

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

Master File No. 09-cv-118 (VM)

**MEMORANDUM IN SUPPORT OF PROPOSED INTERVENOR NEW GREENWICH
LITIGATION TRUSTEE, LLC'S MOTION FOR RECONSIDERATION
OF ORDER DATED FEBRUARY 2, 2016 (DOC. NO. 1547)**

MILBERG LLP
Robert A. Wallner
One Pennsylvania Plaza
New York, New York 10119
Tel.: (212) 594-5300
Fax: (212) 868-1229
rwallner@milberg.com

*Attorneys for Non-Party New Greenwich Litigation
Trustee, LLC, as Successor Trustee of the
Greenwich Sentry, L.P. and Greenwich Sentry
Partners, L.P. Litigation Trusts*

Non-party and proposed intervenor New Greenwich Litigation Trustee, LLC, as Successor Trustee (“Trustee”) of the Greenwich Sentry, L.P. (“GS”) and Greenwich Sentry Partners, L.P. (“GSP”) Litigation Trusts, by its undersigned counsel, respectfully submits this memorandum in support of its motion for entry of an Order (i) pursuant to Local Civil Rule 6.3, granting reconsideration of this Court’s Decision and Order dated February 2, 2016 (Doc. No. 1547, “February 2 Order”) or, alternatively, (ii) declaring that defendant PricewaterhouseCoopers International Ltd. (“PwC International”) is bound by the Proposed PwC Settlement, as defined herein.

PRELIMINARY STATEMENT

On January 25, 2016, in accordance with the Court’s Individual Practices, the Trustee requested by letter (Doc. No. 1541) a pre-motion conference concerning the Trustee’s proposed motion to intervene in this action, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for the limited purpose of objecting to the proposed settlement (Doc. No. 1533, “Proposed PwC Settlement”) between plaintiffs and defendants PwC International, PricewaterhouseCoopers LLP (“PwC Canada”), and PricewaterhouseCoopers Accountants, N.V. (“PwC Netherlands,” together with PwC International and PwC Canada, the “PwC Defendants”).

By Order dated January 25, 2016, the Court directed the plaintiffs and the PwC Defendants to respond jointly to the Trustee’s request. (Doc. No. 1541 at 3.) On January 28, 2016, plaintiffs submitted a letter (Doc No. 1542), and PwC Canada and PwC Netherlands (but not PwC International) submitted a separate letter (Doc. No. 1543).¹ The Trustee submitted a

¹ The February 2 Order references the January 28, 2016 letter of the “PwC Defendants.” (Doc. No. 1547 at 4 (citing Doc. No. 1543).) That letter actually was submitted on behalf of PwC Canada and PwC Netherlands, who referred to themselves as the “PwC Defendants.” (Doc. No. 1543 at 1.) PwC International never submitted or joined in any letter.

reply letter on January 29, 2016. (Doc. No. 1544.) On February 2, 2016, the Court denied the Trustee's request for a pre-motion conference. (Doc. No. 1547.)

The Trustee's request addressed three objections to the Proposed PwC Settlement. Pertinent here is the objection that the settlement agreement is not fully executed. The settlement agreement requires the signatures of counsel for *each* PwC Defendant (*see* Doc. No. 1533 at 1, 15); however, PwC International's counsel never signed the document.² Accordingly, the Trustee contends, even if the agreement were otherwise enforceable against PwC Canada and PwC Netherlands, PwC International is not bound by the agreement, thereby depriving the Trustee and the class members of benefits contemplated by the agreement. Those benefits include PwC International's waiver of any contribution and indemnification rights against GS and GSP (Doc. No. 1533 at 20, ¶ 4) and release of claims against class members (*id.* at 25, ¶ 17; 16, ¶ (bb)).

