UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.* *Plaintiffs,* -against- FAIRFIELD GREENWICH LIMITED, *et al* . *Defendants.* This document relates to all actions.	Master File No. 09-CV-0118 (VM)

JOINT EXPERT DECLARATION OF JEAN-PIERRE FIERENS° AND BART VOLDERS° REGARDING BELGIAN LAW

Brussels, February 25, 2011

° BVBA/SPRL

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1 QUALIFICATIONS

1. JEAN-PIERRE FIERENS° is the head of Stibbe's Litigation and Arbitration team and former head (*bâtonnier*) of the Brussels Bar (1998-2000). He has over 30 years of experience in handling complex (cross-border) litigation and arbitral proceedings with an emphasis on corporate, general commercial and distribution law. He is an Accredited Mediator of the CEDR (Center for Effective Dispute Resolution), acted as counsel in over 60 (domestic and international) arbitrations and is regularly appointed as an arbitrator in (cross-border) commercial disputes. His works are widely published and he is regularly invited as guest speaker at academic conferences.

2. BART VOLDERS° is a member of the Brussels Bar and a member of Stibbe's Litigation and Arbitration team. He holds a PhD. in law (2007), lectured on private international law at the Universities of Antwerp, Belgium (2008-2010) and Bujumbura, Burundi (2008-2009) and the law of international commercial arbitration at the University of Toulouse, France (2009). He is a member of the editorial board (private international law section) of the Belgian Commercial Law Review and the Belgian Consumer Law Review, and served as an assistant editor to the *Yearbook of Private International* (2008-2010) and to *Unilex* (2007-2009).

3. Copies of the *résumés* of Jean-Pierre Fierens° and Bart Volders°, including a list of their relevant publications, are enclosed in this affidavit[1].

2 DECLARATION OF INDEPENDENCY

4. We hereby declare that we are independent from either of the parties to the present proceedings. This joint declaration reflects what we believe to be an accurate description of Belgian (private international) law.

3 QUESTION, MATERIALS RECEIVED AND ASSUMPTIONS

3.1 QUESTION

5. We were asked by BOIES, SCHILLER & FLEXNER LLP, interim Co-Lead Counsel for the Plaintiffs, whether a judgment – or court-approved settlement – that would be handed down by the United States District Court for the Southern District of New York (the "New York District Court") in the framework of a pending opt-out class action litigation under the provisions of *U.S. Federal Rule of Civil Procedure 23* involving both U.S. and non-

[1] Annexes 1 and 2

U.S. investors (including investors domiciled in Belgium), would qualify for recognition in Belgium and would be awarded preclusive (*res iudicata*) effect by the Belgian courts.

If the judgment of the New York District Court qualifies for recognition in Belgium, it shall serve as a bar to subsequent court litigation in Belgium, both for the respondents to the present class action proceedings, and for members of the class which did not (timely and validly) opt-out.

3.2 MATERIALS RECEIVED

6. BOIES, SCHILLER & FLEXNER LLP provided us with the following materials for our drawing up this declaration:

(i) The *Second Consolidated Amended Complaint* dated September 29, 2009, submitted to the New York District Court by Mr DAVID BOIES of BOIES, SCHILLER & FLEXNER LLP *and others* (the "Second Consolidated Amended Complaint");

(ii) The decision handed down and filed by the New York Court on August 18, 2010, in the matter *Pasha S. Anwar, et al., Plaintiffs -against- Fairfield Greenwich Ltd., et al., Defendants*, 09 Civ. 0118 (VM);

(iii) The *Subscription Agreement (Non-United States of America Subscribers only) Fairfield Sigma Limited* (non-dated);

(iv) The *Fairfield Sentry Limited Subscription Documents* (instructions) and *Subscription Agreement (non-United States of America Subscribers only) Fairfield Sentry Limited* (non-dated);

(v) The *Private Placement Memorandum Fairfield Sentry Limited*, dated August 14, 2006;

(vi) A letter of PriceWaterHouseCoopers Accountants N.V., dated February 7, 2006, to Fairfield Greenwich Group (subject: "*Audit – year ended 31 December 2005*");

(vii) A letter of PriceWaterHouseCoopers LLP Chartered Accountants, dated October 7, 2007, to Mr DANIEL LIPTON, Partner and CFO, Fairfield Greenwich Group.

3.3 ASSUMED FACTS AND OTHER ASSUMPTIONS

7. Our analysis below is based on the following assumed facts and other assumptions:

(i) The action is brought before the New York District Court, which has jurisdiction. There is no forum selection clause that awards (exclusive) jurisdiction to the courts of Belgium or the courts of another Member State of the European Union or the 2007 Lugano Convention[2];

(ii) The action is not directed against respondents that are domiciled or habitually resident in Belgium. The various respondents to the proceedings before the New York District Court are hereinafter collectively referred to as the "Respondents";

(iii) The action is brought by U.S. and non-U.S. investors, including several registered and beneficial owners that are domiciled or habitually resident in Belgium. All investors are hereinafter collectively referred to as the "Plaintiffs";

(iv) The procedural and substantive law applicable to the present claims and proceedings before the New York District Court is not Belgian law;

(v) The claims purport to hold the Respondents responsible, *inter alia*, for infringements of U.S. federal securities law, common law of tort, breach of contract and quasi-contractual obligations;

(vi) The Respondents do not have any attachable assets in Belgium;

(vii) The class shall not comprise customers who invested in common pools operated by registered shareholders;

(viii) The Belgian investors will be notified or served individually in accordance with the provisions of the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") to which both Belgium and the U.S. are Contracting Parties. Belgium has agreed to the appropriateness of service or notification by registered mail[3].

