UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED et al. LITIGATION

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

DECLARATION OF ALEXIS MOURRE

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I, Alexis Mourre, declare as follows:

I. QUALIFICATIONS

1. I have been a member of the Paris Bar since January 1988, and am a founding partner of Castaldi Mourre & Partners, a law firm created in 1996 with offices in Paris and Milan. I lead the arbitration and litigation department of the firm, and have advocated in more than 150 transnational cases before State courts of various jurisdictions, EU courts and arbitral panels. I have frequently served as an expert-witness in international disputes, both before arbitral tribunals and foreign courts. I also have acted as party appointed arbitrator, sole arbitrator or chairman of the arbitral tribunal in more than eighty international arbitration proceedings.

2. I specialize in private international law and arbitration, and have written extensively in the field of conflicts of laws and conflicts of jurisdictions. I have directed the private international law chronicle of the International Business Law Journal for eight years, and I am the editor of the *Cahiers de l'arbitrage/The Paris Journal of International Arbitration*, one of the two main French publications on arbitration law. I am the author of various books, including a book on conflicts of jurisdictions and enforcement of judgments in the European Union (*Droit judiciaire privé européen, Droit communautaire – Droit comparé,* Bruylant, Bruxelles, 2003, 1164 p.). I have been a visiting professor of law at the University of Santa Clara (California) and am currently a visiting professor of law at the universities of Versailles Saint-Quentin and Santo Domingo (APEC), teaching private international law and international arbitration. I am also an honorary professor at the University of Lima (Peru). A copy of my *curriculum vitae* with a list of my publications is enclosed in Annex 1.

3. I am independent from the parties in this case, and the present opinion sincerely reflects what I believe to be the correct interpretation of French law.

II. ASSUMED FACTS, QUESTIONS PRESENTED, AND SUMMARY OF CONCLUSIONS

4. I have been asked to provide an opinion on the following questions:

(i) whether it is more likely than not that a judgment obtained in a U.S. class action, on behalf of a class consisting of both non-U.S. and U.S. investors, would be recognized and enforced in France and in Luxembourg and, hence, could be relied upon in a French or a Luxembourg court by the defendants in seeking to dismiss a claim by a passive member of the class who had not opted out ("absent class member").

(ii) whether a U.S. class action would be superior to other methods of adjudicating the controversy; and

(iii) whether it is likely as a practical matter that members of the class in France and Luxembourg would seek to file individual actions against the defendants after a judgment had been entered in the class action in New York.

5. In connection with this engagement, I have reviewed the following materials provided to me by counsel for plaintiffs:

- Second Consolidated Amended Complaint;
- Decision dated 18 August 2010 of Judge Victor Marrero on defendants' motions to dismiss, Pasha S. Anwar, et al. Plaintiffs - against Fairfield Greenwich Ltd, et al. Defendants, 09 Civ. 0118 (VM), US District Court for the Southern District of New York, 2010 U.S. Dist. Lexis 86716;

- The Fairfield Sentry July 1, 2003 Private Placement Memorandum
- The Fairfield Sentry October 1, 2004 Private Placement Memorandum
- The Fairfield Sentry August 14, 2006 Private Placement Memorandum
- Memoranda dated October 8, 2006 for the Fairfield Sentry Fund
- The Fairfield Sentry Memorandum and Articles of Association
- Administrative Agreement between Fairfield Sentry Limited and Citco Fund Services (Europe) B.V. dated February 20, 2003
- Brokerage & Custody Agreement between Fairfield Sentry Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. dated July 17, 2003
- The Custodian Agreement between the Fairfield Sentry Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. dated July 3, 2006
- Administration Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch, and Citco Global Custody N.V., effective dated August 12, 2003
- Brokerage & Custody Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V., dated August 12, 2003
- PricewaterhouseCoopers Accountants N.V. engagement letter dated February 7, 2006
- PricewaterhouseCoopers Chartered Accountants engagement letter dated January 11, 2007

- PricewaterhouseCoopers Chartered Accountants engagement letter dated October 17, 2007
- Fairfield Sentry Limited Subscription Agreement
- Fairfield Sigma Limited Subscription Agreement
- The Investment Management Agreement between Fairfield Sentry Limited and Fairfield Greenwich (Bermuda) Limited dated as of October 1, 2004
- The Investment Management Agreement between Fairfield Sigma Limited and Fairfield Greenwich (Bermuda) Limited dated as of October 1, 2004
- The Fairfield Sentry October 1, 2004 Private Placement Memorandum
- Private Placement Memoranda dated October 8, 2006 for the Fairfield Sentry Fund
- The Fairfield Sentry Memorandum and Articles of Association
- Fairfield Sigma Memorandum and Articles of Association
- Administration Agreement between Fairfield Sigma Limited, Citco Bank Nederland N.V. Dublin Branch, and Citco Global Custody N.V., effective dated August 12, 2003
- The Investment Management Agreement between Fairfield Sentry Limited and Fairfield Greenwich (Bermuda) Limited dated as of October 1, 2004

- The Investment Management Agreement between Fairfield Sigma Limited and Fairfield Greenwich (Bermuda) Limited dated as of October 1, 2004

6. My opinion is based on the following assumed facts:

a) The action is directed against:

- Fairfield Greenwich Group, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, Fairfield Risk Services Ltd., Fairfield Heathcliff Capital LLC, Lion Fairfield Capital Management Ltd., Walter M. Noel, Jr., Jeffrey H. Tucker, Andres Piedrahita, Amit Vijayvergiya, Daniel E. Lipton, Mark McKeefry, Richard Landsberger, Maria Teresa Pulido Mendoza, David Horn, Andrew Smith, Charles Murphy, Yanko Della Schiava, Philip Toub, Lourdes Barreneche, Cornelis Boele, Vianney d'Hendecourt, Jacqueline Harary, Santiago Reyes, Julia Luongo, Harold Greisman, Corina Noel Piedrahita, Robert Blum, Gregory Bowes (collectively referred to as "**Fairfield Greenwich Defendants**");

- PricewaterhouseCoopers International Limited, PricewaterhouseCoopers LLP, PricewaterhouseCoopers Accountants Netherlands N.V. (collectively referred to as "**PricewaterhouseCoopers Defendants**");

- Citco Group Limited, Citco Fund Services (Europe) B.V., Citco (Canada), Inc., Citco Global Custody N.V., Citco Bank Nederland, N.V., Dublin Branch, Citco Fund Services (Bermuda) Limited, Brian Francoeur, Ian Pilgrim, (collectively referred to as "**Citco Defendants**"); and

- GlobeOp Financial Services, LLC (referred to as "**GlobeOp Defendant**").

All of them are collectively referred to as the "defendants").

b) The action is brought before the United States District Court for the Southern District of New York ("the U.S. Court").

c) Under U.S. law, one or more individuals may bring an action (the "Action") on behalf of a class of similarly situated persons with similar alleged rights (the "Class"), and may apply to be a Representative Plaintiff of such persons (a "Class Representative or Lead plaintiff"). Although the Action is styled a class action upon filing, Federal Rule of Civil Procedure 23 requires the proposed Class Representative to ask the U.S. Court to certify the Class. Unless and until a Class is certified, no member of the proposed Class (other than those already parties to the Action) can be bound by the Action's outcome, whether favorable or unfavorable. If, and only if, the Court certifies the Class, the action proceeds as a class action and includes all similarly situated individuals, known as "class members" (the "Class Members"), who do not choose to exclude themselves from (or "Opt out" of) the Class.

d) All members of the proposed class are provided notice of the Action ("Notice"), including notice of their right to "Opt out" of the litigation, through a combination of direct mail or service, publication in newspapers, postings on wire services, and/or postings on the Internet. The Notice is drafted to be as simple and clear as possible, is given in English and in the predominant language of the country or area where it is disseminated, and does not require the retention of a lawyer to understand. In the instant case, I understand that substantially all members of the proposed class established in France and in Luxemburg are identified and will receive individual notice. The recipients of the Notice are advised in the Notice that they can either Opt out (in which case they will not be bound by any judgment in the Action, and would

not be entitled to participate in any recovery in the Action), choose to personally appear in and be personally represented in the Action, or take no action. As the Notice would also explain, in the latter case, those persons who decide to take no action in response to the Notice (such individuals being then referred to as "Absent Class Members") will be part of the Class and be represented by the Court-appointed Class Representatives and the Court-appointed counsel for the Class, and any judgment rendered by the U.S. Court will be binding upon them.

e) Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), the Court-approved Notice of the Action must state "*when and how* [class] m*embers may elect to be excluded* [from the Class]." Class members are given a reasonable amount of time (e.g. around 90 days from the issuance of the Notice) to Opt out by sending a simple letter to the claim or notice administrators. Finally, Federal Rule of Civil Procedure 23(e)(3) provides that the U.S. Court may grant a second Opt out opportunity to the Class members if and when a settlement is proposed

f) In the instant case, the Class Representatives would act in their own name and on behalf of a class of all persons or entities (excluding those who validly opt-out) who invested money in four funds founded and operated by the Fairfield Greenwich Group ("FGG"): Fairfield Sentry Ltd., Fairfield Sigma Ltd., Greenwich Sentry L.P. and Greenwich Sentry Partners L.P.

g) Two of the four funds (collectively, the "Funds") were nominally incorporated in the British Virgin Islands, Fairfield Sentry Ltd. and Fairfield Sigma Ltd. and were directed towards foreign investors. The subscribers are residents of some 68 different countries. The other two funds were nominally incorporated in Delaware, Greenwich Sentry L.P. and Greenwich Sentry Partners L.P. and were restricted to U.S. residents.

h) The overwhelming majority of the money invested in these four funds was, in turn, invested in the Ponzi scheme operated by Bernard Madoff under the auspices of Bernard L. Madoff Investment Securities, Inc., and for which Madoff was sentenced to 150 years in prison following his guilty plea.

i) The basis for the claims are allegations that the Defendants – a number of Fairfield Greenwich entities, executives, and other professional service providers who audited, administered, or served as custodian of the funds – were responsible for violations of federal securities law and common law tort, breach of contract and quasi-contract causes of action.

j) I was also advised that according to the books and records of the Funds:

- There were only a finite number of French investors registered on the books and records of the Fairfield Sentry and Fairfield Sigma funds (seven each in Fairfield Sentry and Fairfield Sigma). These investors were probably institutional investors

because they incurred substantial damages ($357 million in Fairfield Sentry [7.8% of the loss] and $23 million in the smaller Fairfield Sigma fund [3.4% of the loss]);

- Investors with addresses in Luxembourg make up a greater percentage of the class by number, but their losses are less than the French investors. There were 47 investors from Luxembourg in the Fairfield Sentry fund, and they incurred losses of $159 million. The comparable figures for the Fairfield Sigma fund were 36 investors listed in the Fund's share registery. The aggregate losses of these investors in Fairfield Sigma were $160 million;

- Substantially all the French and Luxemburg investors will be notified through individual notices sent to the registered addresses of the investors, or be served via the Hague Convention. Based on these assumed facts, it is my opinion that a U.S. judgment in the Fairfield class action would be recognized and enforced in France and in Luxemburg, regardless of whether it is presented by (a) the Class Representative in a theoretical action to recover the monies due to the Class (in case of a judgment for plaintiffs), or by (b) the Defendants to obtain dismissal of any theoretical future action by Absent Class Members based upon the same claims (in the case of a judgment for Defendants or of an "inadequate" judgment for plaintiffs). More particularly, in the latter scenario, it is my opinion that, as set forth below, such judgment would have *res judicata* in respect of the Absent Class Members, and would therefore prevent them from re-litigating the same claims before a French court.

III. OPINION

7. The issue of whether and to what extent a U.S. class action judgment would be recognized and enforced in France has not yet been directly addressed by French or Luxembourg Courts. Accordingly, there is no precedent on point that can be directly used.

8. Based on the assumed facts set forth in the preceding paragraphs, and on the discussion below, it is my opinion that a U.S. class action judgment in this case will be recognized[1] in France and Luxembourg.

9. I will first provide (**A**) a general outline of the conditions for a U.S. court decision to be recognized and enforced in France and in Luxembourg, then show (**B**) that the connections of the case with the United States are sufficient for the U.S. judgment to be recognized in such countries (**C**), that recognition and enforcement of a Class action decision would not be considered as contrary to French or Luxembourg international public policy, (**D**) and that the French and Luxembourg standards of fraud as a bar to recognition are not met in the case at hand. I will then

[1] I will use the word "recognition" to define both (i) the *exequatur*, which is necessary to a party seeking either to directly enforce the U.S. decision in France or avail itself of its *res judicata*, and (ii) the *reconnaissance incidente*, which is the use of the foreign decision as a defence in a lawsuit. There is a debate, in France, on whether a decision which has the effects of recognising a right (*jugement déclaratif*) can be incidentally enforced by way of *reconnaissance incidente*, or whether it should in any event be submitted to the *exequatur*, with the likely consequence of having parallel procedures (the procedure on the merits, which should by hypothesis be stayed, and the *exequatur* procedure). I believe that the first solution is more appropriate, and corresponds to the evolution of case law (Cass. Civ. 1st 9 December 1974, *RCDIP* 1975, p. 504; Cass. Com. 4 October 2005, *JCP* Ed. G. 2005, 571). That debate, however, has no impact on the substance of my analysis and conclusions here.

present briefly (**E**) the effects of the U.S. judgment in France and Luxembourg and examine (**F**) what the effects of a settlement would be.

A. Conditions for a U.S. Court Decision to Be Recognized and Enforced in France and in Luxembourg

1. Conditions for a U.S. Court Decision to Be Recognized and Enforced in France

10. France and the United States of America are not party to any bilateral or multilateral international convention providing for recognition and enforcement of foreign court judgments. As a consequence, the rules applied will be those set by French case law for the recognition of a foreign judgment.

11. French Private International Law is not codified, and the answers to the questions that are dealt with in this opinion are therefore based on jurisprudence.

12. The French Supreme Court (*Cour de cassation*) set the conditions for a foreign judgment to be recognized in France in *Munzer v. Munzer* (Cass. Civ. 1st Sect., 7 January 1964 – Annex 2). Such conditions have evolved since then, but were the following:

(i) The foreign court had jurisdiction pursuant to French rules on conflict of laws (the assessment by a French court of whether a foreign court had jurisdiction is technically called "indirect competence", or *compétence*

indirecte, as opposed to the direct assessment by a French court of its own jurisdiction);

(ii) The proceedings abroad were "regular", i.e., they satisfied the main procedural requirements that had to be respected in the country of origin;

(iii) The foreign court did apply the law that is designated by the French rules on conflict of laws.

(iv) The decision is not contrary to international public policy.

(v) The action before the foreign court did not amount to fraud.

13. As we shall see, these requirements have been substantially attenuated by subsequent case law. In *Bachir* (Cass. Civ. 1, 4 October 1967, Annex 3), the French Supreme Court ruled that "*the regularity of the proceedings before the foreign judge is to be assessed exclusively with respect to the requirements of French international public policy and to the requirements of due process*". As a consequence of *Bachir*, the requirements set forth in (ii) and (iv) above have been merged.

14. More recently, in *Cornelissen v. Avianca* (Cass. Civ. 1, 20 February 2007, *Rev. Crit. 2007, 420,* note B. Ancel and H. Muir-Watt; *D.*2007, p. 1115, note L. d'Avout and S. Bollée; *JDI* 2007 n°4 p.1195, F-X. Train; *Gaz. Pal.* 2007, n°123, note M.L. Niboyet, Annex 4), the French Supreme court suppressed the control by French courts of the law applied by the foreign court. As a consequence, a French court no longer assesses, when requested to enforce a foreign decision, whether the foreign court applied the proper law according to French rules of conflict

of law. *Cornelissen* is a further sign of the liberal evolution of French private international law towards wider recognition of foreign judgments, for it expresses the availability of the French legal order to recognize foreign judgments rendered on the basis of a law that would not be applicable to the dispute according to French rules of conflicts, provided that the judgment is not contrary to French international public policy.

