

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PACIFIC WEST HEALTH MEDICAL
CENTER INC. EMPLOYEES RETIREMENT
TRUST, On Behalf of Itself and All Others
Similarly Situated,

Plaintiff,

vs.

FAIRFIELD GREENWICH GROUP, FAIRFIELD
GREENWICH LIMITED, FAIRFIELD
GREENWICH (BERMUDA) LTD., FAIRFIELD
GREENWICH ADVISORS LLC, WALTER M.
NOEL, JR., ANDRES PIEDRAHITA, JEFFREY
TUCKER, BRIAN FRANCOUER, AMIT
VIJAYVERGIYA, YANKO DELLAW SCHIAVA,
PHILIP TOUB, LOURDES BARRENECHE,
CORNELIS BOELE, MATTHEW C. BROWN,
VIANNEY D'HENDECOURT, HAROLD
GREISMAN, JACQUELINE HARAY, DAVID
HORN, RICHARD LANDSBERGER, DAVID
LIPTON, JULIA LUONGO, MARK MCKEEFRY,
MARIA TERESA PULIDO MENDOZO,
CHARLES MURPHY, SANTIAGO REYES, and
ANDREW SMITH,

Defendants.

Case No.: 09 Civ. 00134 (UA)

**MICHAEL THORNE
DECLARATION**

MICHAEL THORNE, under penalty of perjury, declares the following is true and correct:

1. I am an attorney duly admitted in New York and currently serve as Managing Director and Associate General Counsel of Fairfield Greenwich Advisors LLC ("FG"). I submit this declaration in opposition to Plaintiff's Motion for a TRO and Preliminary Injunction in the above-captioned case. I am fully familiar with the facts contained in this declaration based on my personal knowledge and the review of information and documents in the possession of FG.

2. Pacific West Health Medical Center Inc. Employees Retirement Trust, the named plaintiff ("Plaintiff") in the above-captioned matter, is an account held by Pacific West Health Medical Center, an institutional investor located in Los Angeles, California. As of January 1, 2009, Pacific West Health Medical Center Inc. Employees Retirement Trust held 154.8452 shares of Fairfield Sentry Limited ("Fairfield Sentry Fund") that at one time was worth US \$200,000. See Pacific West Health Medical Center Subscription Report dated 1/8/09, annexed hereto as Exhibit 1.

3. Fairfield Greenwich (Bermuda) Ltd. ("FG Investment Manager") is the Investment Manager and Fairfield Greenwich Limited ("FG Placement Agent") is the Placement Agent for Fairfield Sentry Fund. FG is an affiliate of the FG Investment Manager and FG Placement Agent and receives a portion of the management fee paid to FG Investment Manager for certain internal accounting and operational services. The "Fairfield Greenwich Group" ("FGG") is an informal collective name for FG, FG Investment Manager, FG Placement Agent and other associated entities and is not itself an independent entity.

4. Plaintiff seeks to freeze any and all property derived from payment of fees to defendants in this case ("Defendants") from monies invested with Madoff. These fees have been among Defendants' earnings for several years, and I am presently unaware of any practical way to disentangle property derived from them from Defendants' other property. Entry of the order requested by Plaintiff would appear to effectively freeze virtually all of Defendants' assets.

5. Plaintiff's proposed temporary restraining order would freeze millions of dollars of assets of the Fairfield Greenwich management companies and would cause enormous hardship to the management companies and their employees and trade creditors for the reasons stated in FG's memorandum in opposition to Plaintiff's application for a restraining order.

6. On or before January 5, 2009, investors with FGG funds with accounts at Madoff, including the Fairfield Sentry Fund, were advised that no money had been paid out by the funds since December 11, 2008 and that the funds were taking steps to ensure that no money would be paid without their consent. Investors were also notified that the FGG management companies had voluntarily suspended the receipt of management fees and performance fees until further notice. *See* January 5, 2009 Letter to Investors attached hereto as Exhibit 2.

7. The individually named Defendants in the above-captioned matter who are partners of the Fairfield Greenwich management companies collectively have suffered losses from the Madoff fraud far exceeding the amount of Pacific West Health Center's \$200,000 investment.

8. An almost identical application for a temporary restraining order freezing a defendant manager's assets in a Madoff fraud related case was not granted last month by Judge Sullivan in *The Calibre Fund, LLC, et al. v. J. Ezra Merkin*, United States District Court for the SDNY, 08 CV 11002 (RSJ). *See* Transcript of Merkin TRO hearing attached hereto as Exhibit 3.

DATED: January 12, 2009



Michael Thorne

Exhibit 1

CITCO

*Citco Fund Services
(Europe) B.V.*

PACIFIC WEST HEALTH MEDICAL CENTER INT.
DR. LAURENCE WIENER TRUSTEE
C/O PACIFIC WEST HEALTH MEDICAL CENTER
11540 SANTA MONICA BL #203
LOS ANGELES, CA 90035

Fund ID : 03302
Holder ID : 11460602
Account ID : 11460602
Contract No. : 64601602
Date : Jan-13-2009
Order No. : 28383902
FAX Number : 001 310 914 76
Email : LWDC123@YAHOO.COM

Account name: PACIFIC WEST HEALTH MEDICAL CENTER INT EMPLOYEES RETIREMENT TRUST

FAIRFIELD SENTRY LIMITED

In accordance with your instructions we confirm having ISSUED the following voting shares in FAIRFIELD SENTRY LIMITED

| | | |
|--------------------------------------|-----|-------------|
| Valuation/NAV Date | | Dec-31-2007 |
| Trade Date | | Jan-01-2008 |
| Value/Cash Date | | Dec-19-2007 |
| Total Consideration | USD | 200,000.00 |
| Net Proceeds | USD | 200,000.00 |
| Subscription Price | | 1,291.6127 |
| No. of voting shares Issued | | 154.8452 |
| Total Consideration Received to Date | USD | 200,000.00 |

Your balance following this transaction will be 154.8452 voting shares .