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2 The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, concluded in Lugano on October 30, 2007.

3 Art. 10 of the Hague Service Convention (available at the website www.hcch.net).

4 OPINION

8. At the outset, we are unaware of any published precedent in Belgian case-law[4] that deals directly with the issue of whether a foreign (U.S.) *opt-out* class action judgment (or court-approved settlement agreement) qualifies for recognition in Belgium. We are similarly unaware of any published case-law of Belgian courts that deals with the recognition of a foreign (U.S.) *opt-in* class action judgment (or court-approved settlement). There are no directly controlling precedents, statutes or other rules expressly prohibiting recognition of, and/or granting *res iudicata* effect to, a U.S. opt-out judgment or court-approved settlement.

The question of whether foreign class action judgments (or court-approved settlements) qualify for recognition in Belgium is, moreover, only scarcely dealt with in Belgian legal writing. The majority of academic articles deal with the question of whether class action proceedings, in a manner similar to other European countries, can or should be introduced in Belgium, and whether and how existing civil procedural law rules would need to be modified for that purpose. Conflict of law is most often not being dealt with in articles discussing class action proceedings, which also means that academic writing only provides us with limited guidance as to whether recognition can be granted.

9. The starting point of our analysis is that a full-fletched U.S.-style opt-out class actions, as is pending before the New York District Court, is currently not available before the Belgian courts. The recognition of a U.S. opt-out class action judgment (or court-approved settlement) would thus require a Belgian court to award preclusive (*res iudicata*) effects to a mechanism that does not, as such, exist under Belgian law, and that would prevent absent (Belgian) class members, which did not opt-out, from embarking into court litigation in Belgium. Recognition would similarly prevent the Respondents from launching proceedings in Belgian with respect to matters that are dealt with in the U.S. class action proceedings.

The structure of our analysis is fourfold. We shall first detail the relevant conditions for the recognition of a U.S. court decision in Belgium (4.1). Then we shall demonstrate that none of the grounds for refusal that could result in the U.S. judgment not being amenable to recognition in Belgium, preclude the recognition of the U.S. opt-out class action in Belgium (4.2). The same conclusion holds true if recognition is sought for a court-approved class action settlement agreement (4.3). We also shall demonstrate why, in our opinion, the opt-out class action proceedings that are currently pending before the New York District Court are superior to other methods that are available to an absent class member for fairly and efficiently adjudicating the controversy before a Belgian court (4.4).

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[4] Only a limited number of Belgian court decisions are made available to the public through law journals or electronically on government or privately held websites or databases. Our analysis does not extend to non-published case-law.

4.1 CONDITIONS FOR THE RECOGNITION OF A U.S. COURT DECISION IN BELGIUM

10. Absent any multilateral or bilateral convention between Belgium and the United States of America (the "U.S." or the "United States"), the recognition of decisions handed down by United States courts in civil and commercial matters is subject to the provisions of the Code of Private International Law (*Code de droit international privé*), enacted by the Law of July 16, 2004[5] and which entered into force on October 1, 2004[6] (the "Code").

The effects of foreign judgments are dealt with in Chapter I, Sec. 6, Art. 22 through 31 of the Code. These provisions apply to foreign judgments handed down after the Code had been entered into force, that is after October 1, 2004 (Art. 126, par. 2 of the Code).

A "judgment" for the purposes of the Code means any decision rendered by an authority exercising judicial power (Art. 22, par. 3, 1° of the Code). The concept of "judgment" should be construed broadly.

11. The Code provides for an automatic recognition of U.S. judgments – meaning that a U.S. judgment gains "legal force" (or "legal effects") in Belgium (Art. 22, par. 3, 2° of the Code) – without there being a need for a particular (preliminary) procedure before the Belgian state courts (Art. 22 of the Code).

Whilst the recognition of a U.S. judgment implies under no circumstances a review of its merits – meaning that a "re-trial" of the substance of the matter before a Belgian court is precluded (Art. 25, par. 2 of the Code) – recognition is, however, subject to the U.S. court decision not infringing upon any of the grounds for refusal that are exhaustively listed in Art. 25, par. 1 of the Code. The grounds for refusal are mandatory, meaning that if the Court would hold that the foreign judgment is infringing upon one or more of the grounds for refusal, it should refuse recognition.

12. A U.S. judgment shall be refused recognition if it infringes upon one or more of the following grounds for refusal (Art. 25, par. 1, 1° through 9° of the Code):

(i) the result of such recognition would be manifestly incompatible with (Belgian international) public policy. Upon determining this incompatibility (which rests as a matter of fact with the lower courts), the Court should take into consideration the extent to which the matter is connected to the Belgian legal order and the seriousness of the consequences which will be caused if the U.S. judgment were to be recognized or enforced[7]. Contrariety to

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5 Belgian Official Journal (*Moniteur belge*) of July 27, 2004 (annex 3).

