

C6IUANWC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 PASHA ANWAR, et al.,

4 Plaintiffs,

5 v.

09 CV 118 (VM) (FM)

6 FAIRFIELD GREENWICH LIMITED et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
June 18, 2012
4:00 p.m.

10 Before:

11 HON. FRANK MAAS

12 Magistrate Judge

13 APPEARANCES (Via Telephone)

14 BOIES SCHILLER & FLEXNER LLP
15 Attorneys for Plaintiffs
16 BY: DAVID BARRETT

17 SIMPSON THACHER & BARTLETT LLP
18 Attorneys for Defendants Fairfield Greenwich, et al.
19 BY: MARK G. CUNHA

20 KIRKLAND & ELLIS LLP
21 Attorneys for Defendant PricewaterhouseCoopers Canada
22 BY: TIMOTHY A. DUFFY

23 HUGHES HUBBARD & REED
24 Attorneys for Defendant PricewaterhouseCoopers
25 Netherlands
BY: WILLIAM MAGUIRE

C6IUANWC

1 (In chambers)

2 THE DEPUTY CLERK: Good afternoon.

3 This is Nolan Robinson, Judge Maas's law clerk.

4 This is a conference in the matter of Anwar v.

5 Greenwich.

6 This conference is being recorded.

7 THE COURT: Let me correct something that my clerk
8 said. It is being recorded, but by a court reporter.

9 I gather there are lots of folks on the phone, but
10 only a few of them will speak, so let me take the appearances
11 of whoever might speak during this conference.

12 MR. BARRETT: Your Honor, good afternoon.

13 This is David Barrett from Boies Schiller & Flexner,
14 and I will be speaking on behalf of the plaintiffs.

15 MR. CUNHA: Your Honor, Mark Cunha from Simpson
16 Thacher Bartlett. I will be speaking on behalf of the
17 Fairfield Greenwich entities and most of the individual
18 defendants.

19 MR. DUFFY: Good afternoon, your Honor.

20 It is Tim Duffy from Kirkland & Ellis on behalf of PwC
21 Canada.

22 MR. MAGUIRE: Your Honor, this is Bill Maguire from
23 Hughes Hubbard & Reed on behalf of PricewaterhouseCoopers
24 Netherlands.

25 THE COURT: Good afternoon, everyone.

C6IUANWC

1 I have to tell you, in all candor, I feel like
2 somebody who just got dropped behind enemy lines with a
3 parachute and no compass. And I know that there has been a lot
4 of water under the bridge in this case but I have read through
5 some of the pleadings, through Judge Marrero's, I guess,
6 200-odd-page decision and some other materials, so I have some
7 sense of what the case is about, but certainly nothing
8 approaching the level of detail that Judge Katz had.

9 In going through materials, I saw a report letter to
10 him that indicates that the parties were submitting joint
11 status reports every three months. And to the extent that
12 discovery continues, I guess I would ask for the same sort of
13 reports.

14 I also found documents that tell me that discovery is
15 slated to be completed for the Fairfield defendants by
16 September 4th and that discovery for the Standard Chartered
17 defendants has already ended, apparently, on May 4, although I
18 also saw in PwC's papers a suggestion that the September date
19 may not be realistic.

20 So let me first ask whether I have the current
21 discovery schedule correct?

22 MR. BARRETT: Your Honor, this is David Barrett.

23 You do have it correct. With respect to the Standard
24 Chartered case, while it is formally consolidated, I believe,
25 by an order of Judge Marrero, essentially that case has been

C6IUANWC

1 proceeding on an entirely separate track and there's been -- I
2 don't think that we have had any or very little overlapping
3 discovery. The Standard Chartered people have attended some of
4 our depositions but, essentially, that case is being litigated
5 separately.

6 THE COURT: Is it accurate that discovery in that case
7 is complete?

8 MR. BARRETT: As I understand it, fact discovery, I
9 believe, is complete. I think they may be working or have a
10 schedule for expert discovery.

