UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al.,	x	
	x	
Plaintiffs	x	
	x	
v.	x	Index No. 09 Civ. 118 (VM)
	x	
	x	
FAIRFIELD GREENWICH LIMITED et al.	x	
	x	
Defendants.	x	

DECLARATION REGARDING DUTCH, CURAÇAO AND OTHER FOREIGN LAW ASPECTS

by

HANS SMIT,
Stanley H. Fuld Professor
of Law Emeritus, Columbia University

New York, March 1, 2011

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Hans Smit, a member of the Bar of New York, declares and says:

I. QUALIFICATIONS

1. I am the Stanley H. Fuld Professor of Law Emeritus at Columbia University and a member of the Bar of the State of New York. At Columbia I taught Civil Procedure, Conflict of Laws, International Law, International Business Transactions, and International Commercial Arbitration (a copy of my curriculum vitae is appended hereto as Exhibit 1).

2. I am a national of the Netherlands, where I obtained my LL.B. and LL.M. degrees in law with highest honors and practiced law as an associate and, subsequently, as a member of the Netherlands law firm now known as De Brauw Blackstone Westbroek. In that capacity, I have handled and argued cases before Dutch courts of first instance and appeals, as well as the Supreme Court of the Netherlands.

3. I hold an LL.B. degree from Columbia Law School, where I was a Kent scholar, was awarded the Ordronaux Prize for graduating with the highest cumulative average, and won the Convers Prize for my article on International Res Judicata and Collateral Estoppel in the United States, subsequently published in 9 UCLA L. Rev. 44 (1963). I was associated with Sullivan & Cromwell in New York City until, in 1960, I joined Columbia's Faculty of Law and became the Director of the Project on International Procedure. As part of that Project, and in co-operation with the U.S. Commissions on International Rules of Judicial Procedure, a body created by Act of Congress, I prepared various legislative reforms related to international civil procedure. All reforms the Project developed with the Commission were subsequently enacted into federal and state law.

4. As Director of the Project, I sponsored and edited monographs on Civil Procedure in Italy, Civil Procedure in Sweden, Civil Procedure in France, and Civil Procedure in Japan. I was subsequently appointed Director of the Columbia Project on European Legal Institutions,

which published Smit & Herzog, The Law of the European Economic Community (a loose-leaf multi-volume work), and later the Director of the Parker School of Foreign and Comparative Law, in which I directed the preparation of Smit & Pechota, The World Arbitration Reporter (6 volumes), and the Smit Guides to International Arbitration (7 volumes), and, as Editor-in-Chief, established The American Review of International Arbitration. I am also a co-author of Elements of Civil Procedure (5th ed. 1991), International Law (5th ed. 2010), and International Business Transactions (mimeographed materials).

5. I have been awarded an honorary doctorate by the Université de Paris-I (Sorbonne) and the E.M. Meyers Medal for distinction in the Law by the University of Leyden. I have been made a Knight in the Order of the Netherlands Lion by the Queen of the Netherlands, and have been elected to the Dutch Academy of Arts and Sciences and the International Academy of Comparative Law. I am the originator of the Paris-I/Columbia Double Degree Program and the Leyden-Amsterdam-Columbia Summer Program in American law. I have also acted as the Head of the U.S. Delegation to the U.N. Conference on the UNCITRAL Convention on Time Limitations in International Sales.

6. At the request of the Netherlands Antilles Government, I drafted a comprehensive Trust Law. I also published International Res Judicata in the Netherlands – A Comparative Analysis, in 16 Buff. L. Rev. 165 (1966).

7. I have acted as an expert on Dutch, Indonesian, Netherlands Antilles, French, German, Swiss, European Union, and U.S. conflicts of law, jurisdiction, and foreign relations law in U.S. courts, and on U.S. and German law in European courts. Specifically, I have submitted opinions on the recognition given in the Netherlands to U.S. class action judgments including Dutch and other foreign class members in In re Royal Ahold N.V. Securities & ERISA

Litigation, No. 03-MD-1539 (D. Md. 2003) (Blake, J.) ("Royal Ahold"), In re Royal Dutch/Shell Transport Securities Litigation, No. 04-CV-374 (D.N.J. 2004) (Bissell, C.J.) ("Royal Dutch"), In re Vivendi Universal, S.A. Securities Litigation, No. 02-CV-5571 (S.D.N.Y. 2002) (Holwell, J.) ("Vivendi"), In re Alstom SA Securities Litigation, No. 03-CV-6595 (S.D.N.Y. 2003) (Marrero, J.) ("Alstom"), and In re Parmalat Securities Litigation, No. 04-MD-1653 (S.D.N.Y. 2004) (Kaplan, J.) ("Parmalat"). The correctness of my conclusions in these cases to the effect that Dutch courts would recognize U.S. class action judgments including foreign members was subsequently confirmed by the Amsterdam District Court in SOBI v. Deloitte Accountants B.V. et al., No. 398833/HA ZA 08-1465 (Dist. Ct. Amsterdam June 23, 2010) (unpublished) (relevant portions of the SOBI decision are appended hereto as Exhibit 2).