6 Art. 140 of the Code (annex 3).

7 Compare with Art. 21 of the Code (annex 3).

(international) public policy is to be construed restrictively, meaning that it can only be triggered in exceptional circumstances.

(ii) the court proceedings in the U.S. would have violated the right to a fair trial and due process of either of the parties to the U.S. proceedings. The right of fair trial and due process comprises the various requirements that are spelled out in Art. 6, par. 1, of the European Convention on Human Rights (the "ECHR").

(iii) in a matter in which the parties cannot freely dispose of their rights, the judgment was obtained only to evade governing law as designated by the Code. This refusal ground penalizes, at the level of recognition, a fraudulent evasion of the governing law (*fraude à la loi*).

(iv) according to local (New York) civil procedural law, the judgment would still be open to an ordinary recourse before the U.S. courts. If so in such a case, it does not qualify as final, meaning that it shall not be amenable to recognition in Belgium. Art. 23, par. 4 of the Code does, however, allow for such judgment to be provisionally enforced in Belgium, albeit still subject to or open to an ordinary recourse in the U.S. Such provisional enforcement may be made, at the discretion of the enforcement court, subject to the provision of a guarantee and is at risk of the party that requested the provisional enforcement.

(v) the U.S. judgment would be irreconcilable with a Belgian decision or an earlier foreign decision that would be amenable to recognition in Belgium. For this purpose, the relevant date of the U.S. judgment shall be the date on which it will be handed down.

(vi) the claim was brought abroad after a claim (which is still pending between the same parties and with the same cause of action) had been brought in Belgium.

(vii) the Belgian courts had exclusive jurisdiction to hear the claim (e.g., because of an exclusive forum selection clause that would award sole jurisdiction to the Belgian courts; or because of an exclusive jurisdiction that would be granted to the Belgian courts with respect to certain matters of the law of intellectual property (Art. 94 of the Code) or company law (Art. 115 of the Code)).

(viii) the jurisdiction of the U.S. courts was based exclusively on the mere presence of the respondent[8] or assets located in the U.S., but without any direct relationship with the dispute. Such jurisdiction is considered as excessive, meaning that the foreign judgment will be struck out as not amenable to recognition in Belgium.

(ix) the recognition would be contrary to the grounds for refusal contained in Articles 39, 72, 95, 115 and 121 of the Code. These provisions relate to certain issues of family law, the law of intellectual property, company law and the law of insolvency.

4.2 CAN A U.S. OPT-OUT CLASS ACTION JUDGMENT BE RECOGNIZED IN BELGIUM?

13. On the basis of our understanding of the factual and procedural background of this matter and the various assumptions we made (No. 7), the grounds for refusal that are relevant to the recognition of a U.S. opt-out class action judgment, comprise (i) and (ii), that is a *contrariety to Belgian international public policy* and an *infringement of the right to a fair trial and due process* by the U.S. court proceedings.

However, we shall demonstrate that, in our opinion, neither of the two grounds for refusal are likely to result in a U.S. opt-out class action judgment not being amenable to recognition in Belgium.

14. The *other grounds for refusal* listed under (iii) through (ix) are clearly *irrelevant* for our assessment below:

The class action proceedings pending before the New York District Court deal with private investments losses, which is a matter that is at the free disposition of the parties under Belgian law, meaning that the third ground for refusal mentioned above is of no interest. We assume that recognition is sought only for a judgment that is not open to any appeal or other ordinary recourse under the laws of the State of New York or under applicable U.S. Federal law. We also assume that there is no (on-going) parallel litigation, either in Belgium or abroad, that could result in a *lis pendens,* and hence, hinder the recognition of the U.S. judgment in Belgium. Moreover, we understand that the claim brought before the New York District Court purports to hold the Respondents responsible for, *inter alia*, infringements of federal securities law, common law of tort, breach of contract and quasi-contractual obligations, and without there being an exclusive forum selection clause for the Belgian courts. Such issues, clearly, do not belong to the exclusive jurisdiction of the Belgian courts. Several plaintiffs and respondents, moreover, are domiciled in the U.S., the

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[8] That is, the respondent in (subsequent) opposition proceedings before the Belgian courts.

law applicable to the dispute includes Federal and New York law, and the class actions are dealing with investment transactions that partly took place in the U.S. Thus the jurisdiction of the New York District Court cannot be considered as excessive. Finally, the proceedings do not deal with issues referred to in Art. 39, 72, 95, 155 and 121 of the Code, which relate to family law, the law of intellectual property, company law and the law of insolvency, meaning that the last ground for refusal referred to here above is also inapplicable to the case at hand.

(a) ***Concepts of international public policy and the requirements of a fair trial and due process***

15. Non-compliance with *Belgian international public policy* allows the Belgian courts to set aside the application of foreign law (in the framework of conflicts of laws)[9] or to refuse the recognition and enforcement of a foreign court decision.