For more information or any inquiries, please contact Citco Investor Relations Group
Tel: (31-20) 572 2850 Fax: (31-20) 572 2610 E-mail: amsterdamweb@citco.com

*Citco Building
Telestone - Teleport
Naritaweg 165
1043 BW Amsterdam
The Netherlands*

www.citco.com

*Phone: (31-20) 5722100
Fax: (31-20) 5722610
Chamber of Commerce 33205112*

Exhibit 2

FAIRFIELD SENTRY LIMITED
Romasco Place, Wickhams Cay 1
Road Town, Tortola
British Virgin Islands, VG 1110

January 5, 2009

Dear Shareholder,

We are writing to apprise you of further developments concerning Fairfield Sentry Limited (the "Company") and the matter of Bernard Madoff and Bernard L. Madoff Investment Securities LLC ("BMIS").

As a preliminary matter, we can assure shareholders that no money has been paid out by the Company since December 11, 2008 and the directors are taking steps to ensure that no money is paid out without their consent. In this regard and as previously advised, the manager to the Company, Fairfield Greenwich (Bermuda) Limited (the "Manager"), has suspended the payment of its management fee and performance fee until further notice.

In addition, the directors and the Manager are taking steps to realise to the greatest extent possible any assets of the Company. On December 15, 2008, the Honorable Louis L. Stanton, a Federal Judge in the United States District Court for the Southern District of New York, appointed Irving Picard, Esq. as Securities Investor Protection Corporation ("SIPC") Trustee for the liquidation of BMIS. Mr. Picard, the SIPC Trustee, has engaged Lazard Frères & Co LLC to assist in the sale of the trading operations of BMIS. Also, Lee S. Richards, Esq., has been appointed Receiver for Madoff Securities International Ltd.

The Manager is liaising with the SIPC Trustee on behalf of the Company to ensure the interests of the Company are represented with SIPC and to seek to retrieve any available assets of the Company as promptly as possible. As we previously wrote to you, the Company has retained counsel in the British Virgin Islands (Conyers Dill & Pearman) where the Company is incorporated, as well as counsel in the U.S. (Seward & Kissel LLP). The Company, with the advice of counsel, will analyze the Company's rights and remedies and consider potential claims.

In addition, the U.S. Securities and Exchange Commission ("SEC") is reviewing the vast amount of records and information involving Madoff and BMIS. The SEC has issued a statement that "those records are increasingly exposing the complicated steps that Mr. Madoff took to deceive investors, the public and regulators" and that "progress to date indicates that Mr. Madoff kept several sets of books and false documents, and provided false information involving his advisory activities to investors and regulators."

We know that shareholders are anxious to learn whatever they can about the status of their investments and the assets of the Madoff companies. Please be assured that all of those involved are working diligently to investigate this matter and to locate and preserve assets that can be used for restitution to investors.

We will continue to endeavor to keep you advised of developments with respect to the Company.

Yours faithfully,

The Board of Directors

Exhibit 3

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

THE CALIBRE FUND, LLC., et
al.,

Plaintiffs,

v.

08 CV 11002 (RJS)

J. EZRA MERKIN,

Defendant.

-----x

New York, N.Y.
December 18, 2008
5:40 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

SUSMAN, GODFREY, LLP
654 Madison Avenue, 5th Floor
New York, NY 10065
Attorneys for Plaintiffs

JACOB W. BUCHDAHL
ARUN SUBRAMANIAN

DECHERT, LLP
1095 Avenue of the Americas
New York, NY 10036-6797
Attorneys for Defendant

GARY J. MENNITT
NEIL A. STEINER

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1 (In open court)

2 THE COURT: Calibre Fund, LLC v. J. Ezra Merkin, 08 CV
3 11002. First of all, I'm sorry that this is a later
4 lifting-off than I had told you. We had an interesting one
5 right before this, but nonetheless this is important. So I
6 appreciate your patience. I don't like to have lawyers waiting
7 around. It is one of the things I hated when I was general
8 counsel because I still had to write the checks, and I try to
9 be very careful about not having lawyers just sitting cooling
10 their heels in a courtroom. So I don't ever do cattle calls.
11 I just thought we'd be done by 5:00 with the last one. Hard to
12 get lawyers to be quiet.

13 Anyway, let me get appearances for plaintiffs.

14 MR. BUCHDAHL: Your Honor, Jacob Buchdahl and Arun
15 Subramanian from Susman, Godfrey for the plaintiff The Calibre
16 Fund.

17 THE COURT: Mr. Buchdahl and Mr. Subramanian.

18 MR. SUBRAMANIAN: That's correct, your Honor.

19 THE COURT: Good afternoon.

20 MR. MENNITT: Your Honor, Gary Mennitt of Dechert,
21 LLP. And with me from Dechert is Neil Steiner.

22 THE COURT: Steiner.

23 MR STEINER: Steiner, yes, your Honor.

24 THE COURT: Mr. Steiner and Mr. Mennitt.

25 MR. MENNITT: Mennitt.

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1 THE COURT: No R.

