the amounts paid in settlement. These adjustments are appropriately performed by the Court after a verdict is rendered. Thus, to the extent Plaintiffs' motion seeks exclusion of this information, it is moot.

What remains of Plaintiffs' motion is their request to exclude any evidence of other payments that Plaintiffs may have received (or that they are likely to receive), as a result of distributions by the funds in which they hold or held an interest. The Fairfield Sentry, Fairfield Lambda, Fairfield Sigma, Greenwich Sentry and Greenwich Sentry Partners funds all have liquidators, receivers, or trustees who have pursued and are pursuing assets on behalf of the

funds, or successors in interest to the funds, that have been or may be distributed to Plaintiffs in accord with their status as fund unitholders or shareholders. This evidence is admissible.

These distributions are not "collateral source payments." They are liquidations of the value of the Plaintiffs' interests in the various funds. These values are integral to measuring the decline in value of the units or shares held by Plaintiffs for which they seek to hold the PwC Defendants responsible. They are part of the ***affirmative*** calculation of damages: "My shares were worth X. They are now worth Y. You owe me X-Y." Plaintiffs may or may not contend that "Y" in this case equals zero, but the PwC Defendants are clearly entitled to present evidence that "Y" is greater than zero, and the jury ***must*** decide that issue in order to properly calculate Plaintiffs' damages.

No case cited by Plaintiffs bars evidence of amounts paid to investor plaintiffs for the shares for which they are seeking to recover for a loss in value. In *Hugo Boss Fashions, Inc. v Federal Insurance Co.*, 252 F.3d 608 (2d Cir. 2001), the defendant insurance company argued it should not have to pay the plaintiff's defense costs incurred because the costs had actually been paid by the plaintiff firm's corporate parent. *Id.* at 623 n.15. *Ocean Ships, Inc. v. Stiles*, 315 F.3d 111 (2d Cir. 2002), demonstrates the most commonly excluded collateral source payment: insurance. In that case, the court held "damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partially ***indemnified for his loss by insurance*** effected by him and to the procurement of which the wrongdoer did not contribute." *Id.* at 116. (emphasis added). That is a fundamentally different scenario than what exists here, where Plaintiffs admit that the PwC Defendants ***are entitled*** to a reduction in their damages. *Ventura Associates, Inc. v. International Outsourcing Services, Inc.*, No. 04 Civ. 5962(PKL), 2005 WL 1634002 (S.D.N.Y. July 12, 2005), is also an insurance case that parallels *Ocean Ships*.

Judge Scheindlin's decision in *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation,* No. 1:00-1898, 2011 WL 6096934 (S.D.N.Y. Dec. 6, 2011), also excluded evidence of proceeds from insurance, but, as her decision explained: "The primary rationale for the collateral source rule is a concern that juries will be unfairly influenced in their determination of a defendant's liability if they hear evidence that the plaintiff received payments for the same injury from another source, such as the plaintiff's personal insurance, or a gratuitous service rendered by an unrelated third party." *Id.* at *2, 7. Here the payments at issue are not compensation for "the same injury from another source," they are simply evidence of the residual value of Plaintiffs' interests in the funds. Moreover, there can be no basis for claiming the jury might "unfairly" consider such evidence, as Plaintiffs admit it would be appropriate to reduce any verdict against the PwC Defendants by these amounts.

The PwC Defendants should therefore be entitled to present evidence showing that Plaintiffs' share or units in the funds did or do have value despite the Madoff Ponzi scheme, and that these amounts should not be included in any damages the jury may award for any diminution in the value of those shares or units proximately caused by any negligence on the part of the PwC Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion *in Limine* No. 5 should be denied.

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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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