The concept of international public policy has no fixed meaning, but instead its content evolves over time. It encompasses principles of substantive and procedural law that are considered to be so fundamental to the Belgian political, social or economic order that they should be complied with at all times. Although the contents of international public policy are proper to Belgian law, in construing the international public policy prong, an "internationalist" approach is preferred.

Contrariety to international public policy should, moreover, be construed narrowly, which follows from the referral to "manifestly" (*manifestement*) in Art. 25, par. 1, 1° of the Code. The contrariety is only triggered because of the results that the foreign judgment produces, or risks to produce, in Belgium, and not because of the (content of the) foreign judgment itself. In other words, in order to infringe upon Belgian concepts of international public policy, the relevant factors are the manner and purpose for which the foreign judgment will be used in Belgium.

In appraising whether such results infringe upon Belgian international public policy, the court should take into consideration the extent to which the matter is connected to the Belgian legal order and the seriousness of the consequences which will be caused if the U.S. judgment were to be recognized or enforced. If the matter is only loosely connected to Belgium, the international public policy prong that could serve as a ground for non-recognition should be construed even more narrowly.

16. The non-recognition because of an *infringement of the right to a fair trial and due process* (Art. 25, par. 1, 2° of the Code) aims at safeguarding that the foreign court

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[9] Art. 21 of the Code (annex 3).

proceedings in the State of origin have not infringed upon the right to defence by either of the parties to those proceedings.

As opposed to the (procedural) international public policy referred to in Art. 25, par. 1, 1° of the Code, the prerequisite that the foreign proceedings and the foreign judgment that is the outcome of those proceedings must meet the requirements of a fair trial and due process is not conditioned on any requirement that the matter is connected to the Belgian legal order or the seriousness of the consequences that recognition or enforcement of a foreign judgment would cause. Even foreign judgments that are only loosely connected to Belgium, but which would infringe upon the requirements of a fair trial and due process, shall not qualify for recognition in Belgium.

The requirements of a fair trial and due process are determined solely by reference to *fundamental* concepts of Belgian civil procedural law (including the requirements that the case is heard by an independent judge and that the respondent is given the opportunity to timely and adequately prepare his or her defence), which includes the fundamental procedural rights spelled out in Art. 6, par. 1 and other provisions of the ECHR. The European Court of Human Rights expressly confirmed in *Pellegrini v. Italy* of July 20, 2001, that a European court should ensure that the foreign court proceedings in the State of origin comply with the fundamental rights and requirements that are spelled out in the ECHR[10].

(b) ***These grounds for refusal do not result in a non-recognition of the U.S. opt-out class action judgment***

17. It is our opinion that recognition of a U.S. opt-out class action by a Belgian court shall not be barred as contrary to substantive or procedural Belgian international public policy, and does not infringe upon the requirements of a fair trial and due process. This conclusion holds even if, as a result of the recognition, absent class members which did not (timely and validly) opt-out, are prevented from launching subsequent court action in Belgium.

This conclusion draws on the following elements.

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10 European Court of Human Rights, July 20, 2001, *Pellegrini v. Italy*, available on the website of the European Court of Human Rights, HUDOC, at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

(i) *The mere fact that opt-out class actions currently do not exist in Belgium, does not make such proceedings contrary to Belgian international public policy*

18. First of all, the mere fact that (opt-out) class action proceedings are unknown in Belgium, does not imply that (opt-out) class actions are *ipso facto* excluded from recognition. In other words, Belgian law shall not oppose recognition just because the mechanism of an opt-out class action has not fully been adopted in Belgian law. For instance, punitive damages are unknown under Belgian law. Still, foreign judgments awarding punitive damages are not a priori or by definition excluded from recognition. Instead, a Belgian court is required to assess, *on the basis of the specific facts of the case at hand*, whether or not foreign judgments that award punitive damages comply with Belgian international public policy.

Another example is unilateral repudiation of marriage, which is practiced in several muslim countries but is unknown in Belgium. This, however, does not imply that a foreign repudiation cannot, by definition, be recognised in Belgium. In exceptional circumstances and subject to certain restrictive conditions being met, Belgian courts are willing to grant recognition to a foreign repudiation, and accept that this technique can produce effects that are similar or even equivalent to a (Belgian) divorce[11].

19. Moreover, although opt-out class action proceedings similar to those under *U.S. Federal Rule of Civil Procedure 23* are as such unknown to Belgian law, various kinds of collective litigation mechanisms are available to plaintiffs who intend to start legal proceedings before a Belgian court.

Some forms of collective litigation recognized in Belgium draw on the general principles of civil procedural law. Belgian civil procedural law, for instance, allows a person's rights and interests to be represented in court by an agent alone, while the parties represented remain anonymous or are identified by class only. Thus, a "lead" insurer may act in its own name, but on behalf of its co-insurers; an assignor is entitled to act for an unidentified assignee; administrators appointed by the members of an unincorporated association can act on account of all members of the association; etc.

In addition, specific laws allow for the introduction of court proceedings for the benefit of a group of persons or enable organizations to bring a case to court and defend the interest of their members. The Bar Councils, professional societies of public law, have, for example, proper standing to defend the professional interests of the Bar as a whole. And with respect to anti-discrimination law, environmental protection, copyright protection and unfair trade practices, public interest groups and private organizations are allowed to bring legal action in the collective interest.

