UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

DECLARATION OF ROBERT C. FINKEL IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

1. I am an attorney licensed to practice law in the State of New York, and am a member of the law firm of Wolf Popper LLP, Interim Co-Lead Counsel for plaintiffs Anwar, *et al.*, in this action.

2. I submit this Declaration, pursuant to 28 U.S.C. § 1746, under penalties of perjury, in opposition to Defendants' motions to dismiss the Second Consolidated Amended Complaint ("SCAC").

3. This Declaration contains (i) documents already identified in the SCAC (Exhibits 1-2); (ii) documents referenced in or pertaining to exhibits submitted by Defendants in support of their motions to dismiss the SCAC (Exhibits 3-4); (iii) information relevant to issues of choice of law (¶¶ 23-24); and (iv) other information that has only recently come to the attention of Plaintiffs' counsel in continuing to investigate the complex factual context of this case that corroborates allegations already in the SCAC (¶¶ 14-22, and 25-37). Any further amendment of the SCAC that may be permitted after disposition of the instant motions would include the additional factual information set forth herein.

A. The Massachusetts Proceeding

4. Annexed as Exhibit 1 is a true copy of the Consent Order dated September 8, 2009 in the proceeding entitled *In the Matter of Fairfield Greenwich Advisors LLC and Fairfield Greenwich (Bermuda) Ltd.*, Docket No. 2009-0028 (Commonwealth of Massachusetts, Securities Division), an administrative proceeding brought by the Commonwealth of Massachusetts against certain of the defendants herein (the "Massachusetts Proceeding").

5. The Administrative Complaint in the Massachusetts Proceedings and the Consent Order are referenced in the SCAC. *See, e,g,,* ¶¶ 250-58.

6. Annexed as Exhibit 2 is a true copy of Exhibit 61 in the Massachusetts Proceeding ("Exhibit 61"). Exhibit 61 is a chart prepared by Daniel Lipton, the Chief Financial Officer of the Fairfield Greenwich Group ("FGG") entitled "Partner Compensation Worksheets 2008." Exhibit 61 identifies Individual Defendants herein as partners of FGG and reflects their percentage partnership interests in FGG's profits. This exhibit is referenced in the SCAC primarily at ¶ 148.

B. Morvillo Submission to the SEC

7. Annexed as Exhibit 3 is a true copy of an undated "Submission" by Morvillo, Abramovitz, Grand, Iason, Anello & Bohrer, P.C. to the Securities and Exchange Commission ("SEC")'s Office of Investigations on behalf of Meagan Cheung. This Submission was made publicly available on the SEC's website only after Plaintiffs filed the SCAC. Exhibit 3 is referenced as Exhibit 281 in the SEC's Office of Inspector General report titled "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme," Report No. OIG-509, dated August 31, 2009 (the "OIG Report"), which

Defendants submitted in support of their motions to dismiss the SCAC as Exhibit 14 to the Declaration of Michael Thorne dated December 22, 2009.

8. The Submission states (at 3) that Ms. Cheung was a branch chief in the SEC's New York Regional Office and participated in the SEC's late 2005-06 "enforcement investigation into allegations of wrongdoing" at Bernard L. Madoff Investment Securities ("BMIS"). *Id.* at 4.

9. The Submission states (at 7) that Ms. Cheung and two other SEC personnel interviewed defendant Amit Vijayvergiya and deposed defendant Jeffrey Tucker of defendant FGG.

10. The SEC's notes of the Vijayvergiya interview and the transcript of the Tucker deposition are not yet publicly available. However, the Submission summarizes the substance of the interview and deposition transcript and states (at 7) that: "the enforcement team was assured by Fairfield Greenwich that it conducted regular audits of Madoff's operations and that it had confirmed that Madoff had maintained custody of the funds entrusted to him." *See also id.* at 11 ("In fact, the sophisticated principals of Fairfield Greenwich trumpeted their extensive due diligence of [BMIS] and their confidence in [BMIS].").

C. The SEC's Typewritten Outline for the Tucker Deposition

11. Annexed as Exhibit 4 is the SEC examiner's typewritten outline prepared in anticipation of Tucker's January 31, 2006 deposition. Exhibit 4 was produced by the SEC in response to a FOIA request seeking documents relevant to the OIG Report submitted by Defendants in support of their motions to dismiss (Thorne Exhibit 14) and was posted to the SEC's website only after Plaintiffs filed the SCAC. As indicated in the

outline (at 12405), the deposition was conducted by Simona Suh, with Ms. Cheung and Peter Lamore present. As noted, the SEC has not made the Tucker transcript publicly available.