11 THE COURT: So the September 4th deadline is also a
12 fact discovery deadline?

13 MR. BARRETT: That's correct, your Honor.

14 THE COURT: I guess that brings us to the letter
15 exchange concerning PwC Canada's witnesses. I heard an
16 appearance for Mr. Maguire, but I don't think I saw the word
17 "Netherlands" anyplace in anything that was submitted to Judge
18 Katz or me. Is that accurate?

19 MR. MAGUIRE: Your Honor, I believe that is entirely
20 accurate, with the only exception being that I believe in some
21 of the correspondence somewhere there is a reference, I think,
22 in which the plaintiffs refer to PricewaterhouseCoopers
23 Netherlands as somehow having engaged in foot-ragging or being
24 slow about offering witnesses, and that we take exception to,
25 but we didn't burden the Court with any letter. So that's the

C6IUANWC

1 only exception, I think, to what I just said.

2 THE COURT: OK. Then, Mr. Barrett, I will hear from
3 you with regard to PwC Canada and its witnesses.

4 MR. BARRETT: Thank you, your Honor.

5 Essentially, your Honor, and I am sorry if we found it
6 necessary to bother the Court with this, but back in March, PwC
7 Canada committed to a deposition schedule which had seven or
8 eight key witnesses who were the partners in charge of the
9 audit team. And based on the document review that we did,
10 other people who were importantly involved in the audits that
11 PwC did in 2006 and 2007 scheduled those depositions for this
12 month and next month here in New York, which we appreciate the
13 fact that they are bringing witnesses to New York, with one
14 exception that was going to be in Toronto because of the
15 witness's health. And it turns out that that witness,
16 unfortunately, had more health problems and we, of course, are
17 prepared to put a stall on that deposition until the witness is
18 able to testify.

19 The reason we had asked for those depositions to start
20 earlier in March and the reason that PwC Canada gave for
21 postponing the depositions is that there is a case which is
22 pending in New York Supreme Court before Justice Fried which is
23 a derivative action that is brought by the trustee of --
24 essentially, the bankruptcy trustee, now the litigation trustee
25 for what are called the Greenwich Century funds -- the

C6IUANWC

1 Greenwich Century funds were two funds that the Fairfield
2 Greenwich group ran and they were for domestic, that is, United
3 States investors. By far the largest funds that are at issue
4 in this case are Fairfield Century -- as opposed to Greenwich
5 Century -- and a couple of related funds called Fairfield Sigma
6 and Fairfield Lambda. The Greenwich Century funds are at least
7 10 times as large as -- I'm sorry -- the Fairfield Century
8 funds are at least 10 times as large as the domestic Greenwich
9 Century funds which are the subject of the state court
10 derivative action.

11 THE COURT: I take it you are likely soon to have a
12 new judge in that because Justice Fried has announced his
13 retirement, correct?

14 MR. BARRETT: We are not going to have it. The
15 plaintiff in that case who is represented by the Milberg firm
16 will have it.

17 In addition, I should point out that, while that case
18 is a derivative case and our case, of course, involves direct
19 claims by investors against PwC, essentially, the substantive
20 issues are, if they are not exactly the same, very similar.
21 The question is, it boils down to, were the PwC audits properly
22 conducted.

23 Back in March when Mr. Duffy presented the schedule
24 with PwC depositions in June and July, he was very much aware
25 at that time of the New York state action, and I think at that

C6IUANWC

1 time took a position which made a lot of sense -- it is quoted
2 in the footnote of the June 11, 2012 letter which is at tab 2
3 of our letter to Judge Katz, now to your Honor, in which he
4 points out to counsel for Greenwich Century that they will have
5 the PwC documents, that this case is no different from any
6 other in which there is ongoing discovery. And there is some
7 risk that a deposition will have to be reopened; and, third,
8 and I think perhaps the most important point, the chances that
9 that would actually be necessary in this case are very slim, to
10 say the least.