15. As a result of *Cornelissen*, the requirements for the recognition of a foreign judgment in France are now reduced to the following: (i) the existence of a characterized link between the dispute and the foreign court's jurisdiction; (ii) conformity with international public policy, both from a substantive and procedural standpoint; and (iii) absence of fraud.

2. Conditions for a U.S. Court Decision to Be Recognized and Enforced in Luxembourg

16. Like France, the Grand-Duchy of Luxembourg is not party to any bilateral or multilateral convention with the United States dealing with the recognition and enforcement of foreign court judgments.

17. The Grand-Duchy of Luxembourg is a small jurisdiction of half a million inhabitants, whose legal system has been borrowed in large part from France. This is particularly the case as far as civil law and civil procedure are concerned. Many of the provisions of the Luxembourg Civil Code and New Code of Civil Procedure have been either directly copied from or are inspired by the French Civil

Code and Code of Civil Procedure. In addition, French cases are regularly cited as authorities by Luxembourg courts, either alone or on par with Luxembourg decisions.

18. As far as the recognition and enforcement of foreign judgments is concerned, I believe that the Luxembourg courts substantially follow the French approach. Accordingly, the first instance court of Luxembourg has, in a 10 January 2008 judgment (Tribunal d'arrondissement de Luxembourg, 10 January 2008, n°13/2008 – Annex 5), expressly adopted the approach taken by the French Supreme court in *Cornelissen* and applied the same three prong test to declare a Peruvian judgment enforceable in Luxembourg, without considering whether the law applied by the Peruvian court would have been applicable according to the conflict of laws rules in force in Luxembourg.

19. Since the January 2008 judgment discussed above, the courts of Luxembourg (including the court of appeal) have ruled several times on the enforcement in Luxembourg of foreign judgments. However, to my knowledge, all such judgments originated from other European jurisdictions, and thus fell within the scope of the European law rules on the recognition of foreign judgments (now Regulation n°44/2001). As a consequence, the Luxembourg courts did not have other opportunities to refer to the *Cornelissen* test, which only applies to judgments rendered outside of the European Union. The 10 January 2008 decision is the last word on recognition of judgments from jurisdictions outside the European Union. Thus, it is highly probable that the Luxembourg courts would continue to apply the *Cornelissen* test if called upon to decide on the recognition and enforcement of a U.S.

class action judgment. Accordingly, the solutions adopted in Luxembourg and in France are likely to be identical.

B. The U.S. Court's jurisdiction

1) French Law

20. The first condition for a U.S. judgment to be recognized and enforced in France is, according to the *Munzer* test, that the U.S. court had indirect jurisdiction over the case according to French rules of conflict of jurisdiction.

21. Such requirement has been substantially alleviated by the *Cour de cassation* in *Fairhurst v. Simitch* (Cass. Civ. 1st Sect., 6 February 1985, and note by Ancel and Lequette – Annex 6), which decision was subsequently confirmed in *Cornelissen* (Cass. Civ. 1, 20 February 2007, Annex 4).

22. In *Cornelissen*, the French Supreme Court confirmed that the indirect jurisdiction (*compétence indirecte*) of the foreign court should no longer be assessed according to French rules of conflict of jurisdiction, but instead review should be limited to the issue whether there was a characterized link between the dispute and the foreign court. Under *Simitch* and *Cornelissen*, the basic jurisdictional requirements for the recognition of a foreign judgment are therefore (a) that no French court has exclusive jurisdiction on the matter, and (b) the existence of a characterized link between the forum and the foreign jurisdiction. Both conditions are met in the instant case as discussed below. As to the condition relating to the absence of fraud, it will be dealt with in §§ 88-90 of this opinion.

a) No French Court Has Exclusive Jurisdiction

23. Traditionally, a French court that was requested to recognise a foreign judgment had to verify two conditions. The first was that the dispute did not fall under the exclusive jurisdiction of a French court. The second was, in cases where French nationals were involved, that no privileges of jurisdiction (called *privilèges des nationaux*) applied.

24. As far as the latter condition is concerned, the French Supreme Court decided, in a landmark decision (Cass. Civ. 1st Sect., 23 May 2006, *Prieur vs. Montenach*, n° 04-12777 - Annex 7), that privileges of nationality do not confer exclusive jurisdiction in the context of determining whether a foreign judgment should be recognised in France. *Prieur* illustrates the evolution of French law towards a more liberal approach to the recognition of foreign judgments. The abandonment in *Cornelissen* of another of the traditional conditions set by *Munzer*, i.e. the control of the law applied by the foreign judge, is another illustration of that evolution. It shows that French courts nowadays observe great respect for what has been decided abroad, unless in very exceptional circumstances, such as procedural fraud, lack of due process or violation of the most fundamental principles of international public policy.

25. As to the former condition, the case at hand does not fall under any of the circumstances which would under French law entail the exclusive jurisdiction of a French court. As a matter of fact, the case does not relate to any of the subject matters for which a French court's jurisdiction could be mandatory (mainly real estate

issues, trademarks or patents, labor law, company law as far as French companies are concerned, capacity and wills).

26. Moreover, in the instant case, there is no contractual forum selection clause in any of the agreements with the defendants conferring exclusive jurisdiction on the French courts that could lead to non-recognition of a U.S. judgment in this case on the basis of lack of indirect jurisdiction.

b) Characterized Link

27. Under *Simitch/Cornelissen*, a U.S. court would have indirect jurisdiction if there is a a "characterized link" between the case and the forum (i.e. the United States), irrespective of whether a court in another jurisdiction might also have had jurisdiction on the same facts.

28. There are no precise criteria to define such "characterized link" between the case and the foreign forum. Thus, a French court will proceed to a global assessment of the circumstances of the case, using a method sometimes called "grouping of connecting factors".

29. French courts adopt, in this respect, a liberal approach. The test is not whether the foreign court was an appropriate forum, but rather whether it was not an *inappropriate* forum. As correctly explained by B. Ancel and Y. Lequette: "*the issue is not to determine which one of the courts in presence was more appropriate. The question is rather whether the foreign court's jurisdiction was not inappropriate*" (B. Ancel and Y. Lequette, *Grands arrêts de droit international privé*, Dalloz, 2001, p. 651 - Annex 8). In other words, the *Simitch/Cornelissen* test (as opposed to the

previous *Munzer* test) only requires French courts to ascertain that there is a satisfactory connection between the case and the foreign forum.

30. For the "characterized link" test to be met, a French court will have to be satisfied that there was some reasonable basis for the foreign court to retain jurisdiction. As I said below, the test will be met if the foreign court's jurisdiction was not manifestly inappropriate. For example, in a 27 November 1981 decision, the Paris Court of Appeal decided that the links of the case with the foreign court were sufficient as long as the foreign court's jurisdiction was not "*arbitrary, artificial or fraudulent*" (*D.* 1983, p. 143 – Annex 9). In practice, French courts have never denied a foreign court's indirect jurisdiction on the basis lack "characterized link", except in cases involving family law, nationality or personal status where the foreign court had no legitimate basis for exercising jurisdiction.

31. In the instant case, the subscribers agreed to submit to the jurisdiction of the New York courts with respect to claims arising from or related to investment in two of the funds[2]. Moreover, *"a substantial part of the events and*

[2] Article 19 of the Fairfield Sentry Limited Subscription Agreement and Article 22 of the Fairfield Sigma Limited Subscription Agreement provide that *"Subscriber agrees that any suit, action or proceeding ("Proceeding") with respect to this Agreement and the Fund may be brought in New York. Subscriber irrevocably submits to the jurisdiction of the New York courts with respect to any Proceeding and consents that service of process as provided by New York law may be made upon Subscriber in such Proceeding, and may not claim that a Proceeding has been brought in an inconvenient forum. Subscriber consents to the service of process out of any New York court in any such Proceeding by the mailing of copies thereof, by certified or registered mail, return receipt requested, addressed to Subscriber at the address of Subscriber then appearing on the Fund's records. Nothing herein shall affect the Fund's right to commence any Proceeding or otherwise to proceed against Subscriber in any other jurisdiction or to serve process upon Subscriber in any manner permitted by any applicable law in any relevant jurisdiction".*

actions of the Defendants that gave rise to plaintiffs claims occurred within New York" (cf. Judge Victor Marrero's Decision and Order dated 18 August 2010). The links between the dispute and New York Courts are, therefore, very strong. In addition, none of the defendants remaining in the case challenged the personal jurisdiction of the New York courts. I believe that such circumstances constitute sufficient connections to meet the jurisdictional test for the recognition of a U.S. judgment in France in this case.