II. FACTS ASSUMED

8. For the purpose of giving this Opinion, I have assumed the following facts:

9. This is a putative class action on behalf of domestic and foreign members who invested large sums of money in four feeder funds owned, operated, and directed by the Fairfield Greenwich Group ("FGG"), a de facto partnership. Foreign members of the class invested in Fairfield Sentry Limited and Fairfield Sigma Limited, two offshore funds organized under the laws of the British Virgin Islands (the offshore funds are referred to herein as the "Funds").

10. Virtually all of the monies acquired in this fashion were invested in the Ponzi scheme operated by Bernard Madoff, who was convicted following a guilty plea to 150 years in prison. The defendants in this action are FGG, principals of FGG, entities controlled and operated by FGG which invested the funds secured by them in Madoff's Ponzi scheme, and service providers to the Funds.

11. Each subscriber to the Funds agreed that any suit with respect to the Agreement and the Fund could be brought in New York (Fairfield Sentry Subscription Agreement, Art. 19;

Fairfield Sigma Agreement, Art. 22) (true and correct copies of the Subscription Agreements are appended hereto as Exhibits 3 and 4 respectively). Article 19 of the Fairfield Sentry Subscription Agreements provides: "Subscriber irrevocably submits to the jurisdiction of the New York courts with respect to any proceeding . . . ." See, in more detail, paras. 31-53 infra.

12. A motion to dismiss the class action was denied in part and granted in part by the Honorable Victor Marrero.

13. The issue now to be addressed is to what extent the class to be certified should include members residing in, or nationals of, foreign countries, including the Netherlands. The consideration of the issue has been argued to include consideration of whether a judgment, including a settlement agreement incorporated in a judgment, in a U.S. opt-out class action that includes foreign members, will be recognized in other countries, and whether absent class members who do not opt-out will be precluded by the judgment from bringing individual actions against the defendants based on the same claims that were or could have been asserted in the class action.

III. ISSUES TO BE ADDRESSED

A. Preliminary Observations

1. The Relevance of Foreign Recognition of the Class Action Judgment Generally

14. Counsel for the plaintiffs has requested that I provide my opinion on whether a class action judgment involving Dutch, Curaçao, and other foreign class members would be recognized in the country in which the foreign members are resident. The notion that inclusion of foreign members in a U.S. class action may depend on whether the foreign forum would recognize a resulting judgment appears to originate in a statement by Judge Friendly in Bersch v. Drexel Firestone, Incorporated, 519 F.2d 974 (2d Cir. 1975), to the effect that inclusion of the

foreign members would be improper if there was "a near certainty" that a judgment including the foreign members would not be recognized in the foreign country. The Supreme Court, in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), subsequently rejected Judge Friendly's construction of the extraterritorial effect of U.S. securities law, but had no occasion to opine on Judge Friendly's criterion for excluding foreign class members. In my opinion, if it had had such an occasion, it would also have rejected the view that foreign recognition of U.S. class action judgments is an important, or even relevant, factor to consider on class certification, when, as here, the foreign class members are resident in approximately sixty-eight countries and the wrongs alleged originated and were implemented in the United States. Rule 23 (a) of the Federal Rules of Civil Procedure defines the general prerequisites to maintaining a class action. No one in this case has argued that these requirements are not met in the case at hand. Rule 23(b) sets forth the further criteria to be considered by the Court in determining whether a class action may be brought under that Rule. Non-recognition in foreign countries of the judgment to be rendered against foreign members of the class is not included in the legislative text either. It might, therefore, be argued that such non-recognition is not a relevant factor in determining the propriety of a class action including foreign members.

15. In my opinion, the only case in which non-recognition of the class action judgment abroad can justify exclusion of the foreign members is the one most unlikely to arise – to-wit, in which, for lack of seizable assets, the class action judgment could not be enforced in the forum that produced the judgment. In all other cases, where the judgment can be satisfied from assets within the jurisdiction of the U.S. court, recognition in a foreign forum lacks all significance and would involve going beyond the text of Rule 23.

16. In any event, whether the defense of non-recognition in the relevant country is available should, in my opinion, rest on the party pleading it as a factor to be considered. If, as in the instant case, the class action as pleaded properly includes foreign members, the burden of proving non-recognition should rest on the party resisting class certification. To impose the requirement of non-recognition and then to saddle the plaintiff with the burden of proving it cannot be justified on reasonable grounds. Furthermore, saddling the party pleading non-recognition with its proof produces the desirable result of limiting recourse to this defense to the cases in which the defense can be established by readily available proof. I therefore, most respectfully, disagree with this Court's ruling in In re Alstom Sec. Litig, 253 F.R.D. 266, 282 (S.D.N.Y. 2008), in two respects: First, the Bersch's criterion is that non-recognition must be "a mere certainty" not merely "likely;" and second, since foreign recognition is not part of the requirements for a Rule 23(b)(3) class action, it should, if recognized at all, be a defense.