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[11] Art. 57 of the Code (annex 3).

Although the conditions under which collective actions can be brought vary, and none of the above mechanisms can be considered the equivalent of the opt-out class action proceedings that are provided for in *U.S. Federal Rule of Civil Procedure 23*, it is an undisputable fact that collective legal action can be brought in Belgium in the interest of individuals who did not expressly consent to it.

20. Also, in employment matters a form of class action proceeding is already available in matters of employment law. Art. 138*bis*, par. 2 of the Belgian Judicial Code (*Code judiciaire*), enacted by a Law of December, 3 2006[12], provides that the public prosecutor may initiate legal action *ex officio* for breaches of laws and regulations that are within the jurisdiction of the labor law courts. The court seized shall hand down a declaratory judgment if it holds that a certain law or regulation has been breached. This declaratory judgment shall have *res iudicata* effects upon all individual workers involved, even though they would not have participated in the proceedings before the labor law court. Individual workers that would be affected by such a breach should afterwards seek damages in a separate, individual lawsuit against their employer. Because the judgment of the labor law court has *res iudicata* effects upon all individual workers concerned, they cannot challenge the declaratory decision handed down by the labor law court.

Although this mechanism, obviously, is different on a number of substantial points from the opt-out class actions under *U.S. Federal Rule of Civil Procedure 23*, it does demonstrate the mere fact that a judgment can produce, also under Belgian law, *res iudicata* effects upon parties who did not formally participate in the court proceedings.

21. Whether or not class actions, either opt-out or opt-in, should be adopted *outside the area of employment law* is, moreover, being explored by the Belgian legislature in a number of draft Bills of Parliament. However, none of these draft Bills have been enacted yet today, because of the fact that parliamentary elections took place in June 2010 (meaning that all pending proposed legislation is automatically halted), and as a result no draft legislation on class actions is currently proceeding before the legislature. Without a doubt, however, some of these draft Bills shall be reintroduced as soon as a new government takes office.

Although today, a full-fletched U.S.-style class action proceeding is not available in all areas in Belgium, the fact that the legislature has been examining whether and how such proceedings could be introduced in Belgian civil procedural law does make it difficult to simply reject the class action mechanism as manifestly contrary to Belgian concepts of international public policy. If that would have been the case, it would not have made sense for the Belgian legislature to examine if, and how, a class action mechanism could perhaps

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[12] Belgian Official Journal (*Moniteur belge*) of December 18, 2006 (2nd edition) (annex 4).

be adopted in Belgium. The mere fact that the legislature has been exploring whether and how class actions could be introduced in Belgium demonstrates that concepts of international public policy are not, or no longer, opposed to recognizing foreign class actions under appropriate circumstances.

This conclusion is also confirmed by the fact that the Bar Council of the Brussels Bar adopted a resolution on May 18, 2009 that provides the members of the Brussels Bar with a specific set of professional ethics rules when dealing with collective court litigation and settlement negotiations (the "Resolution"). These rules amend the existing ethics rules and take into consideration the particularities of collective litigation in order to enable members of the Brussels Bar to serve the class's interests more efficiently. The Resolution also ensures that the interests of class members that would not actively participate in the court or settlement proceedings, are adequately protected.

Again, the fact that the Bar Council of one the most prominent Belgian Bars acknowledges that collective litigation presents a series of particularities that require amendments to the existing professional ethics rules, again strengthens our conclusion that class actions do not, as such, infringe upon Belgian international public policy concepts.

22. Class action mechanisms are furthermore available in neighboring and other European Member States including Germany, Spain, Finland, Portugal and Sweden, and with other countries, such as France and the European Commission are currently exploring whether and how class action proceedings could be introduced in the their legal system.

Although most countries only organize opt-in class action proceedings, some countries including the Netherlands, Portugal and the United Kingdom, do allow for opt-out class actions. The question of whether opt-out class actions infringe upon the requirements of a fair trial and due process and Dutch concepts of international public policy, have been thoroughly addressed by the Dutch legislature as part of the drafting process of the Dutch law on class actions. Thus, the Dutch legislature was satisfied that opt-out class action proceedings do not infringe upon fair trial and due process requirements and Dutch concepts of international public policy. The same holds for Portugal and the United Kingdom.

The fact that class actions, including opt-out class actions, have been accepted in other European countries that are similarly Contracting States to the ECHR and that share a similar, if not common, legal tradition, again supports the conclusion that Belgian concepts of international public policy too should not automatically oppose the recognition of a U.S. opt-out class action judgment in Belgium.

23. Based on these facts, it seems fair to conclude that class action proceedings, including opt-out class actions, do not as such infringe upon Belgian concepts of substantive or procedural international public policy.

This conclusion is further strengthened by the fact that the international public policy prong takes into consideration the extent to which the situation is linked to Belgium and the seriousness of the consequences which will be caused if the U.S. judgment were to be recognized in Belgium (No. 15). Indeed, the matter at hand seems only remotely connected to Belgium. None of the Respondents is a Belgian established company which have its registered offices in Belgium. The transactions that gave rise to the current litigation have no or only remote links with Belgium and Belgian law is not applicable to the proceedings before the New York District Court.

