MILBERG LLP

NEW YORK
LOS ANGELES
DETROIT

Robert A. Wallner
Direct Dial: 212-946-9335
rwallner@milberg.com

January 25, 2016

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 non-party New Greenwich Litigation Trustee, LLC, as Successor Trustee ("Trustee") of the Greenwich Sentry ("GS") and Greenwich Sentry Partners ("GSP") 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 plaintiffs' settlement with defendants PricewaterhouseCoopers LLP, PricewaterhouseCoopers Accountants, N.V. (collectively, "PwC"), and PricewaterhouseCoopers International Ltd. ("PwCIL," and collectively with PwC, the "PwC Defendants").[1] *See generally Marino v. Ortiz*, 484 U.S. 301, 304 (1988). The objections are summarized below.

First, the settlement agreement is void and unenforceable. The agreement states that it is entered into by and among "... the PwC Defendants (as defined herein), by and through their undersigned attorneys ...." Doc. No. 1533, at 1. The definition of "PwC Defendants" includes PwCIL;[2] however, PwCIL's attorneys never signed the agreement -- a fact not disclosed in the

[1] The Trustee sued PwC and others in New York state court. The Trustee has appealed to the First Department the lower court's orders dismissing the litigation, and the appeals are fully briefed.

[2] *Id.* at 15, ¶ (z); *see also* Doc. No. 1533 Ex. 2 at 1, n."5" (class notice: "PwC Defendants" include PwCIL). According to plaintiffs, PwCIL "exercised control" over PwC (Doc. No. 419, at 52), and PwC acted as PwCIL's "agents ... in conducting the audits and issuing the unqualified audit opinions on the Funds' financial statements ...." *Id.* at 47.

class notice.[3] Accordingly, there is no valid agreement. *Scheck v. Francis*, 26 N.Y.2d 466, 469-70 (1970) ("It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed."); NY Gen. Obligations Law § 5-701(a)(1); *see* Doc. No. 1533, ¶ 46 (New York law governs agreement). Moreover, because the agreement contemplates PwCIL's waiver of any contribution and indemnification claims against GS and GSP (Doc. No. 1533, at 20, ¶ 4; *see id.* at 13, ¶ (o)), PwCIL's failure to sign the agreement prejudices the Trustee[4] -- even if the agreement were otherwise enforceable against the remaining PwC Defendants.

Second, the [Proposed] Final Judgment and Order of Dismissal with Prejudice ("Judgment") contains "offset" language that PwC might contend reflects this Court's determination that PwC has colorable rights to offset the Trustee's claims due to the settlement. Specifically, the Judgment states, in pertinent part: "Nothing in this paragraph precludes the PwC Defendants from arguing that the settlement proceeds in this case are an offset against claims that may be made against them in other proceedings." Doc. No. 1533 Ex. 5, ¶ 19.[5] Any offset, however, would be improper, and flies in the face of PwC's statement that the Trustee is not seeking recovery on account of "the same injury" as that alleged by plaintiffs. *See* Doc. No. 1470, at 3 (citation omitted). At the very least, the Judgment should be modified to clarify that the Court expresses no view on the merits of any offset.

Third, the settlement improperly establishes a *single fund* to be shared (after payment of attorney fees and expenses) among all class members, the great majority of whom never invested in GS or GSP.[6] Any settlement should establish a *separate* settlement amount for class members who invested in the other Fairfield funds, and the class notice should disclose the various settlement amounts. This would ensure that the Trustee's claims are not offset by settlement

---

[3] Wilmer Cutler Pickering Hale & Dorr LLP represented PwCIL, but did not sign the stipulation. Although the PwC Defendants may regard themselves as one firm, the stipulation contemplates a separate signature by PwCIL's counsel.

[4] It also prejudices class members, who are supposed to receive releases from PwCIL. *See id.* at 25, ¶ 17; 16, ¶ (bb).

[5] The Trustee raised a similar point in connection with its application to intervene in connection with the Citco settlement, but the Court ruled that the Trustee had not shown prejudice. Doc. No. 1413. Here, however, the other objections described above, without more, establish prejudice.

[6] *See* Order dated Dec. 23, 2009, Doc. No. 372, at 11 (referencing 29 limited partners of GSP); Doc. No. 1205, ¶¶ 4, 6, 8 (Lead Counsel identified approximately 55 class members who invested in GS or GSP from October 31, 2003 to September 1, 2006); Doc. No. 1423, ¶¶ 4-5, 70 (Citco settlement notice sent to over 4000 potential class members who invested in the various Fairfield funds, including Fairfield Sentry Ltd.).

amounts allocated to class members who invested in Fairfield Sentry Ltd. (by far the largest fund by reported value) and other off-shore funds.[7] It also would ensure that class members are notified of the amount of any potential offset that PwC might claim in the Trustee's cases. *See generally In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 475 (S.D.N.Y. 2009) (approving class action settlements involving multiple IPOs, where separate settlement amount was designated for each IPO).

Nonetheless, if a single settlement fund is permitted, each PwC Defendant should be required to disclose the maximum amount it would claim as an offset against the Trustee's claims. Such disclosure is important for class notice and clearly implicates the adequacy of the settlement. For example, if GS and GSP investors collectively stood to receive, say, $5 million of the $55 million settlement fund, but PwC seeks to offset the Trustee's claims by $55 million, the settlement obviously is unfair and prejudicial to the Trustee. *See generally Denney v. Deutsche Bank AG*, 443 F.3d 253, 275-76 (2d Cir. 2006).

Respectfully,

Robert A. Wallner

cc (via email):
David A. Barrett, Esq.
Sarah L. Cave, Esq.
Timothy A. Duffy, Esq.
Robert C. Finkel, Esq.
Fraser L. Hunter, Jr., Esq.
Victor E. Stewart, Esq.

Plaintiffs and the PwC Defendants herein are directed to respond by 1-28-16, jointly by letter not to exceed five (5) pages, to the matters set forth above by non-party New Orleans Litigation Trustee.
SO ORDERED:
1-25-16
DATE
VICTOR MARRERO, U.S.D.J.

[7] *See* Doc. No. 1205, ¶ 35 n.5 (Lead Counsel's statement: "Whereas the purported asset balances of the Domestic Funds [*i.e.*, GS and GSP] approximated $140 million as of August 2006, the reported assets of the off-shore funds at times exceeded $7 billion.").