32. As a further indication of the fact that a French court would not object to the recognition of a U.S. judgment in this case, reference can be made to the decision of the Paris Court of Appeal in the action initiated by *Vivendi* to enjoin the French Absent Class Members from participating to the U.S. proceedings. The action was based on the fact that the U.S. judgment would allegedly not be recognised and enforced In France. In that instance, the connecting link between the dispute and the New York Courts was not as strong as it is in the instant case, for there was no forum selection clause designating New York courts, the defendant was a French company, part of the shareholders were French, and the securities in dispute had been partly traded on European markets. Notwithstanding these circumstances, the Paris Court of first instance (13 January 2010, *Vivendi v. Morel, Gérard and the ADAM*, Annex 10) and the Paris Court of Appeal (28 April 2010, *Vivendi v. Morel, Gérard and the ADAM*, Annex 11) held that "*significant connections* [...] *exist(ed) between the dispute and the American Court*" since the shares acquired by the defendants had been for a large part listed on the New York stock exchange, the alleged

infringements consisted of non-compliance with U.S. stock exchange regulations, and *Vivendi*'s directors were domiciled in New York at the time of the wrongdoings.

33. I, therefore, have no doubt that in the present case, where the connections with the U.S. forum are stronger than in *Vivendi*, a French court would consider that the "characterized link" test is met.

2. Luxembourg law

34. The court of first instance of Luxemburg dealt with the jurisdictional test for the recognition of a foreign judgment (Tribunal d'arrondissement de Luxembourg, 10 January 2008, n° 13/2008 – Annex 5) and adopted the French *Cornelissen* test. In that case, the court of Luxembourg held that the jurisdictional test is satisfied if there is *"a connection between the dispute and the seized court"*. The case related to the recognition in Luxemburg of a Peruvian judgment dealing with the custody of a child. The characterized link consisted in the fact that all parties had been residing in Peru at the time of the proceedings.

35. The January 2008 decision marks an evolution of the law in Luxembourg. In previous cases (Tribunal d'arrondissement de Luxembourg, 2 March 2005, n°88/2005 – Annex 12), courts had denied the recognition of a foreign judgment on the basis that the foreign court lacked indirect jurisdiction on the basis of the choice of court rules applicable in Luxembourg. The court had thus applied the old *Munzer* test, which is now superseded. The January 2008 decision shows that, like French courts, the courts in Luxembourg have now departed from the *Munzer* test and

adopted the *Simitch/Cornelissen* test based on a minimal requirement of characterized links between the dispute and the foreign forum.

36. In any case, even if the assessment was made on the basis of the choice of court rules applicable in Luxembourg (as prescribed by the old *Munzer* test), I believe that the jurisdictional test would also be satisfied in this case. With respect to natural persons, the basic rule in Luxemburg is that the competent court is the court of the domicile of the defendant[3]. As far as legal persons are concerned, Article 41 of the New Code of Civil Procedure provides that corporate disputes fall within the jurisdiction of the court where the seat or the relevant establishment of the company is located. In this case, I believe that submission to the jurisdiction of the New York court is sufficient to satisfy the connection requirements. In addition, the defendants did not contest jurisdiction and have continued to prosecute on the merits of the case after their motions to dismiss were decided against them. Finally, a court in Luxembourg may exercise jurisdiction over co-defendants as long as jurisdiction is established with respect to other defendants and there is sufficient connection between the claims.

[3] Art. 28 of the Luxembourg New Code of Civil Procedure (Annex 13).

C. Absence of Contradiction with International Public Policy

1. Absence of Contradiction with the French Conception of International Public Policy

37. Pursuant to *Munzer* and *Cornelissen*, French courts may refuse the recognition of a foreign judgment if such recognition would be contrary to the French conception of international public policy. There is no precise definition of what international public policy means, as this concept may evolve over time depending on the values that the French forum wants to protect. It is, however, generally considered that international public policy can be defined by reference to those fundamental principles which allow the French forum to set aside a foreign rule of law (in the context of a conflict of laws) or a foreign decision (in the context of its recognition in France).

38. The concept of international public policy is twofold. Indeed, a distinction must be made between substantive public policy and procedural public policy.

39. Regarding substantive public policy, French private international law admits that the French legal order can tolerate situations which would be contrary to French domestic mandatory rules if such situations have been created abroad without fraud (Cass. Civ. 1st Sect., *Rivière v. Roumiantzeff*, 17 April 1953: "*the reaction* [of the forum] *against a provision contrary to public policy differs when such disposition relates to a right to be acquired in France, or to the effects in France*

of a right acquired without fraud in another country, in accordance with the law competent pursuant to French rules of private international law" – Annex 14). Based on such theory (called "attenuated effect of public policy" – "*effet atténué de l'ordre public*"), international public policy will not bar the recognition of a foreign judgment unless it breaches one of the most fundamental principles of the French legal order.

40. International public policy encompasses a very limited number of universal principles. In the field of torts, the French Supreme Court accordingly ruled that "*foreign rules on torts are not contrary to the French conception of international public policy merely because they differ from mandatory provisions of French law, but only insofar as they infringe principles of universal justice considered in the French conception as having universal value*[4]" (Cass. Civ. 1st Sect. *Lautour vs. Guiraud*, 25 May 1948 – Annex 15).

41. Based on such principle, I opine that a French court would not refuse the recognition of a U.S. Class Action judgment for reasons of public policy. In my view, based on the *Lautour* test, a French court would have to find that the U.S. class action procedure infringes principles of universal justice, which I do not believe to be the case for the reasons set out below.

42. First, the United States are not alone in admitting opt-out based class actions. In the Netherlands, class actions are also admitted (Section 3:305a of the Dutch Civil code) and a recent reform of the civil proceedings permits Dutch courts to approve a settlement entered into in a class action and give it *res judicata* in respect to absent class members who did not opt-out (Section 7:907 of the Dutch

[4] Emphasis added.

Civil Code, entered into force on 1 August 2005). In Portugal, a law dated 31 August 1995 provides for opt-out class actions, the decision having *res judicata* with respect to all absent class members. Ontario (Section 9 of the Ontario Class Proceeding Act of 1992) and Quebec (since a law dated 23 January 1982 entered into force on 30 July 1982) equally admit opt-out class actions, as well as Australia (Section 33E and 33J of the Federal Court of Australia Act of 1976). Other countries have a hybrid system, in which opt in and opt out are alternatively applied depending on the circumstances of the case. In Brazil, for instance, a class action judgment that is favorable to the class members will have *res judicata erga omnes*, even towards absent class members (Public Civil Action Law dated 24 July 1985 and Consumer Code as modified by a law dated 11 September 1990). In Norway, while the main rule for class actions is the opt in system, opt out class actions are an alternative left to the discretionary power of the judges where individual claims involve amounts and interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions and are deemed not to raise issues that need to be heard individually (Section 35-7 (1) of the Dispute Act Section entered into force on 1st January 2008). Likewise, in Denmark, if the opt-in system is the main model, the court can also allow an opt-out class action (Chapter 23a of the Danish Administration of Justice Act, entered into force on 1st January 2008). In the United Kingdom, the Office of Fair Trading has published on 26 November 2007 a report which states that: "*So-called opt-in and so-called opt-out regimes can co-exist. It could be left to the judge to decide, in the circumstances of each case but on the basis of appropriately defined criteria and filters, whether given claims shall be brought as*

a representative action on behalf of consumers/businesses at large, as a representative action on behalf of named consumers/businesses, or as individual actions" (OFT, Private Actions in Competition Law: Effective Redress for Consumers and Business, point 7.28, page 26[5]).