For this reason, the international public policy prong must be construed even more narrowly in the case at hand.

(ii) *The recognition of an opt-out class action does not, as such, infringe upon the requirements of fair trial and due process*

24. Moreover, the requirements of fair trial and due process that are, for the most part, embedded in Art. 6, par. 1, of the ECHR (No. 16), do not preclude the recognition of an U.S. opt-out class action judgment.

aa) Fundamental rights of access to the courts and equality of arms?

25. First of all, we think that it is incorrect to state that the fundamental right of access to court that is granted under Art. 6, par. 1 of the ECHR, can only be comprised as awarding (prospective) litigants with a mere individual access to the courts, meaning that Art. 6, par. 1 of the ECHR would by definition preclude all varieties of opt-out collective litigation. Similarly, it would not be persuasive to argue that the fundamental principle of equality of arms would be jeopardized if, in case of an opt-out class action, the *identity* of all of the class members would not necessarily be known to the respondent parties when initiating the court proceedings.

Class action proceedings and other forms of collective litigation purport to ensure that parties are granted an *efficient* access to the courts, meaning that parties are awarded an opportunity to litigate in court claims that otherwise they would not litigate individually. Class actions and other forms of collective litigation also ensure a *proper equality of arms* between the plaintiffs and the respondents to the proceedings, which often cannot be guaranteed to a similar extent if the class members had to litigate individually against the respondents, that most often are repeat-players in complex cross-border litigation.

The fact that the *identity* of the class members in opt-out class action proceedings is not always known to the respondents at the time the proceedings are initiated does not imply that such proceedings necessarily infringe upon Art. 6, par. 1 of the ECHR and the fundamental principle of an equality of arms. There are several precedents in Belgian case-law where the courts have accepted that legal action can be brought by way of summary *ex parte* proceedings, even if the identity of the respondents is unknown and accordingly cannot be served, notified or represented in court. For example, in civil cases against unlawful occupants of a premises ("squatters"), the courts have held that the plaintiff's right of having the court deal with his or her claim *outweighs* the fact that the identity of the respondents could not be made known when the proceedings were launched.

The President of the Court of First Instance of Hasselt, in a decision handed down on May 13, 1994, went even a step further and held that collective summary *ex parte* proceedings could also be used if, because of the number of the respondents involved (some 261 in the case at hand), the plaintiff could not reasonably be asked to initiate court actions against all respondents individually[13].

These decisions lend support to our conclusion that opt-out class action proceedings, with the absent class members' identity not always made known to the respondents at the time the proceedings are initiated, do not, *ipso facto*, infringe upon the equality of arms contained in Art. 6, par. 1 of the ECHR. They similarly confirm that, according to the Belgian courts, the right of an efficient access to the courts should be guaranteed at all times.

26. Also, if the identity of the respondent is known, but not his or her domicile or residence, that person can validly be called to appear in court. Respondents whose domicile or place of residence is unknown, either in Belgium or abroad, can be served by way of serving or notifying the summons to the public ministry's office[14].

Although that particular respondent is assumingly most likely to be unaware of a service or notification being performed and that he or she is being called to appear in court, it demonstrates that the rules dealing with individual, actual service or notification are sufficiently flexible to ensure that a plaintiff is able to bring his or her claim to the courts.

27. The fact that the recognition of U.S. opt-out class actions in Belgium do not, as such, infringe upon Art. 6, par. 1 of the ECRH can further be strengthened by a decision handed down by the Amsterdam Court of First Instance on June 23, 2010 (case number:

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13 President of the Court of First Instance of Hasselt, May 19, 1995, not published, reprinted in E. MONARD and D. DEGREEF, *Het eenzijdig verzoekschrift*, Antwerp, Kluwer, 1998, p. 224 (annex 5).

14 Art. 40, par. 2, of the Belgian Judicial Code (annex 6).

398833 / HA ZA 08-1465)[15]. In this judgment, the Amsterdam Court held that U.S. opt-out class action proceedings were not incompatible with the requirements spelled out in the ECHR, meaning that a final U.S. opt-out class action judgment could be amenable to recognition in The Netherlands.

Since The Netherlands is a contracting State to the ECHR and is therefore subject to the exact same right of access to the courts guaranteed by Art. 6, the conclusion that U.S. opt-out class action proceedings qualify for recognition in The Netherlands and do not necessarily infringe upon the ECHR is, while not binding on a Belgian court, at least persuasive authority.

28. In any event, even if the right of access to court had to be understood as awarding each person with an absolute *individual* right of access to the courts (which, in our opinion, it does not), and even if Art. 6, par. 1 of the ECHR required the *identity* of all plaintiffs be known in advance in order to ensure an equality of arms (which, in our opinion, it does not), the present opt-out class action proceeding pending before the New York District Court still does not jeopardize Art. 6, par. 1 of the ECHR.