2 MR. MENNITT: Correct.

3 THE COURT: All right. First of all, I'll tell you
4 what I have. I have the application for a TRO and order to
5 show cause for a preliminary injunction, as well as the
6 original complaint and attachments filed by plaintiffs, and I
7 have declarations in support of it as well as a proposed TRO.
8 That's what I have. Did I fail to mention something? A
9 memorandum of law, of course. That's what I've gotten,
10 Mr. Buchdahl?

11 MR. BUCHDAHL: Yes, sir, that's all.

12 THE COURT: Have you seen this, Mr. Mennitt?

13 MR. MENNITT: Yes, your Honor. We were served with
14 this late this morning.

15 THE COURT: Let's talk about what you want to do in
16 the first instance. The parties have had a chance to talk now.
17 So what do the parties want to do at this point?

18 MR. MENNITT: Your Honor, we are prepared to address
19 this. We think that it can be dealt with today. If the Court
20 felt that additional briefing was required, obviously we'd be
21 happy to provide that. We think it can be dealt with.

22 THE COURT: OK, if that's what you think. I am never
23 a fan of unnecessary extra briefing. If you don't think so,
24 then I don't think so. Mr. Buchdahl, do you agree?

25 MR. BUCHDAHL: That's fine with the plaintiff, your

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1 Honor.

2 THE COURT: So, I obviously know what Mr. Buchdahl
3 thinks because I've seen his papers. Maybe I should start with
4 you, Mr. Mennitt.

5 MR. MENNITT: Your Honor, Mr. Merkin is not
6 Mr. Madoff.

7 THE COURT: That much I think we can take judicial
8 notice of.

9 Mr. Buchdahl, do you agree they're different people?

10 MR. BUCHDAHL: We do. That's the essence of the fraud
11 in this case, your Honor.

12 THE COURT: The essence of the fraud is that they're
13 different people?

14 MR. BUCHDAHL: Is that Mr. Merkin claimed to be the
15 sole manager and decision-maker for the Ascot Fund, and
16 instead, not only in derogation of his fiduciary duty, but as a
17 fraud, he handed over entire responsibility for making
18 investment decisions to Mr. Madoff in a way that was not
19 disclosed to the limited partners of the Calibre Fund.

20 THE COURT: Mr. Mennitt, I don't know whether you
21 disagree with that point, but you were making a different
22 point.

23 MR. MENNITT: I actually do disagree with that point,
24 and I will address that shortly. The confidential offering
25 memorandum for Ascot Partners LLP, which I have copies of --

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1 THE COURT: It's not attached, is it? It's not
2 attached to what you gave me, Mr. Buchdahl, is it?

3 MR. BUCHDAHL: It is not.

4 MR. MENNITT: Your Honor, that offering memorandum
5 discloses in a number of places that the Madoff firm is at that
6 point in time one of the prime brokers that Ascot Partners LLP
7 is using. That's disclosed in a number of places.

8 THE COURT: The prime broker.

9 MR. MENNITT: Correct. In addition, on the very first
10 page of the offering memorandum, it's disclosed that the
11 partnership will make investments through third-party managers
12 including managed accounts, and then there are other types of
13 investments listed, but clearly that is one of the types of
14 investments that is listed, so it's not true to say that it was
15 not disclosed that he would be using -- that he would be
16 investing through other -- relying on other managers.

17 THE COURT: Let me just stop you. You are focused now
18 on likelihood of success on the merits. Is that what you're
19 talking about?

20 MR. MENNITT: Your Honor, I wanted to make just a
21 couple of these points up front. Really, the focus and the
22 reason I think this motion can be resolved here without further
23 briefing or affidavits is that as Judge Kaplan has held in 2004
24 in the *OSRecovery, Inc. v. One Group International, Inc.* case
25 305 F.Supp. 2d 340, an attempt to get an order freezing a

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1 defendant's assets in a case where a money judgment is sought
2 is not something that this Court can do.

3 THE COURT: That's what I always thought,
4 Mr. Buchdahl. We'll come to you in a minute. But it seems to
5 me that this is all about money. The irreparable harm is that
6 the firm or individual may be insolvent, but that happens all
7 the time too, doesn't it? It can't be that there gets to be
8 TROs every time somebody looks like they might be going into
9 bankruptcy.

10 MR. MENNITT: Your Honor, here, the only way
11 Mr. Merkin is insolvent is if he loses these lawsuits.

12 THE COURT: Lawsuits against?

13 MR. MENNITT: Against Mr. Merkin -- this is the third
14 lawsuit that we're aware of that names Mr. Merkin as a
15 defendant.

16 THE COURT: He might be insolvent for any variety of
17 reasons.

18 MR. MENNITT: He could be. That's correct, your
19 Honor. But there is no evidence of that. There is nothing in
20 the record that suggests that. What the cases hold, including
21 the Supreme Court case, *Grupo Mexicano*. Then there's New York
22 Court of Appeals case *Credit Agricole*. What those cases say is
23 that in these circumstances you cannot at the outset of a case
24 simply freeze a defendant's assets because you're suing him on
25 a money judgment. It's as simple as that. Those cases, the

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1 *Credit Agricole* and *Grupo Mexicano* case are both cited in the
2 Judge Kaplan decision that I reference.

3 So I wanted to make a couple of these points up front
4 about, you know, if you get into the facts, we dispute that the
5 claims are what Mr. Buchdahl says they are, but really to us
6 the dispositive issue is just at the very threshold level the
7 Supreme Court has held -- and I am reading directly from Judge
8 Kaplan's decision: "The Supreme Court has held that a Federal
9 Court does not have the power in the exercise of it showing
10 equitable jurisdiction to issue a preliminary injunction in an
11 action for money damages to prevent the defendant from
12 transferring assets in which the plaintiff claims no lien or
13 equitable interest."