17. I believe that the defense of non-recognition should be rejected because defendants have not met their burden of proof.

18. When there are adequate assets for enforcement of the class action judgment in the forum of its rendition, the foreign class member would share in the recovery obtained in that forum. It would simply make no sense for a foreign member of the class to bring an action in his or her home forum, which would involve retaining and paying a local lawyer, paying the local court filing fees and, if he or she loses, paying (part of) the opposing counsel's fees, seeking to prove his or her case without the benefit of U.S. style pre-trial discovery. Even if this made sense, which it does not, it does not make the class action procedure any less superior, because a foreign class member who prefers to sue locally could simply opt out.

19. In the alternative case, when, for any reason, the class action is dismissed on the merits, the foreign class member would not be likely to bring an action in the local court. If the merits have been decided against it in a U.S. court, it would make no sense to start anew in a local court with all the disadvantages mentioned. Furthermore, by the time the foreign class member has to decide whether to opt out, a class action has typically survived a motion to dismiss. The foreign class member would, therefore, know that the action has survived a motion to dismiss. Indeed, it may even be given an opportunity to opt out at the time a settlement has been reached. If the foreign class member would, nonetheless, prefer to bring its action locally, it could simply opt out. From a realistic point of view, the issue of whether the class action judgment would be recognized in the local courts would, therefore, not be of any real significance.

20. Upon proper consideration, recognition of a class action judgment in foreign countries appears to be of most attenuated significance and relevant only in a case in which the foreign country is the only forum in which satisfaction of the judgment could be obtained. However, since I have been instructed to assume that whether this Court's class action judgment would be recognized in Dutch and other foreign courts is a viable issue, I will proceed on the basis of that assumption.

21. A second observation concerns the importance of the New York forum selection clause in the present case. Since all members of the class have agreed to be sued in the competent New York court, and such an agreement is universally regarded as a proper basis of jurisdiction, there can be no doubt that the foreign countries would regard the New York court to have jurisdiction over all class members. See, in greater detail, paras. 31-53 infra.

22. Last, but not least, it should be noted that the instant case differs essentially from the class actions brought in U.S. courts in which I previously submitted expert opinions. In those cases, the class actions were brought in U.S. courts against foreign corporations headquartered in foreign countries. In those cases, the question naturally arose to what extent the foreign members of the class could, and should, seek recourse against the local companies in courts of their home countries. In those cases, the argument for excluding foreign class members whose own jurisdictions have not themselves implemented U.S.-style opt-out class actions had at least some superficial attraction – although in my judgment, the absence of an opt-out class action mechanism in foreign countries is all the more reason for including the foreign members in the U.S. class action. The instant case, however, involves a U.S. class action against mostly U.S. defendants based on the Ponzi scheme conceived and implemented in the U.S., and more specifically in New York. New York provides the most natural forum for bringing a class action including foreign members of the class based all over the world who participated in Madoff's scheme. The District Court of Amsterdam, in the SOBI case, (see paras. 27-30 infra), stressed the forum delicti as a most significant factor in this context. The fact that the class members agreed that New York would be an appropriate forum confirms this. It would be most unfair to the foreign class members to exclude them from the benefits of a class action in the most appropriate forum.

IV. ANALYSIS

A. Observations on Foreign Laws Relating to Recognition of Class Action Judgments Generally

23. In prior cases, I have submitted opinions not only on the relevant laws of the Netherlands, but also on French, German, Belgian, Austrian, and Swedish law. I felt confident to provide those opinions because, in the absence of controlling foreign case law and

commentatorial authorities, the issue is governed by principles common to all civil law systems. All of them have adopted, by the Lugano Convention of 2007 and the EU Regulation No. 44/2001 (Dec. 22, 2000) (appended as Exhibits 5 and 6, respectively), or local law, rules that authorize the exercise of jurisdiction in multiple party cases in situations that go beyond traditional U.S. rules. They permit the exercise of personal jurisdiction over multiple defendants as soon as there is a proper basis of jurisdiction over any one defendant. And they permit any party subject to impleader to be brought in, regardless of whether there is another appropriate basis of jurisdiction. Those rules are not only incorporated in the foreign rules of civil procedure, they have been made part of an international convention and a European Union Regulation. See EU Reg. No. 44/2001 (Dec. 22, 2000), at Art. 6 ¶ 1 (Ex. 6); Lugano Convention, L 339 Official J. of the European Union 3 (Dec. 21, 2007), at Art. 6 ¶ 1 (Ex. 5). Furthermore, examples of a third party acting without authorization on behalf of, and to protect the interests of, others are found in nearly every civil code. See, in more detail, paras. 63-69 infra.