11 Now, it turns out and we learned for the first time
12 last week when Mr. Duffy wrote to us canceling these
13 depositions that, apparently, the protective order that the
14 state court plaintiffs need to work out with the defendants in
15 order to get access to the discovery records in our case -- all
16 of which we have had access to, obviously, and in the case of
17 PwC Canada for quite a long time -- that that protective order,
18 for some reason, which I don't know, has never been agreed upon
19 and, therefore, the New York plaintiffs have not had access to
20 these documents. That is not something that we knew about or
21 obviously had any control over. But based on those
22 circumstances, we really don't see any basis for postponing the
23 deposition.

24 The other reason which was given by Mr. Duffy is a
25 couple of letter briefs that his firm and our firm sent to

C6IUANWC

1 Judge Marrero following the Second Circuit's decision in
2 Stephenson v. PricewaterhouseCoopers, essentially asking for
3 reconsideration for the second time of Judge Marrero's 250-page
4 decision which kept in some of the claims against PwC. We
5 attached those letters to our letter for your Honor's
6 convenience. I don't know when Judge Marrero will decide that.

7 THE COURT: Nor do I, but I should tell you, I did
8 call him earlier today, among other reasons, to tell him that
9 I'm the new magistrate judge on the case. And he indicated to
10 me that his chambers is working on the application so,
11 presumably, it will be sooner rather than later although, like
12 you, I don't have a clue when that will be.

13 MR. BARRETT: Nor, frankly, does either side know how
14 he is going to decide. And I think that we both would be happy
15 to argue it to your Honor but that probably wouldn't serve any
16 purpose.

17 What I do think is important, though, is even if PwC
18 Canada is dismissed entirely from the case -- and we really
19 don't think that is going to happen -- with respect to all the
20 claims, particularly the claims based on subsequent investments
21 by existing investors where the damages for those claims alone
22 are well over a billion dollars, whether or not the claims are
23 dismissed, the other parties in the case -- PwC will remain an
24 essential party of the case -- essential to the decision of the
25 case, whether or not it is a party. I cannot imagine,

C6IUANWC

1 particularly based on some of the documents that we have now
2 seen, that the other defendants, certainly the Fairfield
3 Greenwich, the FGG defendants and the CITGO defendants are not
4 going to be making contribution claims against PwC or, at the
5 very least, saying or arguing that they didn't do anything
6 wrong, that it was PwC's audits which caused all of the
7 problems and caused the damages to the plaintiffs.

8 Unless Mr. Gin is going to say, and I don't think he
9 is, that under no circumstances would they make those kind of
10 arguments, we are going to essentially have to take the same
11 kind of discovery from PwC whether they are in the case or not.
12 So while, in theory, the argument that Mr. Duffy makes that the
13 depositions will be quite different if there are no claims
14 against PwC, I think that's just not realistic. Maybe he can
15 explain why he thinks it would be different, but given the
16 intensity with which this case has been and is being litigated,
17 it seems to me that it is virtually the same deposition whether
18 or not PwC is a party.

19 Finally, your Honor, as you have seen, there have been
20 a substantial number of depositions in this case. Contrary to
21 what Mr. Duffy has indicated, they have been depositions of key
22 fact witnesses, including from CITGO, managing directors of the
23 CITGO entity who were also directors of the Fairfield Century
24 fund itself. From Fairfield Greenwich we have had depositions
25 of at least three members of the executive committee,

C6IUANWC

1 depositions of the head of sales, deposition of, essentially,
2 the head of finance and of a number of people who use the title
3 of partners in the firm. Everybody has been contributing.

4 The other thing that I should say is there have been
5 depositions of about 20 witnesses on the plaintiffs' side in
6 connection with the class certification process. And we are
7 actively discussing additional dates and additional witnesses
8 for CITGO in particular and also for Pricewaterhouse
9 Netherlands.

10 We are taking the depositions in an order that makes
11 sense to us. We think that we have been diligent in doing
12 that. It is the case that, given where we are and given the
13 realities of some of the document production, it will probably
14 be the case that we need to extend that September 4th discovery
15 deadline by a couple of months but, again, I don't see why that
16 is any reason to wait, in effect, indefinitely to start the
17 depositions of PwC Canada.