14 THE COURT: Well, I figured you'd say something like
15 that. So let me hear from you, Mr. Buchdahl.

16 MR. BUCHDAHL: Your Honor --

17 THE COURT: Your memorandum is a little light on law
18 for the proposition that you get to get a TRO on somebody where
19 you're seeking money damages just because that person is
20 connected to a front-page story.

21 MR. BUCHDAHL: We certainly would not try to support
22 the proposition that you just stated, your Honor. We are
23 seeking a limited TRO in this case, three forms of relief.
24 First of all, the rather uncontroversial remedy that the
25 defendant be enjoined from destroying or concealing documents

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1 in this case.

2 THE COURT: Wait a minute. I haven't heard
3 Mr. Mennitt talk about that one. I assume he is going to
4 preserve any documents. Right, Mr. Mennitt?

5 MR. MENNITT: Yes, your Honor. The individual
6 defendant here is represented by Mr. Levander and the
7 litigation department at Dechert and Schulte, Roth & Zabel is
8 representing the funds, and we are all very well aware of what
9 the preservation obligations are here.

10 THE COURT: All right.

11 MR. BUCHDAHL: Having said that, your Honor, I don't
12 know if he's agreeing to the imposition of an order from this
13 Court, but obviously a Court order enjoining him from
14 concealing or destroying documents would have a lot more teeth
15 than simply --

16 THE COURT: Than a criminal statute? He would be
17 subject to criminal penalties if he destroyed documents at this
18 point.

19 MR. BUCHDAHL: The likelihood of a criminal
20 prosecution in a civil lawsuit is rather remote whereas having
21 the Court order imposed at this stage, we believe, would add
22 some teeth to what's otherwise more of a litigation obligation.
23 Your Honor, that's the first form of relief we're seeking.

24 The second would be what's been called a freeze on
25 assets. We'd like to enjoin Mr. Merkin from distributing

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1 assets other than for ordinary living expenses and reasonable
2 legal fees.

3 And the third, and perhaps the most important, is that
4 Mr. Merkin be called upon to provide an accounting of assets
5 that are available. Turning to the two-part standard for a
6 TRO, the law requires that plaintiff show both irreparable harm
7 and likelihood of success on the merits. I'm going to first
8 address the second point only briefly to respond to what
9 counsel for the defendant said. He mentioned that the Madoff
10 firm is the prime broker. That's obviously not the same thing
11 as making investment decisions. He also pointed out in saying
12 that the offering memorandum disclosed that third-party
13 managers would be used, he essentially disclosed by omission --
14 conceded by omission that Mr. Madoff's name was never listed as
15 someone who would be given discretionary management authority
16 over the funds invested by the limited partners in the Ascot
17 Partners Fund.

18 That's the crux of this case on the merit side, your
19 Honor. It's that people could have given money to Mr. Madoff
20 had they wanted to. Instead, they entrusted their money to
21 Mr. Merkin, and Mr. Merkin wrote glowing reports on a quarterly
22 basis explaining the care which he was treating their assets.
23 And, instead, he literally took all of the money and gave it to
24 Mr. Madoff. For that lack of services, your Honor, he charged
25 a 1.5 percent management fee and took a percentage of the

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1 returns. Hundreds of millions of dollars over the years.

2 Our client put in over \$10 million at the beginning of
3 this year, your Honor, entrusting that to Mr. Merkin's care.
4 What he did, as disclosed only in December of this year in a
5 letter that they received to their horror last Thursday, was
6 say that they had given all of it to the perpetrator of the
7 greatest Ponzi scheme in history.

8 Now, obviously, the Court's attention is focused on
9 irreparable harm, and we believe we've met that standard, your
10 Honor. While given the time constraints, we didn't bother to
11 cite dozens of cases to the Court, we believe that we've cited
12 two cases that both establish the proposition that in a case
13 where a defendant is facing insolvency, in Judge Posner's words
14 in the *American Hospital Supply*, that is "a standard ground for
15 concluding that harm cannot be cured afterwards by a damages
16 award."

17 That makes perfect sense, your Honor, because as Judge
18 Posner explained in that decision, he emphasized that what
19 you're trying to do is minimize the cost of being mistaken at
20 this point in making a decision on a TRO. In other words, you
21 weigh the harm to the plaintiff if the relief is denied against
22 the harm to defendant if relief is granted. And what would
23 happen here, there would be irreparable harm to the plaintiff
24 if this defendant is permitted to transfer assets or dissipate
25 the only source of recovery. Because what we now know is that

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1 Ascot Partners is completely devoid of recoverable assets.

2 We have been informed now by counsel for Ascot that
3 there are only \$9 or 10 million remaining out of a \$1.8 billion
4 fund. That is not remotely close to satisfying the claims that
5 will be made against Mr. Merkin. I would emphasize here that
6 Mr. Merkin is not only facing \$1.8 billion in claims based on
7 Ascot Fund alone, but the Court can take judicial notice of the
8 fact that Mr. Merkin is responsible for the Gabriel Fund which
9 suffered huge losses by transferring funds to Mr. Madoff. The
10 Ariel Fund, a very similar situation. He was also responsible
11 for investment decisions at various charitable organizations
12 and schools, including Yeshiva University which has suffered
13 massive losses. In many of these cases, Mr. Merkin is the only
14 conceivable source of recovery for these huge losses that he
15 caused by delivering all this money to Mr. Madoff. What
16 *American Hospital Supply* said, as I quoted before, insolvency
17 is a standard ground for concluding --

18 THE COURT: A standard ground. What are the Second
19 Circuit cases and Southern District cases like this one where
20 somebody who is accused of the kind of fraud that Mr. Merkin is
21 being accused of here where the Court has stepped in and
22 granted a TRO over their assets?