The class members to the present proceedings will be served or notified either individually pursuant to the Hague Service Convention, or by the best means possible under circumstances, so that absent class members will be informed of their right to opt-out of the proceedings and of the consequences of their failing to do so. The fact that a class member forfeits his or her right to initiate individual court action if he or she, deliberately or negligently, fails to opt out, does not at all imply that this person never had an individual access to the courts.

(bb) Other procedural barriers?

29. Again, even if in the present case, certain Belgian residents may not be individually served or notified pursuant to the provisions of the Hague Service Convention, we do not think that the recognition of the decision that is to be handed down by the New York District Court shall strand upon other procedural barriers, notably the right to select one's own counsel. The tenet that no one can represent another person in court unless empowered by law or on the basis of a power of attorney (which is known by its French formulation: "*nul ne plaide par procureur*") cannot prevent the recognition of the judgment of the New York District Court. According to the Belgian Supreme Court (*Cour de cassation*), this tenet is not a general principle of law[16], meaning that it cannot be considered as part of the

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15 Available on the website: www.rechtspraak.nl (annex 7).

16 Cass., September 28, 1984, *Arr. Cass.*, 1984-85, p. 169 (annex 8).

Belgian concepts of international public policy and the requirements of fair trial and due process.

30. We are unaware of other procedural barriers that could result in the judgment of the New York District Court not being amenable to recognition in Belgium because of a contrariety to the requirements of fair trial and due process.

4.3 DOES A U.S. COURT-APPROVED CLASS ACTION SETTLEMENT AGREEMENT QUALIFY FOR RECOGNITION IN BELGIUM?

31. Art. 22 through 31 of the Code dealing with the recognition and enforcement of foreign judgments apply irrespectively of whether the decision is in an adversarial matter initiated by a complaint or any other type of proceeding, like adoption proceedings or other proceedings initiated by petition.

A class action settlement agreement that is approved by the New York District Court and entered as part of a final judgment or court order shall thus be amenable to recognition in Belgium in the same manner, with the Belgian courts being authorized to award preclusive (*res iudicata*) effects to this court-approved settlement agreement.

4.4 SUPERIORITY OF U.S. CLASS ACTION PROCEEDINGS TO OTHER AVAILABLE METHODS FOR FAIRLY AND EFFICIENTLY ADJUTICATING THE CONTROVERSY

32. We understand that the New York District Court should also appraise, on the basis of *U.S. Federal Rule of Civil Procedure 23 (b), 3°*, if the U.S. opt-out class action could be considered as superior compared to other available methods for fairly and efficiently adjudicating the controversy.

33. An absent class member that would file court action in Belgium, in case he or she opposes the outcome of the U.S. opt-out class action proceedings, would face a number of (practical and legal) hurdles that would render individual court action (more) onerous.

That individual class member shall indeed be required to effect (cross-border) service upon all Respondents individually. He or she shall also be required to advance the costs of such service, and moreover, since the court proceedings in Belgium shall be conducted in Dutch or French, the individual plaintiff should arrange, at his or her own costs, for appropriate translations of the summons and complaint and, at the discretion of the court, for translations of all other documents that would not be drafted in Dutch or French, depending on the language of the proceedings. These costs for service and translations can only be recovered if the plaintiff's action would be successful.

Since the matter relates to investment operations carried out outside Belgium, and with the only relevant link to Belgium being the domicile or establishment of some of the investors, it is similarly uncertain whether a Belgian court would be prepared to take jurisdiction with respect to some or all of the Respondents. Belgian conflict of jurisdiction rules do not provide in a *forum actoris* that award jurisdiction to the Belgian courts merely because the plaintiff is domiciled in Belgium.

If the Belgian court would hold that foreign law is applicable on the merits, it can ask the parties for their input[17], meaning that the plaintiff should most likely consult, at his or her own costs, with experts on the contents and meaning of the foreign law applicable. It is unclear whether, in ordinary court proceedings, such costs can be recovered if the court would rule in favour of the plaintiff.

The law applicable to the procedure shall necessarily be Belgian law. Belgian civil procedural law does not provide for pre-trial discovery.

In case the court would dismiss the claim, the individual class member shall be ordered to pay the costs of the proceedings and is also required to indemnify the counsels' fees, up to a fixed maximum amount, to the Respondents[18]. This indemnity varies, for claims of EUR 1,000,000.01 or more, between EUR 1,000.00 and EUR 30,000.00, depending on the complexity of the matter, the financial means of the plaintiff, etc. This indemnity can be increased in the case where there are two or more respondents[19]. Contingency fees are not allowed under Belgian law and moreover, even if the plaintiff would win, he can only recover part of his own counsel's fees from the Respondents.

34. Accordingly, we are unaware of any civil cross-border securities fraud cases brought before the Belgian courts by one or more Belgian investors, acting as plaintiffs, against respondents that are exclusively foreign.

35. These elements strengthen our view that, supposing that a Belgian court would be prepared to take jurisdiction, compared to collective class action litigation in New York court proceedings before the Belgian courts are more onerous, and will indisputably deter class members from launching legal action individually or collectively.

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17 Art. 15, par. 2, of the Code (annex 3).