B. The Amsterdam Courts Have Confirmed The Correctness of My Conclusions

24. Most significantly, leading Dutch courts have now rendered rulings confirming the correctness of my conclusions. The Amsterdam Court of Appeals, a prominent civil law court, has rendered dispositive rulings in Dutch class action settlement proceedings recognizing the binding effect of judgments in such an action on foreign members that did not opt-out. The Netherlands is the only civil law country that has an opt-out class mechanism, but it is available only to confirm an extra-judicial settlement concluded between the class and the defendant. The difference with the U.S.-type class action is that, if the parties do not agree to a settlement, the

plaintiffs cannot bring a lawsuit for damages on behalf of an entire class. But a judgment in such a class action settlement proceeding binds all members of the class who did not opt-out.

25. In the matter of Dexia Bank Nederland N.V., et al. v. Stichting Platform Aandelenlease, No. 1783/05, available at www.rechtspraak.nl ("Dexia"), the Amsterdam Court of Appeals approved a class settlement that purported to bind members of the class who had not opted-out. Dexia § 9. It rejected all of the arguments advanced against the judgment, including the argument that it violated the asserted principle of Dutch law that a plaintiff had the right to decide when and where he wishes to bring suit. Id. §§ 5.4, 5.7 – 5.8, 8.1. It also rejected the argument that the opt-out class action ran afoul of the European Human Rights Convention. Id. §§ 5.6 – 5.15. And it rejected the argument that the notice to the foreign class members had to be served in accordance with The Hague Service Convention. Id. § 5.3. The correctness of my opinions was thus confirmed by the special chamber of the Amsterdam Court of Appeals, a court specially designated by the Dutch Legislature for the purpose of examining class-wide settlements, and widely recognized in the Netherlands as possessing special competence.

26. Rather surprisingly, however, the experts on Dutch law proffered by the defendants in earlier cases, persisted, even after the Dexia case, in making the arguments already rejected by the Amsterdam Court. But in a subsequent decision in the Shell case, the Amsterdam Court of Appeals confirmed its Dexia ruling. Shell Petroleum N.V., et al. v. Dexia Bank Nederland N.V., et al., No. 106.010.887 (Amsterdam Ct. App. May 29, 2009) (sworn English translation attached hereto as Exhibit 7) ("Shell") §§ 5.7 – 5.14 (finding notice to known as well as unknown and unidentifiable Dutch and foreign class members via regular mail and publications via websites, press releases, and newspaper advertisements satisfactory and in accordance with Dutch law and treaty requirements), §§ 5.21 – 5.25 (accepting jurisdiction over

foreign investor claims and stating that its class-wide approval of the settlement must be given *res judicata* effect by foreign courts). Significantly, this was a case with many foreign class members, and the question of whether the class action judgment would bind the foreign members of the class who did not opt out was, therefore, of prime significance. See Ex. 7 (Shell) §§ 5.3, 5.7, 5.21 – 5.25. These cases left no doubt that Dutch courts would similarly recognize U.S. class action judgments purporting to bind the Dutch members of the class who did not opt out.

27. Subsequently, that precise question was addressed in Stichting Onderzoek Bedrijfs Informatie SOBI v. Deloitte Accountants B.V. et al., No. 398833/HA ZA 08-1465 (Dist. Ct. Amsterdam June 23, 2010) (unpublished) (Ex. 2). This case involved claims against the Dutch and U.S. accountants after the securities fraud litigation revolving around Royal Ahold's U.S. subsidiary, U.S. Food Service, had been litigated against Royal Ahold, its accountants, and others, in the District Court for the District of Maryland. See In re Royal Ahold N.V. Secs. & ERISA Litig., No. 03-MD-1539 (D. Md. 2003) (Blake, J.). After Dutch class members, including absent class members, again sued the accountants in the Amsterdam District Court, on June 23, 2010, the District Court for the District of Amsterdam became the first Dutch court to address the effect of a U.S. class action judgment (in the Royal Ahold matter) in the Netherlands.

28. In its Decision and Opinion, the Amsterdam District Court addressed the question "whether Deloitte Netherlands, Deloitte USA, and Plaintiff No. 3 can, vis-à-vis the persons and entities represented by SOBI, raise the outcome of the litigation in the United States as a bar in the context of the present proceeding," and held that the answer requires a finding that "the Settlement Agreement and the Final Judgment are subject to recognition in the Netherlands." Ex. 2 (SOBI) § 6.5.1. According to the Amsterdam court, such a finding requires the Court to answer three sub-questions:

(i) was the jurisdiction of the U.S. court based on internationally recognized grounds; (ii) did the U.S. procedure that led to the Final Judgment satisfy the requirements of due process; and (iii) does the Final Judgment comport with Dutch public policy—all against the background of Article 1 of the First Protocol to the European Convention on Human Rights (ECRM First Protocol).