18 THE COURT: Mr. Duffy.

19 MR. DUFFY: Your Honor, I don't disagree in terms of
20 the basic facts and much of what Mr. Barrett says, but it won't
21 surprise you that I have a little bit different view. As set
22 forth in our letter, our primary reason for seeking to weigh in
23 on the depositions --

24 THE COURT: Hang on just a second. The reporter and I
25 are both having trouble. It is not accurate to say that your

C6IUANWC

1 voice is breaking up, but it sounds like you are too close or
2 using a speakerphone or all of the above.

3 MR. DUFFY: Is this a little better?

4 THE COURT: It is. Go ahead.

5 MR. DUFFY: Let me try this.

6 The primary reason we are seeking to delay these
7 depositions is because of the Stephenson decision. I think
8 even plaintiffs agree it is bound to have a dramatic effect on
9 the claims against PwC and, of course, in our view, it may get
10 rid of those claims entirely.

11 And given that issue which, hopefully, Judge Marrero
12 will address shortly, combined with the fact that for reasons
13 that I won't go into, but simply the fact that the plaintiffs
14 in the state court litigation are not ready to start discovery
15 and those depositions are very likely to be duplicative, as
16 Mr. Barrett said, depositions in this matter. And in fact both
17 Justice Fried who is being replaced, by the way, and Judge
18 Marrero have ordered all the parties to coordinate their
19 discovery to the fullest extent possible.

20 By postponing the depositions, to the extent they are
21 necessary, we kill two birds with one stone. We need to
22 coordinate on the other litigation so there's not duplicative
23 depositions. Layer on top of that the fact that the schedule
24 will be extended. I would be surprised if it is only a couple
25 of months. Mr. Barrett didn't say how many more depositions he

C6IUANWC

1 needs to do, but I think the answer is north of 20 at least.
2 And I am not faulting him for taking long, it is just a
3 complicated case, there are a lot of depositions to take, but
4 if it is not going to happen by September, it is not going to
5 happen by October.

6 Given those circumstances, we feel it makes sense to
7 defer. Now the argument is made --

8 THE COURT: Let me just tell you that your voice is
9 starting to break up again.

10 MR. DUFFY: I apologize, your Honor.

11 He made the argument that, well, the depositions will
12 still be necessary in that event and, frankly, I just don't see
13 how that is true. None of the other parties are objecting to
14 postponing, waiting to get clarity on the claims, if in fact
15 they intend to make claims. And even if there is a sort of
16 finger-pointing, for lack of a better word, I very much doubt
17 it would require the same level of intensity, the same scope of
18 discovery that is currently on the table with the plaintiffs.

19 We are happy to go forward whenever we have to go
20 forward, but what we are trying to avoid is having to go
21 forward twice and with depositions that turn out to be
22 irrelevant because the claims change so much. I think we all
23 prefer Judge Marrero to resolve the issue one way or the other
24 and we proceed. We just think it makes sense to wait until
25 that happens and, frankly, that is not prejudicing anyone given

C6IUANWC

1 the state of the overall schedule.

2 THE COURT: Well, my initial thought was, as
3 Mr. Barrett said, that there is no stay and, therefore, the
4 depositions should go forward immediately, but I am not
5 insensitive to what you said in terms of not wanting to do it
6 twice in relation to the state court plaintiffs. And I
7 understand that the hang-up there is lack of a confidentiality
8 order such that PwC can turn over its documents.

9 In some cases where there has been parallel litigation
10 in state court and federal court, I have contacted the state
11 court judge and have taken on some of the role, I guess, that a
12 referee might take in state court and have tried to smooth
13 things over. I don't know whether that is something that would
14 be helpful here or not. I have had some cases where people
15 have been averse to my contacting the judge in the commercial
16 division, but a confidentiality order would not seem to be a
17 heavy lift in terms of moving things along.