23 MR. BUCHDAHL: Your Honor, we cannot identify a case
24 that involved the exact facts as this.

25 THE COURT: Well, exact facts. Similar facts.

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1 MR. BUCHDAHL: Even where we're asserting a similar
2 kind of Ponzi scheme fraud, I have not seen that. We do cite
3 *Brenntag International* case that Judge Winter decided, and,
4 again, the basis for his finding of irreparable harm was
5 insolvency. In that case, he affirmed the decision by Judge
6 Sweet granting a TRO, and the standard, as he articulated it,
7 was that is there a substantial chance that the parties cannot
8 be returned to their positions ex ante. And he recognized that
9 in the insolvency context, you have a situation where the
10 parties cannot be assured of any form of recovery, and this,
11 your Honor, we submit, is a sufficient basis for meeting the
12 standard and for seeking the limited relief that we're asking
13 here.

14 As counsel has already pointed out, they are already
15 facing many of these obligations just by virtue of the fact
16 that they are named in civil lawsuits. What we are asking is
17 the non-controversial request that this defendant be enjoined
18 from, for example, transferring assets overseas, selling
19 assets. We understand that he has an art collection worth
20 hundreds of millions of dollars. He should be enjoined at this
21 stage of the litigation, your Honor, from transferring assets
22 that are the only likely recoverable source for plaintiffs such
23 as our client, and dissipating those assets, transferring them,
24 doing whatever he might decide to do with them before these
25 cases get resolved. Your Honor, as far as --

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1 THE COURT: You say it's non-controversial, but then
2 you only cited two cases, one of which is a Seventh Circuit
3 case. So it's non-controversial in the sense that, what? That
4 there are two cases that you found?

5 MR. BUCHDAHL: Non-controversial in the sense that no
6 one would suggest that this defendant has the right to begin
7 transferring assets overseas or taking other steps to conceal
8 assets. In our discussions with counsel, counsel's first
9 objection to me about why no order is necessary, he said, well,
10 if we did that sort of thing, that would be a fraudulent
11 conveyance in all events. That may be true, your Honor, but an
12 order at this stage would add some teeth to that, would provide
13 some assurances to our client and to other similarly situated
14 individuals who are seeking to recover from Mr. Merkin that he
15 will not take steps to hide the wealth that he amassed at their
16 expense.

17 THE COURT: Am I literally going to get a TRO request
18 every time somebody wants to basically send a letter to
19 opposing counsel saying preserve documents and don't
20 fraudulently convey remaining assets? I really need to be
21 dropping everything, put it on the top of my pile, and do this
22 sort of TRO work?

23 MR. BUCHDAHL: Your Honor, we believe that would not
24 be the case. First of all, we think the fact that these
25 requests are unusual shows that this is an unusual case. And

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1 the fact that this is a case with the overwhelming possibility
2 of losses here, and, as we said, just in the Ascot Fund alone
3 \$1.8 billion worth of losses, this is a highly unusual
4 situation, and one in which perhaps an unusual remedy is
5 appropriate.

6 THE COURT: But, look, an unusual situation in the
7 sense that it's part of the Madoff scheme, which is, let's be
8 honest, it's tabloid fodder and on a scale it's nothing like
9 anyone has ever seen. I get that. In terms of insolvency, as
10 a motive for someone fraudulently conveying assets or
11 deep-sixing documents? I mean, that's not terribly out of the
12 ordinary, is it?

13 MR. BUCHDAHL: Your Honor, I can't answer the question
14 of how many perpetrators of fraudulent schemes are likely to be
15 insolvent. In my experience, having prosecuted fraud cases,
16 very often they're not insolvent.

17 THE COURT: How many TROs can you cite me where
18 basically what's being sought is what is normally achieved by a
19 letter from counsel to counsel?

20 MR. BUCHDAHL: Your Honor, I cannot cite a case that
21 is on all fours with this or I would have done so. I would
22 submit, it's not altogether different from what the SEC did in
23 this case with respect to Mr. Madoff. While it is true that
24 Mr. Merkin is not Mr. Madoff --

25 THE COURT: Well, the SEC is -- you're not the SEC

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1 either, right?

2 MR. BUCHDAHL: Pardon?

3 THE COURT: You're not the SEC either.

4 MR. BUCHDAHL: Absolutely not. But for the same
5 reasons it's justified there and for the exigencies that they
6 cite, and the fact they recognize that this was necessary to
7 protect people with claims, those same arguments, your Honor --
8 my only suggestion here is that those same arguments support
9 the finding of irreparable harm, just as Judge Winter found in
10 the *Brenntag* case.

11 Now, I don't think that the defendant can dodge the
12 import of these two decisions which plainly cite insolvency as
13 the "common standard ground" for a finding of irreparable harm.
14 So, I think the fact that these applications are perhaps
15 uncommon by plaintiffs does not mean that in the right case
16 they are not appropriate or supported by the law.

17 And given that the absence of recoverable assets and
18 the fact that there is a substantial likelihood that a
19 plaintiff may not be able to get full recovery from a situation
20 with overwhelming liability hanging over Mr. Merkin's head, we
21 believe is a proper basis for the limited relief that we seek.
22 Again, we are not -- this would not enjoin Mr. Merkin from
23 anything that he should be doing or likely would be permitted
24 to do under various laws, your Honor.