12. At 12412, Ms. Suh was prepared to ask Tucker "[h]ow does FGG know that the trades [placed by Madoff] in fact happened? That the assets are in fact in the accounts?" At 12416, Ms. Suh was prepared to ask Tucker "Where are the Sentry funds' assets custodied? What is the nature of this arrangement? How is it documented? What is the role of the custodian? Of sub-custodian?" In context, it is these questions that appear to have elicited the responses summarized in Ms. Cheung's Submission to the SEC's Office of Inspector General (*see* Exhibit 3 hereto, pp. 7 and 11).

13. The SEC outline also contains charts (at 12419-23) reflecting changes in the disclosures concerning Madoff that were made in private placement memoranda ("PPMs") and Confidential Offering Memoranda ("COMs") for the Fairfield Sentry Limited and Greenwich Sentry L.P. funds between July 1, 1998 and January 1, 2005. The PPMs and COMs are referenced throughout the SCAC. *See, e.g.*, ¶¶ 171, 180-81, 194, 237-39, 240, 245, 278, 345, 353, 406-07, 411, 418, and 478-79.

D. Confidential Witness Evidence of FGG's Knowledge of Unexplained "Excess Profit" Option Trades

14. On February 23, 2010, David Barrett of Boies Schiller & Flexner LLP (an Interim Co-Lead Counsel) and I conducted a telephone interview of a confidential witness (the "CW"), who had personally analyzed the trading records provided by BMIS to FGG for the Madoff advised funds and had personal knowledge of communications with FGG concerning his analyses, including numerous highly suspect purported "excess profit" option trades.

15. CW said that during the 1980s, he worked with Fred Kolber and met defendant Jeffrey Tucker (who was then Kolber's lawyer). In approximately 1995, after Kolber joined FGG, CW said he was contacted by Tucker and told that FGG was trading with BMIS, who was using a split-strike conversion strategy. CW had many years of experience as an options trader and was generally familiar with the split-strike conversion strategy. Tucker asked CW to review Madoff's monthly trading reports to FGG and write a "narrative" explaining the trading and quantifying the results. CW was later asked to accompany the narrative with a spreadsheet that broke down profits and losses from stock trading, option trading, dividends, and interest. CW said that Tucker wanted CW to verify that Madoff's trades complied with the split-strike strategy.

16. Each month, FGG sent CW computer printouts of Madoff's purported trading on behalf of all FGG funds. From the outset in 1995 through November 2009, these printouts came in the form of outdated IBM broadsheet mechanically generated documents, not modern laser print reports generally used by brokerage firms during that period. When Tucker retired from day-to-day management in 2003, he directed CW to send the reports to Amit Vijayvergiya.

17. CW said that his job was not to critique Madoff's strategy, but to report on it – essentially to say when Madoff "entered" the market with the split-strike strategy, when he left the market, and what the monthly returns were.

18. CW said that there were a few times each year when Madoff made option trades that "looked anomalous" because they were not consistent with the split strike strategy – they did not involve the paired selling of calls with buying of puts. These trades were always profitable, and CW called them "excess profit" trades. The excess

profit trades were "material" to the overall position of the funds, generating "typically millions" in profit for each trade. CW said that when these trades occurred he would note them in his written reports. CW said that "on average" there would be three or four "excess profit" trades a year. CW would discuss his reports with Vijayvergiya, including the excess profit trades that were inconsistent with the strategy.

19. In April and May 2008, there were a number of excess profit trades that pushed CW from skepticism to disbelief, and he sent Vijayvergiya an email requesting a meeting. CW said that in July 2008, he participated in a conference call with Vijayvergiya and Gordon McKenzie to discuss his concerns. CW provided Vijayvergiya with a list of information that FGG should get from Madoff to verify the suspicious trades. CW was concerned not only with the extreme implausibility of the excess profit trades, but also the solvency of counter-parties and advised Vijayvergiya to assess the strength of the counter-parties.

20. CW has informed us through his lawyer that he will provide us with documents reflecting his communications with FGG, including the excess profit trades, if served with a subpoena. Plaintiffs are unable to do so at this time due to the PSLRA stay.

E. Peter Schmid and Jan Naess

21. On February 11 and 12, 2010, Victor Stewart of Lovell Stewart Halebian & Jacobson LLP (the third Interim Co-Lead Counsel), Mr. Barrett and I interviewed Peter Schmid and Jan Naess, former directors of the Fairfield Sentry Ltd. ("Sentry") and Fairfield Sigma Ltd.("Sigma") funds (together, the "Funds") in London, England. We were advised of the following:

Background and Service as Directors

22. Schmid and Naess became members of the Boards of Directors of Sentry and Sigma in 1994. The only other director of each of the Funds was defendant Walter Noel. The primary contacts that Schmid and Naess had with FGG personnel were with Jeffrey Tucker, Mark McKeefrey and Daniel Lipton.

23. Neither Naess nor Schmid ever attended a Board meeting of the Funds in the British Virgin Islands ("BVI"), or ever went to the BVI on any other Fund business. Board meetings of the Funds were held in person in Bermuda, New York or Europe, or by conference call. The Funds never held any stockholder meetings.