18 MR. DUFFY: No, your Honor, it wouldn't. And,
19 frankly, based on email traffic over the last couple of days,
20 we hope to get it finalized very soon. And I don't think that
21 it is necessary to wait until it is actually entered by the
22 court, as long as I have a handshake agreement with the
23 plaintiffs in that case, I am happy to give them my documents
24 but they have, frankly, been a little slow in getting that
25 done, I think, actually, frankly, to give themselves more time

C6IUANWC

1 to prepare. I am hopeful that that is on track and very close
2 to being resolved. I am ready to send them my documents as
3 soon as I can. Hopefully, your involvement won't be necessary,
4 although we have no objection to it if it turns out to be.

5 THE COURT: As I said, absent a stay, I thought I
6 would simply order that the depositions go forward.

7 I think what I am going to do, Mr. Barrett, is hedge
8 my bets somewhat and say that they should go forward commencing
9 the week of July 16th. That gives some time for documents to
10 be turned over to the Milberg firm, although not a lot of time,
11 I suppose and, perhaps, better enables the two cases to be
12 coordinated in terms of discovery of PwC.

13 But I do agree with Mr. Barrett that this should not
14 necessarily await the outcome of Judge Marrero's ruling with
15 respect to the Stephenson case. Obviously, parenthetically, it
16 increases the likelihood that perhaps Judge Marrero may have
17 ruled, but none of us know when that will occur and it could be
18 some time away. So unless somebody gives me a good reason to
19 reach a different result, that is going to be my decision.

20 MR. DUFFY: Your Honor, I believe you said the week of
21 July 16th. It was a little hard to understand.

22 THE COURT: Yes. That's what I said.

23 MR. BARRETT: That would certainly be fine with us.
24 We have a couple of depositions that are already scheduled
25 after that and I'm sure that we could reschedule the ones that

C6IUANWC

1 were supposed to take place before that.

2 MR. DUFFY: Yes, your Honor, I would be willing --

3 THE COURT: This is Mr. Barrett?

4 MR. BARRETT: That was Dave Barrett, your Honor. I'm
5 sorry.

6 MR. DUFFY: Your Honor, it is Mr. Duffy.

7 Obviously, I would prefer a different result, I think
8 that is not an unreasonable solution so we will move forward on
9 that basis. I will conference with Mr. Barrett and his
10 partners as to whether they want to speak with those people
11 they already have on those days or move everyone back or
12 however they want to approach it. We will get those set on the
13 calendar.

14 THE COURT: If you conclude that some other adjustment
15 is required, whatever counsel work out, obviously, by agreement
16 is fine with me.

17 Just for my own education, are there any other issues
18 in the offing that you see between now and September 4th other
19 than possibly an extension of the fact discovery deadline?

20 MR. BARRETT: Your Honor, this is David Barrett.

21 As Mr. Maguire, who is counsel for PwC Netherlands
22 indicated, we are concerned that there may be a problem -- I
23 certainly am not suggesting that there will be and I hope that
24 we can work it out -- in arranging the depositions for PwC
25 Netherlands, essentially because, unlike the other parties in

C6IUANWC

1 the case who were entitled, apparently, under the law to insist
2 that depositions occur where the witness is located -- I am not
3 sure that that is the case for every witness, it may depend on
4 the status of the witness within the organization, but both PwC
5 Canada and CITGO have agreed -- CITGO, with certain conditions
6 that I think we can work out -- to bring their witnesses to the
7 United States which is obviously a huge savings in time and
8 expense for all the parties.

9 PwC Netherlands has been unwilling to do that and so
10 far is insisting that the depositions take place in Amsterdam.
11 We have asked them to schedule the depositions in such a way
12 that if they are going to insist on that -- and, again, it
13 seems to me it is inefficient and expensive for them to send
14 lawyers to the Netherlands when one witness could travel
15 versus, presumably, a number of lawyers even for their own
16 preparation -- that only maybe two trips or three trips at the
17 most overseas would be necessary. And at least so far, we have
18 not been able to accomplish that. And so, I hope that we will
19 be able to, you know, work that out, but that would be the
20 issue that was alluded to in my letter.