25 THE COURT: Let me interrupt you, and just say, while

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1 I am smacking Mr. Buchdahl around, the reality -- the question,
2 I guess, for you, Mr. Mennitt, is: Why aren't you just
3 agreeing to these relatively modest requests, which are, I
4 think, the reason why we don't have a lot of case law on this
5 typically is that parties agree to this at the early stages of
6 litigation, right?

7 MR. MENNITT: I don't think that's correct, your
8 Honor.

9 THE COURT: No?

10 MR. MENNITT: I mean, perhaps in the context of if
11 they had called and said, we won't sue you, and we'll enter
12 into a tolling agreement, we would have --

13 THE COURT: With respect to documents. All it
14 generally requires is a letter to you saying, you are on notice
15 Do not destroy any documents.

16 MR. MENNITT: We would send back a letter saying we
17 are not going to destroy documents.

18 THE COURT: The next request is to not fraudulently
19 convey assets; and, ultimately, they want an accounting of the
20 assets, which they're going to be entitled to, right?

21 MR. MENNITT: Well, if they win the case, they'll be
22 entitled to an accounting of the assets. At the present time,
23 they're not entitled -- this lawsuit is only against Mr. Merkin
24 individually. They're not entitled to an accounting of
25 Mr. Merkin's personal assets.

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1 And, your Honor, Mr. Buchdahl sort of challenged me to
2 try to dodge the *American Hospital* and the *Brenntag* case, I
3 would like to try to dodge those cases. The *American Hospital*
4 case, which is the Seventh Circuit case which Judge Posner
5 decided, enjoined the defendant from wrongful termination of a
6 distribution contract. It didn't have anything to do with the
7 facts in this case. The *Brenntag* case, which is the Second
8 Circuit case, was an injunction against payment under a letter
9 of credit where the goods weren't delivered under the supply
10 contract. So, those cases have nothing to do with this.

11 In fact, the Judge Kaplan case that I cited is an a
12 fortiori case because in that case the defendants were the
13 primary bad guys in a Ponzi scheme. They were the guys who ran
14 a Ponzi scheme. Even under the allegations in the complaint
15 here, there's no allegation even of that.

16 THE COURT: Of what? Allegation that your client ran
17 a Ponzi scheme?

18 MR. MENNITT: Right, that Mr. Merkin was running a
19 fraud. He was a major victim of this fraud, personally.

20 So, you know, it's just simply relief that he's not
21 entitled to -- he has no legal basis to seek.

22 With respect to the related relief that he seeks, I
23 think your Honor's reaction is exactly correct; that those are
24 discovery matters, and, in fact, in Judge Kaplan's decision,
25 the plaintiff there sought similar relief, and Judge Kaplan

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1 footnote 37 said, "plaintiffs seek a grab bag of other
2 purported injunctive relief, such as an accounting" - which is
3 exactly what they're seeking here - "and disclosure of various
4 sorts of information. These matters are better dealt with in
5 discovery."

6 And, your Honor, to come back to the question that you
7 started with, in addition to all of that, the fact that there
8 is no factual basis, there is no legal basis for this relief.
9 In addition, the entry of such an order seems to suggest that
10 there has been some sort of a wrongdoing, and there hasn't
11 been. There's nothing in the record that suggests that.

12 THE COURT: Well, I mean, the complaint alleges a
13 wrongdoing, doesn't it?

14 MR. MENNITT: The complaint alleges a wrongdoing, but
15 they haven't alleged that Mr. Merkin is attempting to secret
16 his assets. They say they suspect that he might be, but there
17 is absolutely no shred of -- they don't submit an affidavit
18 that says that, much less admissible facts to support that.
19 There is no indication that he's doing anything to destroy
20 documents or that his counsel are not behaving in an
21 appropriate manner.

22 THE COURT: You didn't, Mr. Buchdahl, address, I
23 think, the Judge Kaplan case which Mr. Mennitt mentioned. Have
24 you seen it?

25 MR. BUCHDAHL: I have not seen it. Mr. Mennitt did

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1 not provide that to me prior to this proceeding, your Honor.
2 So I'm not prepared to address that at this time.

3 I will say going back to *Brenntag* for a minute, the
4 Second Circuit authority, that they enjoined the defendant from
5 making payment on a letter of credit. That does nothing but
6 retain assets for the defendant the plaintiff asserted he would
7 be entitled to down the road.

8 So, it's really a very similar effect in that it was
9 trying to make sure that this potentially insolvent defendant
10 would not dissipate assets. I think that -- I'll wait for a
11 question before I continue.

12 THE COURT: No, go ahead.

13 MR. BUCHDAHL: As far as wrongdoing, of course, we
14 have alleged wrongdoing. We've alleged fraud. We've alleged
15 breach of fiduciary duty, gross negligence, and breach of
16 contract. We think that we've overwhelmingly demonstrated a
17 likelihood of success on the merits. And in light of the
18 limited relief we're seeking, it's hard to find a sound basis
19 for objecting to most of what we're asking given that the
20 defendant can't claim an ability to do most of the things we're
21 enjoining him from doing.

22 THE COURT: My concern is that if insolvency or
23 suspected insolvency is enough of a basis to get a TRO, who
24 wouldn't be able to get a TRO in virtually every case, right,
25 especially in times like this where there's always the prospect

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1 of some insolvency on the part of a defendant? So, I'm not
2 sure that those cases stand for the blanket and broad
3 proposition that insolvency alone is enough of a basis to
4 demonstrate irreparable harm.