18 Art. 1017, par. 1, of the Belgian Judicial Code (annex 9).

19 Art. 1022, par. 2, of the Belgian Judicial Code (annex 10).

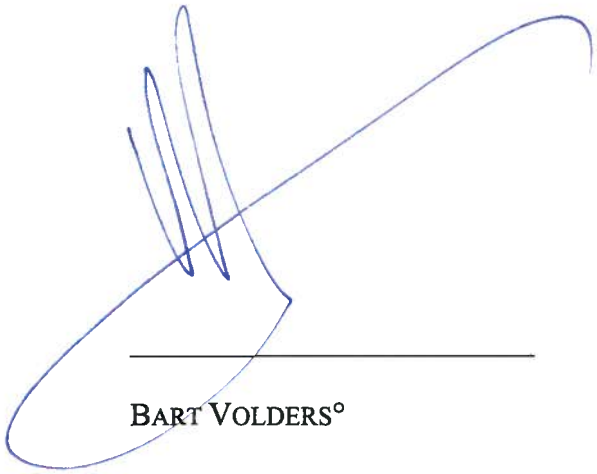
5 CONCLUSION

36. On the basis of the foregoing analysis, it is our opinion that a Belgian court is likely to recognise an opt-out class action judgment handed down by the New York District Court, and shall award preclusive (*res iudicata*) effects to such a judgment.

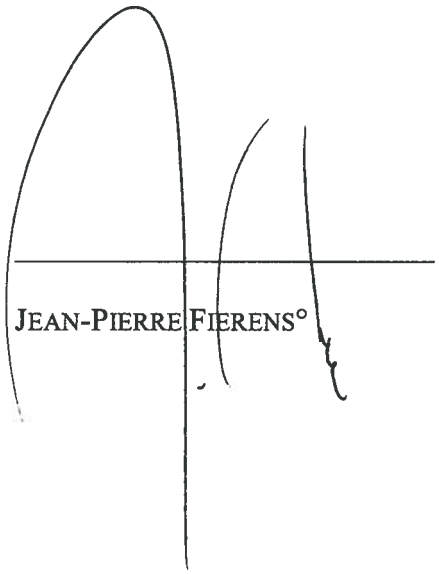
A Belgian court shall similarly recognize and award preclusive (*res iudicata*) effects to a court-approved class action settlement agreement.

We declare under the penalty of perjury under the laws of the United States of America, that the foregoing analysis is accurately reflecting, in our opinion and to the best of our knowledge, the current state of Belgian (private international) law.

Executed in Brussels, Belgium, on February 25, 2011.



BART VOLDERS°



JEAN-PIERRE FIERENS°

ANNEXES

Annex 1: *Résumé* of Jean-Pierre Fierens°;

Annex 2: *Résumé* of Bart Volders°;

Annex 3: Authentic text of the Code (in Dutch and French) and English translation by Professor Paul Torremans and Ms Caroline Clijmans, Esq., published on the website of the Institute of Private International Law of the University of Ghent (www.ipr.be);

Annex 4: Art. 138*bis*, par. 2, of the Belgian Judicial Code;

Annex 5: President of the Court of First Instance of Hasselt, May 19, 1994, not published, reprinted in E. MONARD and D. DEGREEF, *Het eenzijdig verzoekschrift*, Antwerp, Kluwer, 1998, p. 224;

Annex 6: Art. 40, par. 2, of the Belgian Judicial Code;

Annex 7: Amsterdam Court of First Instance, June 23, 2010, case-number : 398833/HA ZA 08-1465, available on the website www.rechtspraak.nl;

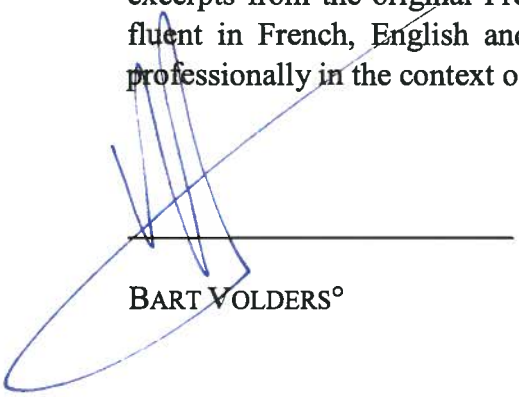
Annex 8: Belgian Supreme Court (*Cour de cassation*), September 28, 1984, *Arr. Cass.*, 1984-85, p. 165 *et seq.*;

Annex 9: Art. 1017, par. 1, of the Belgian Judicial Code;

Annex 10: Art. 1022, par. 1, of the Belgian Judicial Code.

CERTIFICATION

I, BART VOLDERS°, hereby certify that I have provided the English translation of excerpts from the original French language text in Annex 8 hereto, and that I am fluent in French, English and Dutch and regularly use each of these languages professionally in the context of court and arbitral proceedings.



BART VOLDERS°

CERTIFICATION

I, DELPHINE GILLET, hereby certify that I have provided the English translation of excerpts from the original French and Dutch language texts in Annexes 4-7, 9-10 hereto, and that I am fluent in French, English and Dutch and regularly use each of these languages professionally in the context of court proceedings.

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DELPHINE GILLET