Ex. 2 § 6.5.1.

29. The Amsterdam Court found that each of these requirements was met, stating that (i) "in any event the U.S. court, as the *forum delicti*, could reasonably find that it had jurisdiction," (id. § 6.5.2); (ii) the U.S. class action procedure "sufficiently protects the interests of individual class members and does not violate Article 1 of the ECRM First Protocol," (id. § 6.5.4), and (iii) that "[w]hile there are differences between the U.S. procedure and the WCAM, these dissimilarities are not such that the U.S. procedure must be deemed to violate due process or Dutch public policy."[1] Id. § 6.5.5.

30. The court specifically held that "[t]he most important guarantees of both [the Dutch and the U.S.] rules relate to the rights of all those affected by the settlement to provide comments to the court regarding the content of the settlement and decide, within a reasonable time after notice of the settlement or proposed settlement is given, not to participate in it" (id. § 6.5.3), and that the U.S. procedure, like the Dutch procedure, "ensures that interested persons receive timely and efficient notice, have access to and may be heard by the presiding judge, and have an opportunity to exclude themselves from the Settlement Agreement if they so desire." Id. § 6.5.4. Accordingly, it held that the Royal Ahold settlement and the U.S. Court's final judgment were to be recognized in the Netherlands, and the findings of fact and conclusions of law contained therein could be invoked as a bar against the real parties in interest represented by SOBI. Id. § 6.5.6. The court further noted that when the above requirements are satisfied, a

[1] WCAM is the Dutch statute governing collective settlement procedures.

foreign judgment receives "automatic recognition by operation of law in the Netherlands." Id. § 6.5.1. Accordingly, there can be no doubt that the Dutch courts would recognize a U.S. class action judgment in the instant case.

C. The Impact of the Choice of Forum Clause

31. In any event, there can be no doubt that a Dutch court would find that this Court has jurisdiction over all members of the class. The New York forum selection clause in the Subscription Agreements puts this beyond any doubt. The Netherlands, like all relevant foreign countries, recognizes the binding effect of forum selection clauses like the one involved here, and would not permit a signatory to disavow it. See further paras. 31-53 infra.

D. The Significance of the Forum Delicti

32. Moreover, I would argue, the nature of this class action, which addresses the legal consequences for the members of the class of the Ponzi scheme created and implemented by Madoff and the defendants in this case in New York, renders the New York forum the most appropriate forum for adjudication of this action. The ruling of the Amsterdam District Court, in the SOBI case, see para. 29 supra, confirms this opinion.

E. The Scope and Reach of the Choice of Forum Clause

33. The Subscription Agreements provide for the application of New York law. See Ex. 3, Art. 16; Ex. 4, Art. 19. The scope and reach of the choice of forum clause must therefore be determined under New York law. But even if the Subscription Agreements did not contain a choice of law clause, the result would be the same. In the Netherlands, the effectiveness of a choice of forum clause would be decided by reference to Dutch principles of conflict of laws or, in Dutch parlance, private international law. In my judgment, a Dutch court, and all courts of the foreign countries here involved, would judge the effectiveness of the choice of forum clause by reference to New York law.

34. They would do so principally for two reasons. First, it is a well settled principle of private international law that the effectiveness of a contractual clause is to be determined by reference to the law of the place where it is to be performed. The effectiveness of the choice of forum clause in the case at hand must necessarily be decided ultimately by the courts in the chosen forum. If it is not valid there, it is irrelevant. The clause, to put it another way, seeks to be effective in New York, and New York would necessarily apply the law prevailing in New York to judge the effectiveness of a clause bestowing jurisdiction on courts sitting in New York.

35. Secondly, the law prevailing in New York will ultimately have to decide whether it recognizes the effectiveness of a clause bestowing jurisdiction on its courts. A foreign law or court cannot bestow jurisdiction on a New York court that is not prepared to exercise it.

36. Applying New York law, i.e., the law prevailing in New York, to the issue promotes uniformity of result on the issue in all cases in which the form selection clause is included in foreign courts. It will ensure that all subscribers are treated identically in regard to this most important issue.

37. I have, therefore, no doubt that Dutch, or other relevant foreign courts, would evaluate the validity, reach, and scope of the forum selection clause by applying the relevant New York law to these issues.

38. Of course, the relevant law prevailing in New York governing this issue is determined by the law determining the personal jurisdiction of federal courts sitting in New York, which is federal law.