43. In sum, it cannot be said in my view that the opt-out mechanism is *universally* rejected. It is a mechanism that has not been adopted by France, but that France has no reason to reject in an international context as being contrary to the French conception of international public policy.

44. Another reason for excluding that the opt-out based class action procedure could be held to be contrary to the French conception of international public policy in the context of the recognition of a foreign judgment is that French law considers that issues of *jus standi* and legal representation are not part of international public policy.

45. In French law, the general principle is that no one is entitled to represent another in court except pursuant to a power of attorney under conditions provided by the law. That principle is called *"nul en France ne plaide par procureur..."* (B. Starck, H. Roland and L. Boyer, *Droit civil - Les Obligations – Contrat*, Litec 6th Ed., n° 261, 1998, p. 96 – Annex 16). Yet, there is abundant jurisprudence confirming that said principle is not part of the French conception of international public policy, that it applies only in domestic actions before French courts (Cass. Civ. 2nd Sect., 3 April 2003, *Fitzpatrick vs. Berner* – Annex 17), and that it cannot therefore be used to set aside a foreign judgment or an award. For

[5] The OFT Report is available on Internet at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf?version=1

example, in a case where a party objected to the recognition in France of an Italian decision arguing that the foreign court had disregarded the principle "*nul ne plaide par procureur*", the Supreme Court held (Cass. Civ. 2nd Sect., 4 April 1973, *Eurasia v. Agenzia Marittima Tirreno* – Annex 18) that the appellate judges rightly enforced the Italian decision and did not have to determine whether the principle also applied in Italy. In many occasions, French courts have subsequently confirmed that the principle "*nul ne plaide par procureur...*" is not part of the French conception of international public policy (Paris, 5th Sect. B, *Chenue v. Brachot*, 24 October 1991; Colmar, *Kruger v. Fougerolle*, 30 April 1996; Paris, 1st Sect. C., *Mandel v. Coprim*, 27 October 1998 – Annex 19). The reason for this exclusion is that the rule "*nul ne plaide par procureur...*" relates to the capacity of the plaintiff (Paris, 1st Sect. C., 6 December 2001, *Gothaer v. Taffin* – Annex 20), which is a condition for a claim to be admissible (Article 122 of the Code of civil procedure[6]), and that French courts consider that "*the capacity to act in court is not part of international public policy*" (judgment related to the enforcement of an award: Paris, 1st Sect. C. *Gothaer v. Taffin*, 6 December 2001 – Annex 20; see also the Supreme Court judgment holding that the inadmissibility defense based upon the lack of capacity of a party is not of public policy and that it can therefore not be raised by the court on its own motion: French Supreme Court, Commercial Sect., *Bail Marine v. Vessereau*, 10 May 1982 – Annex 21). I believe that the objection that Absent Class Members have not

[6] Article 122 provides that: a plea of inadmissibility is one that seeks to obtain a declaration by the court, with no examination on the merits of the case, that plaintiff has no title or standing to act in court, is time-barred or barred by way of *res judicata*.

consented to being represented in this class action in New York would follow the same principles.

46. As far as *procedural* public policy is concerned, due process rights (such as the right to a proper service of process or the right to be duly represented in court) are enforced under Article 6 of the European Convention on Human Rights ("the ECHR") and are subject to a full review without limitation.

47. Procedural public policy applies to the treatment given to the parties in court (e.g. their right to be heard, the judge's impartiality and independence, the duration of the proceedings). In my view, the question raised by the U.S. opt-out rule does not pertain to procedural public policy, i.e. whether Absent Class Members had a fair opportunity to present their case before the U.S. court, but rather to whether Absent Class Members have been properly represented, a question that should in my view be considered as substantive, not procedural.

48. I also do not believe that the argument could be made, in order to object to the recognition of the U.S. judgment in France, that the attenuation of public policy contemplated by *Rivière* should be excluded based on the doctrine of *ordre public de proximité* (proximity). The argument would be that the attenuation of public policy would only be permitted in absence of significant connections of the case with France, such as the presence of French nationals amongst Absent Class Members. In the instant case, however, the dispute has very limited connections with France. As a consequence, the doctrine of public policy will apply in a limited manner, as provided by *Lautour*.

49. In sum, I am of the opinion that recognition of a U.S. class action judgment in this case would not be considered as an offence to French public policy.

50. This is all the more true given that (**a**) class actions are not incompatible with the French legal tradition, provided certain conditions are met, and that (**b**) they do not violate Absent Class Members' fundamental rights. Finally (**c**), the fact that the form of Notice will be approved by the U.S. Court and will be served to substantially all the French investors personally or via the Hague Convention, removes any doubt as to the likelihood that the judgment will be recognized in France.

a) Class Actions Are Not Incompatible With the French Legal Tradition

51. Although there is currently a debate on their possible introduction, class actions similar to those provided by the U.S. Federal Rule of Civil Procedure 23 do not exist in French law. However, the mere fact that such actions are unknown in French law does not in and by itself make them incompatible with our legal tradition.

52. In fact, the principle according to which a plaintiff is allowed to represent a group of individuals in court is not unknown in France. There are situations, in French law, in which it is admitted that a legal action can be brought in the name of individuals who did not individually and expressly consent to it. Clearly, there are many differences between the examples below and a U.S. class action. Yet, these examples show that binding an absent class member to the class action judgment would not, provided certain conditions are met, be incompatible with the fundamental principles of the French legal order.

53. The first example is in the field of labor law. French law allows in specific situations (Article L. 1247-1of the French Labor Code[7]) trade unions to initiate actions in the individual interest of employees with no requirement of written consent from the same, provided that (i) the said employees have been informed of the action, (ii) they have not objected to the action being brought on their behalf, and (iii) they are identified or identifiable.

54. Such actions are considered, in French law, as protecting both an individual and a collective interest. In the case of trade unions, the Constitutional Court ruled on 25 July 1989 (n°89-257 DC – Annex 22) that they are not contrary to our Constitution, provided that the individuals were duly informed and had the possibility to withdraw from the action.

55. The second example is in the field of intellectual property law. Article L. 321-1 of the Code of Intellectual Property[8] provides that professional associations of authors and artists (such as the *Société des Auteurs Compositeurs et Editeurs de Musique – SACEM*[9]) have the right to act in court on behalf of their

[7] Article L. 1247-1 of the French Labor Code (the same rule is also enshrined in Art. L. 8233-1, L. 1251-59, L. 1144-2, L. 1235-8, L. 8255-1, L. 2262-9, L. 7423-2) provides that for disputes relating to long term contracts, representative trade unions may initiate an action in court on behalf of an employee without being authorized by proxy to do so. The employee must be informed of the action by notice in the form of a registered letter and must not have opposed the action within 15 days from the notice. The employee may always intervene in the action and end it at any time.

[8] Article L. 321-1, second paragraph, of the Code of Intellectual Property (formerly Article 38 of the 3 July 1985 law), provides that: duly established civil law societies shall be entitled to take legal action to defend the rights for which they are responsible under their statutes. Article L. 331-1, second paragraph, of the same Code (formerly Article 65 of the 11 March 1957 law), also provides that: entities regularly constituted to protect professional interests shall be entitled to institute legal proceedings to defend the interests entrusted to them under their statutes.

[9] In respect of the *SACEM*, it is generally held that authors assign their rights to it. Yet, the Supreme Court held that authors nevertheless have the right to act individually (Cass. Civ. 1st Sect., 24 February 1998, Dalloz 1998, Jur. p.471). As a consequence, it should be considered that, when it acts on behalf of an artist, the *SACEM* also does it in the name of the artist, and not only as its assignee.

members. For example, the *SACEM* has been authorized to act in court to request an attachment on the assets of a night-club, in guarantee of amounts due as copyright to an artist (Civ. 1, 10 February 1987 – Annex 23).