5 I think the point Mr. Mennitt was making before with
6 respect to the allegations of wrongdoing was that there is no
7 specific allegation of him engaging in the types of conduct
8 that would perhaps otherwise merit the injunctive relief you're
9 seeking, i.e, the destruction of documents or the squirreling
10 away of assets overseas or elsewhere. You don't have any
11 specific information about that.

12 MR. BUCHDAHL: Your Honor, all I would point to in
13 that regard is that yesterday when we were discussing these
14 things, we couldn't reach an agreement on these very simple
15 requests, and if the defendant is not willing to say to us, oh,
16 sure, no problem, we won't send assets overseas, we won't
17 destroy documents. He kept relying on other sources of an
18 obligation, saying, well, that would be a fraudulent
19 conveyance. Well, informing me that it would be a fraudulent
20 conveyance is very different from saying this defendant agrees
21 not to transfer assets overseas. So it doesn't provide a lot
22 of comfort.

23 This is a defendant who had no problem defrauding all
24 the limited partners of Ascot by transferring \$1.8 billion to
25 Mr. Madoff. So he hasn't demonstrated an overwhelming

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1 indication that he will comport with legal obligations.

2 So, your Honor, we think that in a situation where --
3 I think your Honor put your finger on it when you said the
4 reason you don't see this a lot of times is because the parties
5 agree to it. Where is the agreement? Why don't we hear
6 counsel for Mr. Merkin saying, sure, we agree that we won't
7 destroy documents and we're willing to have the Court enter an
8 order to that. We agree that we won't transfer assets
9 overseas, and we're willing to have a court order to that
10 because none of that is anything that our client would ever do.
11 And in an accounting this would seem to be an appropriate
12 remedy that we're seeking in the extreme circumstances of this
13 case where there are billions missing, and probably only
14 hundreds of millions available from Mr. Merkin.

15 So, this is a situation where your Honor is
16 appropriately concerned about a rash of similar requests, and
17 the guard against that is to tailor the relief sought to the
18 circumstances of the case. There may be many times when it
19 would be inappropriate to enjoin a corporation from taking
20 certain actions in the normal course that would totally disrupt
21 its business simply because it threatened lawsuit or threatened
22 insolvency.

23 We're not trying to do that here. We're not trying to
24 disrupt Mr. Merkin's life in a way that makes it onerous for
25 him, which is why if you return to Judge Posner's balancing

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1 test, and say, what would the harm be to the plaintiffs and
2 what would the possible harm be to the defendant if I award
3 this relief? And, here, what harm can Mr. Merkin point to?
4 How does it prejudice him in the slightest if he is prohibited
5 from transferring assets overseas, from selling off his art
6 collection, from destroying documents? There is no harm
7 whatsoever because, as counsel forthrightly concedes, in large
8 part he's prohibited from doing all these things anyway.

9 THE COURT: I think the issue is not what harm would
10 it do to him to impose such an obligation or an order. The
11 issue is what irreparable harm would we fall your client if I
12 didn't do that? I guess the response is, I'm not sure any. I
13 mean, there are other safeguards against that kind of activity,
14 which I think that's the reason why we don't see these that
15 often.

16 MR. BUCHDAHL: Respectfully, the irreparable harm here
17 is the inability to fully collect on what's owed. And that is
18 recognized in the decisions that we've cited, the fact that
19 insolvency presents an irreparable harm.

20 THE COURT: Let's start with the first one you asked
21 for, which is an order enjoining him from the destruction of
22 documents. If I don't grant you that, the irreparable harm
23 will be he'll destroy documents?

24 MR. BUCHDAHL: Potentially, your Honor.

25 THE COURT: But there are other safeguards against the

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1 destruction of documents, aren't there?

2 MR. BUCHDAHL: There may be --

3 THE COURT: Do I just need to duplicate everything
4 that's in the Criminal and Civil Codes and the Code of
5 Judicial -- Code of Ethics, and I guess New York now has a new
6 one.

7 MR. BUCHDAHL: Of course Mr. Merkin, your Honor, is
8 not subject to the Code of Ethics.

9 THE COURT: Mr. Mennitt is.

10 MR. BUCHDAHL: Mr. Mennitt -- unfortunately, if it
11 were Mr. Mennitt who were responsible for preserving these
12 documents, I would not be here, your Honor. We have no doubt
13 that Mr. Mennitt will adhere to all of his ethical
14 responsibilities.

15 THE COURT: My point is: Why do I need to issue
16 orders that are basically suspenders when there's already a
17 belt? I don't think that's what TROs are supposed to be for.
18 They're supposed to be for really the extraordinary
19 circumstances where some harm is going to befall a plaintiff if
20 the Court doesn't take action. I don't think you've made the
21 case that some irreparable harm is going to befall your client
22 if I don't enter the order of the relief that you're asking
23 for.

24 MR. BUCHDAHL: The idea in the case law is that harm
25 is not irreparable if you can be made whole afterward with a

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1 money judgment. That's the fundamental idea. The rejoinder to
2 that, your Honor, is that if you cannot be made whole because
3 there are insufficient assets available, then the irreparable
4 harm is irreparable. It's as simple as that. Because where
5 there is not a likely prospect for full recovery, you cannot be
6 made whole. You cannot be returned to where you were before
7 this happened.

8 THE COURT: But there's an entire section of law about
9 assets that have been dissipated after the initiation of a
10 suit, right? Happens all the time. Mr. Merkin may have
11 creditors all over the place for all I know. Some of them may
12 be standing way ahead of your clients.