21 MR. MAGUIRE: Your Honor, this is Bill Maguire.

22 Obviously, it would be much easier for me too if we
23 could get everybody to come to New York as Mr. Barrett said.
24 Nothing would be easier and more convenient for me.

25 Our problem is that our witnesses, the people who are

C6IUANWC

1 with PricewaterhouseCoopers Netherlands, in fact most of the
2 people we are talking about are no longer with the firm, they
3 are former employees, they are employed by other organizations
4 or they are not working now, they are retired or housewives or
5 whatever. They live and those who are employed are employed in
6 the Netherlands, that's where they live and work. So we,
7 obviously, can ask these people to come to New York, but if
8 they prefer to be deposed in the Netherlands, that is their
9 right.

10 We have gone back a couple of times now with the
11 witnesses. And I spoke with Mr. Barrett's partner,
12 Mr. Gregory -- to try to get a more convenient -- we have been
13 given dates twice and we have gone back and forth to try to get
14 better dates, to try to save everybody as much travel and
15 inconvenience as possible. We have had some success in that.
16 We have managed to try to consolidate or make back-to-back or
17 approximately back-to-back as many depositions as we can, but
18 plaintiff started out asking for 19 witnesses, working through
19 about the first dozen.

20 And our problem has been, number 1, our witnesses have
21 other commitments; and, number 2, we have been trying to get
22 everything done by this September 4 date. And so that has a
23 great deal limited our ability to find dates that are totally
24 convenient to everybody. So we have been doing our best, to
25 the extent that we have some breathing room beyond September 4,

C6IUANWC

1 I think that might make it a lot easier for us to try to save
2 everybody a lot of unnecessary travel.

3 And I think if Judge Marrero's decision comes down and
4 it turns out there are a lot of witnesses who don't need to be
5 deposed, that would obviously save a tremendous amount of
6 trouble. So we will continue to work with plaintiffs because
7 it is in our interests to keep the expense down and keep the
8 unnecessary travel down and within the parameters of the
9 discovery cutoff and for what plaintiffs reasonably want and
10 need, but we will do our best.

11 THE COURT: Confer with Mr. Barrett and if there is a
12 schedule that goes beyond September 4 but it is in everybody's
13 interest because it reduces to, say, two trips the number of
14 times attorneys need to go to the Netherlands, that is
15 certainly something I would probably look favorably upon. But
16 failing that, I am sure that Mr. Barrett wants to move his case
17 along.

18 MR. BARRETT: Yes, thank you, your Honor.

19 And I appreciate Mr. Maguire's cooperation, but people
20 who are no longer working, in particular, I think that they
21 would find an expense-paid trip to New York to be a nice perk,
22 but maybe they like it better in Amsterdam.

23 THE COURT: And maybe they have been to New York in
24 August.

25 MR. BARRETT: We had better make it September then.

C6IUANWC

1 THE COURT: The only other question I had is, in large
2 cases I often schedule periodic in-court conferences just to
3 see how we are doing. That doesn't seem to have been the
4 pattern here. Does that make sense or what would counsel
5 prefer? By way of example, should I be scheduling something in
6 early August just to see how you are doing?

7 MR. BARRETT: Your Honor, this is David Barrett.

8 I am not sure that it is necessary in this case.
9 There's been, as you said earlier, a lot of water under the
10 bridge, but given where we are now, I am not sure that it is
11 necessary or at least necessary at that point.

12 THE COURT: OK. That's fine.

13 So then I will wait to hear from counsel as to
14 whatever other issues arise, and I will expect that I will
15 likely hear something about the fact discovery schedule. If
16 you do make an application to me to adjust the fact discovery
17 schedule, play it out and also give me an expert discovery
18 schedule deadline at the same time.

19 Anything else from anyone?

20 OK. Thank you all.

21
22 o 0 o
23
24
25