39. I, therefore, conclude that, as a matter of Dutch conflict of laws, the validity, effect, and the reach, of the choice of forum clause in the Subscription Agreements is to be determined by reference to federal law prevailing in New York.

40. The choice of forum clause in the Fairfield Sentry Subscription Agreement reads as follows:

> "19. New York Courts. 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...." (Ex. 3)

Art. 16 of the Fairfield Sigma Subscription Agreement is identical (Ex. 4).

41. This forum selection clause is, undoubtedly, of the broad variety. It establishes jurisdiction in the competent New York court in "any suit, action or proceeding ('Proceeding') with respect to this Agreement and the Fund." It is not required that the action arises from the Agreement. All that is required is that the action is "with respect to" the Agreement. And it is sufficient that it relates to "the Agreement and the Fund."

42. There cannot be any doubt that the class action in the instant case is "with respect to the Agreement and the Fund." It is all about that Agreement and the Fund and how they were intrinsic parts of the Ponzi scheme created by Madoff and implemented, and made effective by, the defendants in this action.

43. The choice of forum clause also extends its reach on its face to all who bring an action "with respect to the Agreement and the Fund." It is the subscriber, and the subscriber alone, who assumes the obligation to be sued in the New York court of competent jurisdiction. That wide-open obligation extends, on its face, to all who wish to bring, or are drawn into, an action relating to the Subscription Agreements and the Funds.

44. The forum selection clauses are, to that extent, third-party beneficiary clauses that can be invoked as binding on a subscriber by any other subscriber and by any other person or

entity that is part of the fundraising scheme and may have occasion to draw a Subscriber into litigation. It is clearly formulated so broadly as to have this effect.

45. This construction of the forum selection clauses clearly serves the purpose for which they were inserted in the Funds' Subscription Agreements. They assure that all claims by Subscribers that come into existence by virtue of the Subscription Agreements can be adjudicated in a New York court. Efficiency of adjudication and fairness to all parties involved is promoted by these clauses, and they should be construed to achieve these laudable goals.

46. The relevant federal case law clearly supports this reading of these clauses. Federal courts in New York have readily extended a choice of forum clause to non-signatories to the contract that contains it when there is a close relationship with a named party, the non-signatory is involved in the transaction that forms the basis of the dispute, and the non-signatory is likely to derive benefits from the transaction that is the subject of adjudication. The relevant criteria are enumerated in Aguas Lenders Recovery Group, LLC. v. Suez, S.A., 585 F.3d 696, 701-02 (2d Cir. 2009). The clause is typically extended to parent companies, subsidiaries, or other entities in a group of companies involved in a transaction that is the subject matter of the action brought, which is the case here. But, in a leading decision, the Second Circuit extended a forum selection clause's reach to an unrelated company that had contracted to perform certain services for the signatory company to an agreement which contained an arbitration clause, a form of forum selection clause. See Am. Bureau of Shipping v. Tencara Shipyards S.P.A., 170 F.3d 349, 352-53 (2d Cir. 1999). The justification common to all of these cases is that it is most undesirable to have parts of a case adjudicated in one forum and other parts in another.

47. In the case at hand, the choice of forum clause should, therefore, be construed to reach all defendants in this action, including the service providers, and the other subscribers.

Citco's forum selection clause does not preclude this Court's jurisdiction (see par. 31, supra), and no other providers have objected to the New York forum. This will ensure that all aspects of the case brought by subscribers against all defendants be brought in the most appropriate forum, i.e., New York.

48. Under Dutch rules of private international law, which direct recourse to the above detailed rules of federal law applied by courts in New York, the New York courts, therefore, have jurisdiction over all members of the plaintiff class, including all Dutch members. All members, including the Dutch ones, have agreed that the New York courts have jurisdiction over all members and that no party bound by the choice of forum clause can be heard to argue otherwise. Elementary principles of good faith estop and preclude them from arguing otherwise.

49. Of course, since all relevant parties agreed that the New York courts would have jurisdiction over all subscribers, all proceedings in New York could take any form appropriate under the rules of procedure prevailing in the New York court. They could simply be made parties or, as it did in the case at hand, the New York court could prescribe that they would be class members who would not be bound if they opted out.

50. While, under Dutch private international law rules, the validity, scope, and personal reach of the clause selecting the New York forum is to be determined by reference to New York law, the effect of the clause in a Dutch court must be determined by reference to Dutch law. For it must be determined by a Dutch court whether the jurisdiction bestowed on the New York court will be recognized in the Netherlands.