56. In addition to the foregoing, even though U.S.-style class actions do not exist in France, it is not to be ruled out that they might be introduced in our legal system in the future. Two examples can be given of possible future tendencies.

57. First, the OECD has issued, during the summer of 2007, a Recommendation on Consumer Dispute Resolution and Redress (Annex 24), which advocates the introduction of class actions, including on an opt-out basis. The recommendation underlines that "*when a number of consumers allege that they have suffered economic harm as a result of the similar conduct of the same entity or related entities, and it is not practicable or efficient for them to act individually to resolve their disputes, those consumers should have access to mechanisms that provide for the collective resolution of those disputes*". The desirability of class actions is thus clearly affirmed. In case of opt out class actions, the recommendation is that: "*Member countries should ensure that reasonable measures are taken to inform customers of the initiation of such cases so that they can take steps to exclude themselves if so desired. Consumers should not be forced to take part in, or be bound by the resolution of a collective action proceeding of which they have not been adequately informed*". The similarity of the OECD recommendation with U.S. law is noteworthy for it is not required that each class member be individually reached by an individual registered letter, but that "*reasonable*" and "*adequate*" measures be taken to give the notice.

58. Second, the European Commission has published in April 2008 a White Book on Damages Actions for Breach of the EC Antitrust Rules (COM(2008) 165 final), which recommends the introduction of collective actions based on representation as well as opt-in based collective actions. The European Commission has also published in November 2008 a Green Paper on Consumer Collective Redress (COM (2008) 794 final) where the introduction of collective actions is contemplated, and which does not rule out the opt-out system provided that sufficient safeguards exist. In its opinion dated 18 May 2010, the European Economic and Social Committee on the Green Paper on Consumer Collective Redress (2010/C 128/18, Annex 44) declares to be in favour of *"a combined system of group actions, which combine the advantages of the two systems of opt in and opt out, depending on the nature of the interests at stake, the determination of the group members or the lack of it, and the extent of individual damage"*.

59. From a more general perspective, the fact that a party may be bound based on its silence, like an Absent Class Member who fails to opt-out, cannot in my view be considered as being contrary to the French legal tradition. Several examples of such situations exist in French law.

60. French company law, for example, accepts that a shareholder in a public company be convened to a stockholders' assembly by way of a notice in the press (Article 124 *et seq.* of the 23 March 1967 Decree). This example is relevant for the interests at stake may in such case be no less important than those of a plaintiff called to participate in a class action.

61. In another context, French law accepts that a silent party be bound by commitments taken by an individual without his consent, on the basis that such silent party's behavior was such that third parties could believe that the author of the commitments was his agent[10] ("*mandat apparent*"[11]). For example, if a person knows that another is acting as his representative and fails to react by informing third parties that the latter has no such capacity, such person will be bound by the commitments taken by said party in his name, even though no mandate was given to that effect.

62. In the field of insurance contracts, Article L. 112-2 of the Insurance Code[12] provides that the insured can be bound by an amendment or an extension of the insurance if the insured remained silent after having received a notification from the insurer.

63. It is also admitted in civil law that a party can be bound by its silence if he failed to react to the notification of an offer made in its exclusive interest (Req., 28 March 1938; Cass. Civ. 1st Sect., 1st December 1969; Cass. Soc., 17 December 1970; Cass. Soc. 21 July 1986; CA Toulouse, 14 February 1996 – Annex 26), which is a situation quite comparable to that of the notification of a class action. Likewise, French law admits that a party can waive a right by remaining silent (Com. 26 January 1993 – Annex 27).

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[10] Cass. Assemblée Plénière, 13 December 1962, *Banque canadienne nationale v. Directeur général des impôts*, H. Capitant, F. Terré & Y. Lequette, *Les Grands Arrêts de la Jurisprudence civile*, n°267, Cass. Civ. 1st Sect., 10 October 1995, Annex 25.

[11] « *mandat apparent* » can be translated as « apparent authority ».

[12] Subparagraph 5 of Article L. 112-2 of the French Insurance Code provides: The offer made by registered letter to extend or to amend the contract or bring a contract back into force shall be deemed accepted if the insured does not refuse said offer within ten days after receipt thereof.

64. Finally, Article 442-6 III of the Code of Commerce provides for the right of the Ministry of Finance, the State Attorney, or the President of the Competition Authority to act in court to nullify clauses of a contract that breach certain mandatory rules of distribution law. Such actions may lead to decisions having *res judicata* with respect to the parties to the annulled contract, although they did not decide to initiate the action[13].

65. There are many other situations in French law in which a court decision will be binding upon a party which did not participate in the proceedings. Such is the case of the judgment rendered against the debtor, which is binding upon the guarantor even though he was not a party to the proceedings (Cass. Com., 22 April 1997, n°95-11532; Cass. Soc., 7 October 1981, *Bull. Civ.* V 1981, n°763 – Annex 28), or of the judgment against the liable party, which is binding upon the insurer (Civ. 2nd, 14 January 1999, *Bull. Civ.* II 1999, n°7 – Annex 29).

66. In procedural law, there are also instances in which a person or legal entity will be deemed to have participated to the proceedings on the basis of a mere publication.

67. In bankruptcy law, Articles L. 622-24 and R.622-21 of the French Commercial Code[14] provide that, in case of bankruptcy, the proceedings are published

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[13] See § 73.

[14] Article L. 622-24 of the French Commercial Code provides that: upon publication of the judgment opening the insolvency proceedings, all creditors whose credit originated prior to the judgment, with the exception of employees, shall send their declaration of credit to the creditors' representative. Creditors who hold a published lien or a published leasing contract shall be informed personally and, where applicable, at their elected domicile.

The declaration of credit can be made by the creditor or by any employee or representative he chooses.

Credits must be declared, even when they are not documented.

in an official journal (*BODACC*) and the curator of the bankruptcy (*représentant des créanciers*) informs the creditors by letter. Said publication triggers a two month time limit (four months if the creditor is domiciled abroad) for the creditor to petition for the admission of its claim into the bankruptcy. If the creditor fails to file a claim by the deadline, the claim is extinguished. According to consistent case law, even if the curator of the bankruptcy fails to inform personally the creditors, the timelimit is nevertheless triggered on the basis of the sole publication in the *BODACC*, with the consequence that the right of a creditor – whether domiciled in France or abroad – to participate in the payments made *pari passu* by the bankruptcy to all creditors may be extinguished on the basis of his failure to consult the publication in the *BODACC* (Cass. Com. 11 October 1988; Cass. Com. 29 January 1991; Cass. Com. 6 July 1999; Cass. Com. 23 January 2001 – Annex 30).

68. It therefore appears that French law admits, in various instances, that an individual or a legal entity be bound on the basis of its silence or other failure to react to a notice, even if said notice was not sent to each individual recipient. These examples show that a French court would certainly not hold as being contrary to international public policy a principle of implied representation that, in various circumstances, is admitted by French domestic law itself. For all these reasons, I do not believe that class actions would be considered by a French court having to decide on the recognition of a U.S. judgment as incompatible with the fundamental principles of the French legal order.

Article R. 622-21 et R. 622-24 provide that: the creditor's representative must, within 15 days from the opening judgment, inform known creditors that they have to send him their declaration of debt within two months from the publication of the judgment in the B.O.D.A.C.C. Such time limit is extended by two additional months for creditors domiciled outside France.

b) Class Actions are not Contrary to the Absent Class Members' Fundamental Rights

69. The argument has been made, amongst those authors who are opposed to collective actions, that the opt out mechanism would be contrary to French Constitutional law for U.S. law infers from the Absent Class Members' failure to opt out that they consented to participate to the Class. Those authors rely, to that effect, on a 25 July 1989 decision of the French Constitutional Court.

70. The Constitutional Court's 25 July 1989 decision (Annex 22) deals with a specific provision of labor law authorizing trade-unions to act in court on behalf of employees. To that effect, it sets the condition that each employee be individually informed of the action. That decision, however, cannot be construed as preventing the recognition of a U.S. class action judgment in France.