24. The Funds had no operations or employees in the BVI, although they did retain attorneys and certain professional service providers there.

Conflicts of Interest

25. The Boards of Sentry and Sigma repeatedly approved Investment Management Agreements ("IMAs") which retained Fairfield Greenwich (Bermuda) Limited ("FGBL") as the Funds' investment manager and set the fees that the Funds would pay to FGBL for those services. For example, at its May 18, 2004 meeting, the Sentry Board, approved a proposed amendment to Sentry's fee agreements with FGBL. Those modifications were reflected in the IMA dated as of October 1, 2004, which provided that Sentry pay FGBL a monthly management fee of 0.0833% of the Net Asset Value of the Fund (1.0% on an annual basis), and a 20% performance fee payable quarterly based on the net profits of the Fund. The October 1, 2004 IMA was executed on behalf of Sentry by Walter Noel.

26. Based on information provided by Schmid, a majority of the Funds' Boards of Directors had conflicts of interest that may invalidate any approval of the IMAs in 2004 and at other times because the same conflicts existed.

27. One Board member, Walter Noel was a founding partner and the second largest shareholder of FGG, which in turn controlled defendant FGBL when the Board approved the IMAs obligating the Funds to pay fees to FGBL.

28. Schmid also had conflicts. Schmid stated at the interview that he acted as an investment advisor on behalf of clients to whom he sold shares in the Funds. Indeed, as of December 2009, Schmid's clients had Fund investments valued at approximately $20 million. As compensation for selling Fund shares to his clients, FGBL remitted back to Schmid 30% of the performance fees that were paid by by the Funds to FGBL pursuant to the IMAs that were approved by the Board. Schmid thus had a personal financial interest in the IMA terms that he approved as a Fund director.

29. Schmid also informed us that he sold other FGG investment products to his investment advisory clients and was paid portions of the management and performance fees of those funds by FGG. In addition, Schmid had a financial interest with defendant Piedrahita arising out of Schmid's joint sponsoring with Piedrahita of an investment fund (Brazil Direct) formed to make private equity investments in Brazilian companies.

30. Naess informed us in a separate interview that he was aware as a director of the Funds that Schmid had separate business dealings with FGG, but was not aware that Schmid had a financial interest in FGG's 20% performance fees or that Schmid had separate investment interests with Piedrahita.

31. Further, Schmid informed us that he had meetings from time to time with defendant Piedrahita and other of the partners at FGG about becoming a partner in FGG. As a partner, Schmid would have had a financial interest in the performance and management fees that he was approving as a Fund director.

PwC Audits of the Funds

32. FGG provided Naess and Schmid with copies of the audit reports for the Funds that were prepared by PricewaterhouseCoopers ("PwC"). No one from PwC ever met personally or communicated directly with Naess or Schmid during their service as Fund directors. Naess and Schmid understood that PwC was verifying trade data with Madoff as part of its audits.

33. According to the Minutes of a meeting of the Sentry and Sigma Boards of Directors conducted on May 18, 2004, it was noted at the meeting that "PricewaterhouseCoopers ('PwC') as auditors of the Fund should be ready to sign off in the 1st week of June 2004." The Board resolved that "PwC be reappointed as auditors for the financial statements of the Fund for the year ending 31st December 2004, but may wish to request that the PwC office responsible for the audit be removed to New York from Rotterdam." Ultimately the audit was transferred from that Rotterdam office to PwC's Toronto office.

34. Naess and Schmid informed us that they were not concerned that the audit was being conducted out of the Toronto office rather than the New York office because it was their understanding from the PwC opinion letters and other correspondence and information available to them as Board members that PwC operated as a single integrated worldwide firm with global resources.

Citco's Role In Mailing PwC Audit Reports to Fund Shareholders and Confirming that Subscription Agreements Were in Good Order

35. Naess and Schmid said that that Citco mailed hard copies of the Funds' annual financial statements audited by PwC to all Fund investors. They said that the reason why audited financial statements were prepared was to inform shareholders of the financial status of the Funds and induce them to invest.

36. Naess and Schmid understood in their capacity as directors that Citco received and verified the subscription agreements and related documentation from investors in the Funds, and was charged with ascertaining that these materials were complete and in good order, including representations that the investor had read the offering memoranda.

Citco's Monthly Reconciliation of Redemptions and Subscriptions

37. Naess and Schmid informed us that at the end of each month, Citco would calculate the net asset value per share of each fund and reconcile the amount of new money being invested in the fund by subscribers, against the amount of money being paid to investors from redemptions. If there was more money being invested in the Funds than being distributed for redemptions, Citco would remit the excess amount to Madoff and the Funds' other investment managers. If there was less money being invested in the Funds than being distributed for redemptions, Citco would redeem the necessary funds from Madoff.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 22, 2010

s/Robert C. Finkel
Robert C. Finkel