51. Dutch courts give full effect to forum selection clauses even when the selected forum would be regarded as inconvenient by reference to a forum non conveniens doctrine. The Netherlands is a party to the Lugano Convention concluded by a large number of European

countries. It is also bound by the European Union Regulation on the Recognition and Enforcement of Member State judgments. The Lugano Convention and EU Regulation No. 44/2001 provide that forum selection clauses are to be recognized and given effect. Indeed, they provide that the clause must be enforced as if it were exclusive unless the parties agree otherwise. Lugano Convention, at Art. 23 ¶ 1 (Ex. 5); EU Reg. No. 44/2001, at Art. 23 ¶ 1 (Ex. 6).

52. While the Regulation and Convention apply only in relation to members of the European Union or signatories to the Convention, respectively, they reflect a policy fully endorsed by the Netherlands to give full effect to forum selection clauses. The Dutch courts would, therefore, give full effect and consequence to the effect, scope, and personal reach of the forum selection clause in the Subscription Agreements as determined by applicable U.S. law as applied by New York courts.

53. I may add that, in my opinion, it is beyond reasonable doubt that, if the Dutch courts were to determine the effect, scope, and personal reach of the forum selection clause by reference to Dutch rather than New York law, they would reach the same conclusions as the New York courts. The argument for giving the forum selection clause in the Subscription Agreements the effect, scope and personal reach described above (see paras. 40-47 supra), are equally applicable and effective under Dutch law.

F. The Issue of Notification

54. As stated in my prior declarations, whether the foreign class members were given notice appropriate under foreign law is irrelevant. It does not bear on the question of whether there was jurisdiction over the foreign class members, as that question turns on whether opt-out personal jurisdiction is recognized at all. But if notice were a relevant consideration, there can

be no doubt that recognition would not be denied for improper notification, since the notice to be given would be entirely proper.

55. The propriety of notification to the class members of the proceeding brought in New York under the forum selection clauses of the Fairfield Sentry and Fairfield Sigma Subscription Agreements should, under Dutch rules of private international law, be determined by reference to the law of the place where the notification is effectuated. In the case at hand, that would be the Netherlands.

56. Dutch law would be controlling in this respect because it is for the Netherlands to determine whether a notification effectuated in the Netherlands is valid and effective. Only the Netherlands can decide to what extent notification effectuated in the Netherlands is to be given effect.

57. However, also in this respect, it would make no difference whether U.S. law or Dutch law were controlling. Both, for the reasons stated here, would regard notification effectuated pursuant to the provisions of Article 19 of the Fairfield Sentry Subscription Agreement (and Article 22 of the Fairfield Sigma Subscription Agreement) as fully valid and effective.

58. Some experts retained by defendants in previous class action cases involving foreign members in the class have argued that notification of foreign members of the class was ineffective because it had not been effectuated in accordance with The Hague Convention of Service of Judicial and Quasi-Judicial Documents. This argument is not available in the case at hand.

59. First, the Netherlands has, under Article 10 of The Hague Convention, not objected to service or notification by registered mail.

60. Second, all members of the class have agreed that they may be notified by registered or certified mail, return receipt requested. Article 19 of the Fairfield Sentry Subscription Agreement provides:

> "Subscriber further 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." Ex. 3.

Article 22 of the Fairfield Sigma Subscription Agreement is to the same effect. Ex. 4.

61. Subscribers of the Funds would breach their contractual obligations by arguing, and can, therefore, not be heard to argue, that they must be notified in some other fashion.

62. Third, the Dutch courts have held that non-compliance with the Hague Service Convention does not deprive a non-confirming notification of its effect and does not render a resulting judgment ineffective. When the person to be notified has, in fact, received adequate notice of the proceedings, he cannot be heard to argue that the notice should have been given in some other form.

G. Traditional Features Of The Dutch Legal System, As Well As All Civil Law Systems, Favor Recognition Of A Class Action Judgment Including Foreign Members.

63. The forum selection clause subscribed to by all members of the class provides an entirely adequate basis of jurisdiction over them. But even if there were no forum selection clause, prevailing civil law principles require that a judgment rendered in the instance case comprising foreign members be fully recognized. The reasons are the following.

64. The Dutch Civil Code and Code of Civil Procedure, like the Belgian and Luxemburg codes, are borrowed and are largely copied from the French code. (While the Dutch Civil Code was revised approximately 20 years ago, it very much continues to show its French

heritage.) Both in scholarly writings and in cases argued in Dutch courts, reliance is frequently placed on foreign, and in particular French, German, and Swiss, legal authorities so that Dutch lawyers develop a significant measure of familiarity with the laws of other European countries, aided in this endeavor by their fluency in foreign languages, including French, German, and English. Accordingly, in my professional career I have frequently studied, and given opinions and lectured on, issues of French, German, and Swiss, in addition to U.S. and English, law.

65. As I have previously stated in opinions submitted in the Royal Ahold, Alstom, Vivendi, and Royal Dutch cases, Dutch law, French law, and all other civil law systems for that matter, endorse, in multiple party cases, rules that go far beyond those that permit class actions. They all recognize that, in multiple party cases, the societal interest in adjudicating cases involving multiple parties together so as to avoid conflicting results and unnecessary duplication of judicial efforts warrants extension of judicial power over parties not otherwise subject to judicial jurisdiction.