71. First, the Constitutional Court's requirement that all individuals receive notice of the action is not fundamentally different from the requirements set forth by U.S. law. Both laws require that class members be informed of the action, and both laws require that the notice be sufficiently detailed in order to enable each addressee to understand its content. The differences between U.S. law and the Constitutional Court's requirements are therefore marginal, and essentially lie in that U.S. law allows that notice be given by way of an adequate publication program for unidentified class members or those for whom there are no current addresses.

72. Second, the Constitutional Court decision has no real relevance outside the field of labor law. The Constitutional Court specifies that it only aims to

protect *"the freedom of the employee with regard to trade unions"* (Constitutional Court n°89-257 DC of 25 July 1989, preamble n°26, Annex 22).

73. In this respect, it is noteworthy that in an important decision, the French Supreme Court (Cass. Com. 8 July 2008, *D.* 2008, p. 2067, Annex 31), held that Article L. 442-6 III of the French Commercial Code, providing for the right of the Finance Minister to act in Court on behalf of suppliers and to claim for damages on their behalf without their consent is not contrary to fundamental principles. That decision shows that the 25 July 1989 decision of the Constitutional Court is limited in scope to the protection of employees with respect to unions.

74. Third, and in any event, the Constitutional Court decision has no relevance in the context of the recognition of a *foreign* judgment. The decision sets rules of *domestic* public policy, not international public policy. As said above, the concept of international public policy is in French law circumscribed to a limited number of universal principles (see above, § 40), and there is no reason to believe that the standard set by the Constitutional Court for actions brought by a trade union in defense of the interests of an employee in the context of domestic labor law would be applied in the very different context of the recognition of a foreign judgment. The fundamental assumption in French private international law is that a situation created abroad without fraud should be allowed to produce its effects in France, even though the foreign rules at stake are different from or contrary to those admitted in France.

75. There is no equivalence between constitutional law and international public policy, and there are many instances in which French constitutional law sets prohibitions that are not elevated to the level of international

public policy in the context of the recognition of a foreign judgment. For example, the French Supreme Court has admitted the recognition in France, on the basis of the attenuated effect of international public policy, of a unilateral repudiation of a wife by her husband, which repudiation is contrary to the constitutional principle of equality between men and women. (Cass. Civ. 1st, 3 November 1983, *Rohbi v. Kharkouch*, *Les grands arrêts de Droit international privé*, n° 63 p. 593 – Annex 32)[15]. In another example, the French legal order accepted the polygamist marriage contracted abroad between foreigners, although polygamy is also contrary to the constitutional principle of gender equality (Cass. Civ. 1st, 3 January 1980, *Bendeddouche v. Boumaza*, *Les grands arrêts de Droit international privé*, n° 61 p. 593 – Annex 33). These examples show that there is no equivalence, in private international law, between international public policy and constitutional law.

76. It should be noted, in this respect, that the tribunal of Commerce of Nanterre rejected in summary proceedings an application by Vivendi to suspend the publication of the class notice in France on grounds that such publication would be contrary to the Constitutional Court's decision of 25 July 1989. The Court considered that the alleged violation of constitutional law has not been established with sufficient clarity (Nanterre Court of First Instance, 27 August 2009, Annex 34).

77. Likewise, in the action initiated on the merits by Vivendi before the courts of Paris in order to enjoin the French class representatives from participating into the class (Paris Court of First Instance, 13 January 2010, *Vivendi v. Morel, Gérard and the ADAM*, Annex 10, and Paris Court of Appeal, 28 April 2010,

[15] An exception to the recognition of such a repudiation would be when the woman is a French national, based on the doctrine of *ordre public de proximité* (Cass. 17 February 2004 – see above § 65).

Vivendi v. Morel, Gérard and the ADAM, Annex 11), Vivendi forcefully made the point that the U.S. opt-out rule was manifestly contrary to French International Public Policy. Yet, both the Paris Court of First Instance and the Paris Court of Appeal considered that no such contradiction had been established and rejected Vivendi's claims.

78. Finally, as an additional indication that a mechanism such as opt-out based class actions would not be considered as contrary to French International Public Policy in the context of the recognition of a foreign judgment, it is noteworthy that the French Supreme Court, in a recent 1 December 2010 decision, held that a U.S. decision awarding punitive damages is not contrary to International Public Policy and should be recognised although punitive damages are not admitted in French law and would constitute a breach of Public Policy in the domestic context (Cass. Civ. 1. 1 Dec. 2010, *Epoux X. v. Fontaine Pajot*, Annex 35). This decision is interesting on two counts. First, it establishes that even if the Court in the present case orders punitive damages, that circumstance will not prevent the U.S. judgment's recognition in France. Second, the decision demonstrates that French courts will not deny recognition to a U.S. judgment based on rules that are not admitted in France or even that are contrary to French domestic Public Policy, unless such judgment is manifestly contrary to the most fundamental principles upon which the French legal order is based.

79. There is very little legal literature on the question in discussion. Two authorities have however clearly taken position in favor of the recognition of a

US class action judgment in France, considering that the opt out system is not contrary to the Constitutional decision of 1989.

80. According to Andrea Pinna: *"The Constitutional Court in particular accepts allowing trade unions the possibility of bringing a collective claim through an individual case including all employees who did not opt out, but it does require that the employee be notified of this initiative and that such a notification explains clearly the object of the claim and the possibility for the employee to be excluded from the class 'at any time'. It is clear that the requirements of the Constitutional Court for the introduction of a class action in France are more stringent than those in force in the US, especially because in French law the absent class member can exclude himself from the procedure at any time before the final judgment, and not only during a predetermined opt-out period. However, this does not seem sufficient to consider an opt-out US class action judgment contrary to French public policy. As noted above, international public policy only prevents a legal situation totally incompatible with the foundation of the law of the forum to produce effects on its territory. Indeed, it is said that public policy has reduced effect (effet atténué) when it comes to the recognition of a juridical situation created abroad, as opposed to a strictly interior matter, that is in the case when a court has to decide whether a such juridical situation can be created on French territory. This means that the fact that the French legislator cannot enact a rule because of constitutional requirements does not necessarily imply that a foreign legislator or judge will be bound by the same requirements. On the contrary, it is more likely that the Constitutional Court's decision of 1989 shows that this is no 'allergy' of the*

French legal system to the US opt-out mechanism and that there are only divergences on its modalities and the way the opt-out right can the exercised. There should be no reason therefore to refuse Res Judicata effect in France of a US class action judgment on this ground" (Andrea Pinna, "Recognition and *Res Judicata* of US class action judgments in European legal systems", *Erasmus Law Review,* Volume 01, Issue 02, 2008, Annex 36).

81. Professor Christophe Seraglini also considers that the fact that the opt-out mechanism does not strictly comply with the conditions that appear to be established by the Constitutional Court on the admissibility of a substitution claim in French domestic law does not imply that an opt out class action judgment would not be recognized by French courts. According to him, an opt out class action judgment should be deemed compatible with French international public policy as long as the class members had a sufficient amount of time and a real opportunity to opt out (Christophe Seraglini, "Les effets en France des actions de groupe étrangères", Communication before the French Comitee of Private International Law on 20 November 2009, *to be published*, Ed. Pedone, 2011, Annex 37).

82. Professors Marie-Laure Niboyet and Géraud de Geouffre de la Pradelle (*Droit International Privé*, 2nd Ed., LGDJ Paris, 2002, n°529, Annex 38) agree on this point, considering that the question of the compatibility of opt out class actions with French conception of international public policy depends on whether the notice program was such as to properly inform the class members of their right to opt out.