In its February 2 Order, the Court ruled that the Trustee could not establish formal legal prejudice, stating: "PwC International has agreed to be bound by the Proposed PwC Settlement." (Doc. No. 1547 at 7.) As shown below, the Court should reconsider the February 2 Order because its statement -- although central to its ruling -- is factually erroneous. Alternatively, the Court should rule that, because PwC Canada and PwC Netherlands' counsel signed the Proposed PwC Settlement, their signatures bind PwC International as well.

² The Trustee's other objections concerned (i) "offset" language in the proposed final judgment, and (ii) the settlement's failure to establish a separate fund for investors in GS and GSP. *See* Doc. No. 1541 at 2-3.

ARGUMENT

I. THE APPLICABLE STANDARD

Reconsideration is appropriate where the moving party can show that the court “overlooked” facts or controlling law that “might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see* Local Rule 6.3; *see generally In re 310 Assocs.*, 346 F.3d 31, 35 (2d Cir. 2003) (stating that, under Fed. R. Civ. P. 60(b)(1), it was an “abuse of discretion not to correct [an] obvious factual mistake”) (brackets in original) (construing *Cappillino v. Hyde Park Cent. Sch. Dist.*, 135 F.3d 264 (2d Cir. 1997)).

II. THE MOTION SHOULD BE GRANTED

In ruling that the Trustee could not show formal legal prejudice by PwC International’s failure to sign the settlement agreement, the Court stated that PwC International has “agreed to be bound” by the settlement. (Doc. No. 1547 at 7). In fact, it has never agreed to be bound. To express its agreement to be bound, PwC International would have had to sign the settlement agreement. It did not do so. Nor has it otherwise represented that it is bound by PwC Canada and PwC International’s signatures. As such, the Court’s statement that PwC International “agreed to be bound” by the settlement is factually erroneous.³

Additionally, the Court overlooked controlling law. Because the settlement agreement contemplated that it would be signed by PwC International’s counsel, counsel’s failure to sign

³ The source of the error may have been the letters submitted by defendants PwC Canada and PwC Netherlands (Doc. No. 1543) and plaintiffs (Doc. No. 1542). According to the February 2 Order, “[t]he PwC Defendants join the January 28 Anwar Plaintiffs Letter,” which “contends that ... PwC International agrees to be bound by the final judgment ...” (Doc No. 1547 at 4.) However, the term “PwC Defendants,” as used in the letter submitted by PwC Canada and PwC Netherlands, referred only to *those* two defendants, *and not PwC International*. *See* footnote 1, above.

the agreement renders the agreement void under New York law. *See 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 generally* Proposed PwC Settlement, Doc. No. 1533, ¶ 46 (New York law governs agreement).

In light of PwC International’s failure to sign the settlement agreement, the agreement is unenforceable against PwC International -- even if it is otherwise enforceable against PwC Canada and PwC Netherlands. That fact, without more, prejudices the Trustee and the class members, because they lose the benefits that PwC International is supposed to provide under the settlement. As the Second Circuit has explained, formal legal prejudice exists “when, for example, the settlement agreement formally strips a non-settling party of a legal claim or cause of action, such as a cross-claim for contribution or indemnification” *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014) (emphasis omitted); *see* February 2 Order at 6 (quoting *Bhatia*). Here, while the settlement agreement does not strip the Trustee, GS or GSP of any claims for contribution or indemnification, it is supposed to *protect* them from PwC International’s assertion of any contribution or indemnification claims. PwC International’s failure to sign the agreement deprives the Trustee, GS and GSP of those protections, thus establishing formal legal prejudice.

Accordingly, the Court should reconsider the February 2 Order and grant the Trustee’s request for a pre-motion conference. Alternatively, the Court should rule that PwC International is bound by the Proposed PwC Settlement so that, if finally approved, it will be enforceable against PwC International.

CONCLUSION

For the foregoing reasons, the motion should be granted.

Dated: February 9, 2016

Respectfully submitted,

MILBERG LLP

By: /s/ Robert A. Wallner

Robert A. Wallner

One Pennsylvania Plaza

New York, New York 10119

Tel.: (212) 594-5300

Fax: (212) 868-1229

rwallner@milberg.com

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