66. All civil law countries, and also all members of the Lugano Convention and EU Regulation No. 44/2001, provide for the exercise of jurisdiction in multiple party cases over all parties as long as there is jurisdiction over one (see Art. 6 of the Lugano Convention (Ex. 5) and Art. 6 of the EU Regulation No. 44/2001 (Ex. 6)). Under this rule, any involuntary plaintiff can be joined as a defendant even if there is no other basis of jurisdiction over him or her.

67. And, under generally prevailing rules in civil law countries, a party may be impleaded even if there is no independent basis of jurisdiction over him. See EU regulation No. 44/2001, at Art. 6 ¶ 3 Ex. 6; Lugano Convention, at Art. 6 ¶ 3. Ex. 5.

68. Furthermore, there is no general principle in the civil law granting a potential plaintiff the immutable right to decide when and where to initiate litigation, as contended by the

experts of many defendants. All countries recognize some form of declaratory judgment. And, as already stated, an unwilling plaintiff, whether indispensable or not, can be served together with any defendant over which there is jurisdiction. As a consequence, civil law countries have no indispensable party doctrine as endorsed by common law courts.

69. All civil law countries also embrace the doctrine of "negotiorum gestio," accordingly to which a person may be bound by acts performed by third parties in defense of that person's interest. That doctrine reflects the spirit that underlies the U.S. class action.

70. The correctness of my conclusion in my previously submitted opinions, namely that a class action judgment would be recognized in the Netherlands, has been squarely endorsed by subsequent decisions by the courts of Amsterdam: (i) the Amsterdam Court of Appeals in the Dexia and Shell cases (see paras. 25-26 supra). (This court has been given special jurisdiction by the Dutch legislature to hear cases involving what, as far as I know, is the only form of opt-out class action in civil law countries – namely, a class action to approve a settlement reached by a representative part of the class and the defendants); and (ii) the Amsterdam District Court, which has expressly held that U.S. class action judgments and court-approved settlements may be recognized, and operate as a defense, in the Dutch courts. See Ex. 2 (SOBI) §§ 6.5.1 – 6.5.6 (holding that the Royal Ahold class action settlement is subject to recognition and may act as a bar in the Netherlands); Ex. 7 (Shell) §§ 5.7 – 5.14 (finding notice to known as well as unknown and unidentifiable Dutch and foreign class members via regular mail and publications via websites, press releases, and newspaper advertisements satisfactory and in accordance with Dutch law and treaty requirements).

H. The Same Conclusions Apply to Curaçao

71. The same is true in regard to the recognition of class actions comprising foreign class members from Curaçao. The Curaçao legal system is copied from the Dutch one. The Dutch Codes of Commercial Law, Civil Law, and Civil Procedure have virtually literally been re-enacted for Curaçao. The courts of Curaçao and the former Netherlands Antilles frequently have Dutch lawyers as members, and appeals may be taken directly to the Supreme Court of the Netherlands.

72. The analysis developed in regard to the Netherlands, therefore, applies with equal force to Curaçao, and a class action rendered in the instant case purporting to bind members in Curaçao. In fact, Curaçao has a special interest in according full recognition to a U.S. judgment rendered in a class action. It cannot continue to attract investments from the U.S. unless it accords adequate recognition to reasonable regulation by the U.S. of investments straddling the borders of the U.S. and Curaçao.

V. CONCLUSIONS

73. On the basis of the above, I have reached the following conclusions:

1. A Dutch court would recognize this Court's jurisdiction over Dutch members of the class on the ground that this Court has jurisdiction over all members of the class by virtue of the choice of forum clause in the Subscription Agreements.
2. A Dutch court would recognize this Court's jurisdiction over all Dutch members of the class on the ground that the exercise of jurisdiction is fully compatible with Dutch concepts of jurisdiction and compatible with basic concepts of Dutch law relating to the exercise of jurisdiction over multiple parties in litigation.

3. Dutch courts would, therefore, recognize a judgment in this class action purporting to bind Dutch members who did not opt out.
4. The conclusions stated in subparagraphs 1 – 3 are equally valid under the law in Curaçao, and the laws of the foreign countries that embrace the rules in the Lugano Convention and EU regulation No. 44/2001 on jurisdiction over multiple and impleaded parties.
5. Notification of the foreign members of the class given pursuant to Article 19 of the Fairfield Sentry Subscription Agreement and Article 22 of the Fairfield Sigma Subscription Agreement would be regarded as valid and effective in the Netherlands, Curaçao, and all foreign countries considered in this Opinion.

New York, March 1, 2011

Respectfully submitted,

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