83. Two authorities, finally, have opined against the recognition of US class actions in France (Daniel Cohen, "Contentieux d'affaires et abus de forum shopping", *D.* 2010, p. 975; J. Lemontey and N. Michon, "Les class actions américaines et leur éventuelle reconnaissance en France", *JDI,* Avril-Mai-Juin 2009, p.535). It should however be noted that such authors have acted as experts on behalf of *Vivendi* before the court of New York.

c) It is likely that substantially all French Absent Class Members will receive the notice personally or be served via the Hague convention

84. Finally, I understand that in the instant case, substantially all French class members are identified and that, as a consequence, the Notice will be served to them personally or be served via the Hague Convention. I also understand that the class representatives would, as far as the limited number of unidentified class members are concerned, serve notices on the institutional investors with instructions to pass the notice on them. I believe that such procedures will be sufficient to address any concern as to the Constitutional Court requirement. It should be recalled, in this respect, that the constitutional Court in its decision of 1989 essentially pointed to the fact that employees should be informed personally. Assuming that the Constitutional Decision of 1989 would be relevant in the context of the recognition of a foreign judgment – which I do not believe – no such concern would exist in the instant case.

2. Absence of Contradiction with the Luxembourg Conception of International Public Policy

85. Luxembourg courts have defined public policy as including the essential values of the Luxembourg legal order (Court of Appeal of Luxembourg, January 8th, 2004, no 27530 – Annex 39). To my knowledge, in recent times, there is only one instance in which a court in Luxembourg denied recognition to a foreign judgment on grounds of public policy (Court of Appeal of Luxembourg, January 8th, 2004, no 27530 – Annex 39). This case, however, related to a matter involving family law matters (recognition of a decision relating to an adoption in Morocco).

86. In other instances, courts consistently rejected defenses to recognition based on public policy (Court of Appeal of Luxembourg, February 5th, 2007, no 31257 – Annex 40).

87. As a consequence, in spite of the paucity of case law, and because I believe that courts in Luxembourg would take the same approach as French courts, my view is that a court in Luxembourg would not object to the recognition of a U.S. judgment in this case on public policy grounds.

D. Absence of Fraud

1. French Law

88. According to *Cornelissen*, a foreign judgment would not be recognized in the hypothesis of a fraud to the law (i.e. the use of a foreign jurisdiction with the intent of circumventing the normally applicable rules of French law to the merits).

89. I do not believe that it could be reasonably argued that bringing this case before the courts in New York is objectionable in this case. As a matter of fact, the facts that give rise to the claims occurred in New York, allegedly in breach of U.S. laws. In addition, the dispute does not present any link with France apart from the nationality of a limited number of investors, and French law has no preferential title to adjudicate the matters at issues in this case.

2. Luxembourg Law

90. To my knowledge, there is no precedent in Luxembourg dealing with an objection to the recognition of a foreign judgment based on an alleged fraud. For the reasons that I already have expressed, I believe that a court in Luxembourg will follow the same approach as a French court.

E. Effects of the Recognition in France and in Luxembourg of the U.S. Class Action Judgment

91. It follows from the above that, both in France and in Luxembourg, a court would in my view accept the recognition of a U.S. class action judgment in this case. Two possible situations have to be distinguished in this regard. The first scenario is that of an action aiming at obtaining a direct judicial declaration of recognition of a judgment in favor of the Class through the *exequatur* procedure (in order for example to seize assets of the defendants located in France). Such action would presumably be brought by the Lead Plaintiffs. The second is an action to seek the judgment's incidental recognition (as opposed to direct recognition) in the context

of another legal action. For example, if the defendants prevail in the U.S. proceedings, they could seek to use the U.S. judgment against any Absent Class Member who might later try to initiate a similar action in France or in Luxembourg.

92. For all of the reasons previously discussed, I believe that the U.S. class action judgment would be recognized both in France and in Luxembourg. As a consequence, the U.S. class action judgment (i) would have preclusive effects (*res judicata*) in both countries, which means that the parties – including the Absent class members – would not be allowed to re-litigate the case in France or in Luxemburg by filing individual actions, and (ii) could be enforced in France or in Luxemburg – if necessary – after exequatur proceedings.

F. Effects of a Settlement Agreement

93. I understand that any settlement between plaintiffs and defendants would need to be approved and entered as part of a final judgment or order in the U.S. action. Therefore, a judgment approving a settlement would be enforceable to the same extent as any other judgment.

94. In addition, any Absent Class Member that accepted a benefit under the U.S. settlement would, I understand, be required to sign a release as a condition of receiving a payment, which release would be fully enforceable as a matter of contract law in France. As a matter of fact, both in France and in Luxembourg, a settlement signed by the parties is a contract, and can be enforced like any contract (Articles 2044 *et seq.* of the French Civil Code[16], Annex 41; Cass. Civ.

[16] Pursuant to Article 2044 of the French Civil Code: a settlement is a contract by which the parties terminate an existing controversy, or prevent a controversy from arising. That contract must be made in

2nd Sect., 3 October 1968 – Annex 42; Articles 2044 *et seq.* of the Luxembourg Civil Code[17], Annex 43).

95. Even assuming *arguendo* that the French courts would not bar an Absent Class Member from filing a separate lawsuit after a judgment had been entered in the New York proceedings, it is highly unlikely as a practical matter that an Absent Class Member would have an incentive to do so: First, the Absent Class Member would have to pay his own legal fees because French law does not permit lawyers from taking an action on a contingency. Second, the Absent Class Member would run the risk of having to bear a share of the defendants' legal costs if his action were dismissed. Third, the Absent Class Member will only have limited ability to make discovery. Fourth, the court is likely to heed the defendants' arguments that the findings of the U.S. court should be entitled to persuasive weight even if the court finds that the claims of the Absent Class Member are not precluded.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is in my opinion correct according to the current state of French and Luxembourg law.

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writing. According to Article 2052 of the same Code, a settlement between the parties has the *res judicata* authority of a final judgment. It may be attacked neither on account of an error of law, nor on account of an imbalance of the parties' obligations.

[17] Articles 2044 and 2052 of the Luxembourg Civil Code have been the same as Articles 2044 and 2052 of the French Civil Code since Napoleonic time.

Executed this 28th day of February 2011 in Paris,

Alexis Mourre

List of Annexes

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Annex 3: Cass. Civ. 1, 4 October 1967, *Bachir*, Bulletin civil 1, n°277;

Annex 4: Civ. 1, 20 February 2007, *Cornelissen v. Avianca;*

Annex 5: Tribunal d'arrondissement de Luxembourg, 10 January 2008, n°13/2008;

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Annex 16: B. Starck, H. Roland and L. Boyer, *Droit civil - Les Obligations – Contrat*, Litec 6th Ed., n° 261, 1998, p. 96;

Annex 17: Cass. Civ. 2nd Sect., 3 April 2003, *Fitzpatrick vs. Berner*, n°99-21024;

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Annex 26: Req., 28 March 1938; Cass. Civ. 1st Sect., 1st December 1969, *Bull. Civ.* 1969, I, n° 375; Cass. Soc., 17 December 1970; Cass. Soc. 21 July 1986, n° 84-11626; CA Toulouse, 14 February 1996;

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Annex 35: Cass. Civ. 1. 1 Dec. 2010, *Epoux X. v. Fontaine Pajot*, n°09-13303;

Annex 36: Andrea Pinna, "Recognition and *Res Judicata* of US class action judgments in European legal systems", *Erasmus Law Review,* Volume 01, Issue 02, 2008.

Annex 37: Christophe Seraglini, "Les effets en France des actions de groupe étrangères", Communication before the French Comitee of Private International Law on 20 November 2009, *to be published*, Ed. Pedone, 2011;

Annex 38: Marie-Laure Niboyet, Géraud de Geouffre de la Pradelle, *Droit International Privé*, 2nd Ed. LGDJ, Paris, 2009, n°529;

Annex 39: Court of Appeal of Luxembourg, January 8th, 2004, no 27530;

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Annex 42: Cass. Civ. 2nd Sect., 3 October 1968, *Bull. Civil,* 1968, II, n° 226;

Annex 43: Articles 2044 *et seq.* of the Luxembourg Civil Code.

Annex 44: Opinion of the European Economic and Social Committee on the Green Paper on Consumer Collective Redress (2010/C 128/18)