13 MR. BUCHDAHL: That is precisely the point, your
14 Honor, that Judge Winter made in the *Brenntag* decision, and he
15 addressed the fact that potentially this would be intention
16 with the bankruptcy laws, but he still said that because of the
17 insolvency, the plaintiff had demonstrated an irreparable harm,
18 and he affirmed Judge Sweet's TRO.

19 So, your Honor, I'm not trying to convince the Court
20 that this happens every day or that it should happen every day.
21 I'm just saying in this instance where we have talked to the
22 other side, and we have not been able to get agreements for
23 this; where we have overwhelming evidence of a fraud and
24 overwhelming likelihood that Mr. Merkin will not be able to
25 satisfy all the plaintiffs resulting from the Ascot Fund, let

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1 alone our client, who has lost over \$10 million according to a
2 letter he received last week, that in this case the irreparable
3 harm to my client is that he's not going to get a full
4 recovery, the Calibre Fund will not get a full recovery of its
5 \$10 million from Mr. Merkin. And seeking the relief that
6 Mr. Merkin be enjoined from transactions or dissipation of
7 assets outside his ordinary course of life imposes little to no
8 burden on this defendant.

9 THE COURT: Again, that's part of the analysis, but I
10 think it's sort of tail wagging the dog.

11 MR. BUCHDAHL: Your Honor, if the Court is not
12 persuaded by the argument with respect to insolvency, then we
13 do not have an alternative basis for arguing irreparable harm.
14 The real danger here is that an already subpar recovery by our
15 client will be reduced further by actions that are taken. We
16 simply want things held in the status quo.

17 THE COURT: All right. I mean, Ms. Giovanola, who is
18 my law clerk, who is the brains of this operation, handed me a
19 note indicating that *Brenntag* deals with a case -- is a case
20 and it cites other cases in which there was actual insolvency
21 and not merely the threat of insolvency. Is that a distinction
22 that's worth discussing?

23 MR. BUCHDAHL: I think there is a scale, your Honor.
24 I think where in solvency is a merely speculative event, then
25 you would be on very weak ground. I think that the case law

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1 does not suggest that there must be insolvency. I think the
2 Court can look at the situation here, recognize the destruction
3 that Mr. Merkin has left in his wake with regard to the Ascot
4 Fund, the other funds I mentioned and other places where he was
5 entrusted with assets, and say there is no doubt but that
6 insolvency will follow here. Assuming, again, we have to
7 demonstrate a likelihood of success on the merits, but if he
8 has to make whole \$1.8 billion worth of claims, there has been
9 no suggestion Mr. Merkin can do that. That's insolvency, your
10 Honor, where your liabilities outweigh your assets by that
11 extent.

12 So we are looking at a situation where insolvency is
13 not a remote or speculative event, but is the necessary
14 consequence. I don't even hear counsel to argue that that's
15 not what would result if plaintiff is successful and other
16 plaintiffs in the other lawsuits that he faces. I think that
17 all of counsel for the defendant's arguments are premised on
18 the fact that he'll somehow overcome the allegations of fraud.

19 But, your Honor, we believe that, first of all, there
20 are three separate requests here, and they can be looked at
21 separately.

22 THE COURT: Well, destroying documents, freeze on
23 assets, and an accounting of assets.

24 MR. BUCHDAHL: We believe that we have demonstrated
25 the basis for all of those to the Court. We do not think this

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1 is a situation that is going to present itself that frequently,
2 and one reason is because of what the Court just identified in
3 terms of whether insolvency is just some remote speculative
4 event or whether just looking at the raw numbers, it appears no
5 way for a defendant to possibly avoid it. Again, in a
6 situation that has been described by the Courts as a standard
7 right for finding irreparable harm, in a situation that is --

8 THE COURT: You keep saying that. Then I ask you, do
9 you have any cases, and you've cited me exactly one Second
10 Circuit case.

11 MR. BUCHDAHL: It's that standard.

12 THE COURT: It's that standards.

13 MR. BUCHDAHL: There are certain propositions that
14 perhaps do not bear repeating that often.

15 THE COURT: All right. Let me suggest this: I am not
16 inclined to grant summary judgment -- summary judgment. It's
17 late. I'm not inclined to grant the TRQ in this case. I don't
18 find that there's been irreparable harm. I'm going to reserve
19 simply I can take a closer look at *Brenntag*. Judge Posner I
20 admire, but he doesn't pound on my head, whereas Judge Winter
21 and his friends may. So I will take a closer look at that, and
22 I am going to look at the Kaplan case that you mentioned as
23 well.

24 MR. BUCHDAHL: Your Honor.

25 THE COURT: Yes.

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1 MR. BUCHDAHL: May we have until midday tomorrow to
2 put in a letter to respond to Kaplan?

3 THE COURT: That's fine. I don't want to insist on it
4 because I don't want anybody to feel they need to spend time
5 unnecessarily if they think it's not necessary. I'm not
6 ordering it, but if you'd like to, I'll give you till noon.

7 MR. BUCHDAHL: Since I haven't read it, your Honor,
8 we'd appreciate that opportunity.

9 THE COURT: All right.

10 MR. MENNITT: Your Honor, we'll do the same. We'll
11 keep it short.

12 THE COURT: That's fine. I don't want to play this
13 out. I want to get this resolved, as do you.

14 MR. MENNITT: Yes.

15 THE COURT: Good. This was interesting. Good to see
16 you all. And thank you for your patience. I again apologize
17 for making you wait. Anything else we should cover now?

18 MR. MENNITT: No.

19 MR. BUCHDAHL: Thank you, your Honor.

20 (Adjourned)

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