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COURT OF APPEALS

STATE OF NEW YORK

JIANNARAS,

Respondent,

-against-

No. 64

ALFANT,

Appellant.

20 Eagle Street
Albany, New York 12207
March 30, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

FREDERICK LIU, ESQ.
HOGAN LOVELLS US LLP
Attorneys for Appellant
555 Thirteenth Street, NW
Washington, DC 20004

MARTIN E. KARLINSKY, ESQ.
KARLINSKY LLC
Attorneys for Respondent
1500 Broadway
8th Floor
New York, NY 10036

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 64, Jiannaras v. Alfant.

3 Counsel.

4 MR. LIU: Thank you, Your Honor. May it
5 please the court, Fred Liu for appellants, On2
6 Technologies and its former directors.

7 With the court's permission, I would like to
8 reserve three minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You have your three
10 minutes.

11 MR. LIU: Thank you.

12 Courts across the country have held that the due
13 process clause does not require opt-out rights when a
14 class action involves equitable relief and damages that
15 are merely incidental.

16 JUDGE GARCIA: Counsel, so as I understand
17 your argument, the court is Colt. Right. The Colt
18 case. Two arguments you make; one, this doesn't fall
19 within Colt, there is some distinguishing facts; two,
20 if it - - - to the extent it does, asking to revisit
21 Colt.

22 Staying on the first point, what are the
23 distinguishing facts in this case from Colt?

24 MR. LIU: Well, I - - - as you - - - as
25 Your Honor is aware, there are two holdings in Colt.

1 And I think our case is different from the second
2 holding, but on all fours with the first holding.

3 JUDGE GARCIA: Okay.

4 MR. LIU: Let me begin with the first
5 holding. You look on pages 188 to 89 of the Colt
6 decision, the court there lays out the claims
7 involved in that complaint. Those are the exact same
8 claims released by the settlement. The complaint in
9 Colt, on page 189, included damages relief. That's
10 also relief sought in this case. And the court in
11 Colt certified the class there for purposes of
12 settlement. That is the same here.

13 So the - - - all those three factors are
14 the same, in the first holding in Colt, as they are
15 here. Completely - - -

16 CHIEF JUDGE DIFIORE: Does the complaint
17 here include a prayer for damages?

18 MR. LIU: The complaint itself does not,
19 Your Honor, but what matters for the due process
20 analysis is what is released by the settlement.

21 JUDGE GARCIA: Right.

22 MR. LIU: Because it's the settlement that
23 is going to control what claims are extinguished.
24 But if you compare the scope - - -

25 JUDGE RIVERA: The settlement then

1 extinguishes any and all claims for damages; does it
2 not? It's quite broad.

3 MR. LIU: Well, that - - -

4 JUDGE GARCIA: Isn't that the same as Colt?

5 MR. LIU: That's not - - - that's not
6 exactly true. And this is a key distinction between
7 our release here and the second holding of Colt.

8 The release here is much narrower than the
9 release in Colt. If you look at appendix page 803, the
10 trial court authoritatively construed this settlement
11 release to apply only to damages claims relating to their
12 merger. And that's key, because if you look at the
13 settlement release in Colt, it swept much more broadly to
14 encompass not just merger-related claims, but also claims
15 arising out of a recapitalization that occurred two years
16 before the merger at issue in Colt.

17 So because the settlement here is limited to
18 merger-related claims, we know that the only damages
19 claims that are possible are incidental.

20 JUDGE GARCIA: Would damages for the
21 recapitalization in Colt have been individualized?

22 MR. LIU: The answer is yes. That is what
23 Merritt argued in - - - in this court in Colt. The
24 reason why is because his - - - his claims arising
25 out of the recapitalization were securities fraud

1 claims. And oftentimes, those claims turn on
2 individualized issues like reliance or causation.
3 Note the release in this case, on page A169,
4 expressly reserves the right of the objectors to
5 proceed and pursue federal securities fraud claims.

6 CHIEF JUDGE DIFIORE: Did one of the
7 objectors raise the securities-related claim?

8 MR. LIU: Did one of the - - - no, no. I
9 mean, they - - - they have said that they would like
10 to pursue them, but the - - - but the complaint, if
11 it's a federal securities law claim, page A169 allows
12 them to proceed.

13 What the settlement covers are claims that
14 are related to the merger. And so if there is a
15 claim out there that's unrelated to the merger, the
16 settlement doesn't prevent them - - -

17 JUDGE RIVERA: So let me ask this. In the
18 class action context, you know, when the class is
19 seeking equitable relief, and as you say the damages
20 are incidental, that paradigm is that the equitable
21 relief overshadows the damages. Really the point of
22 that class action is that equitable relief. So how
23 is that the case, given the settlement covers broadly
24 these damages? How is one to know that from this
25 settlement?

1 MR. LIU: Well - - -

2 JUDGE RIVERA: That that equitable relief
3 continues to overshadow the damages request.

4 MR. LIU: Two points in response, Your
5 Honor. The first is, overshadowing is not our test;
6 that's actually a test of predominance rejected by
7 the United States Supreme Court in Wal-Mart. Our
8 test for predominance isn't one about subjective - -
9 - subjective motivations or relative importance. It
10 is a purely objective test that hinges on the nature
11 of the damages at issue.

12 JUDGE RIVERA: Did Wal-Mart not reserve the
13 question that you are actually asking us to decide
14 here?

15 MR. LIU: Wal-Mart did reserve the
16 question, but I think it's important to point out
17 that Wal-Mart recognized this very distinction
18 between incidental and individualized damages.

19 JUDGE RIVERA: But doesn't that tell us
20 something that they reserve the question, they did
21 not want to answer it in that context?

22 MR. LIU: Well, it didn't - - - the court
23 in Wal-Mart didn't need to reach the question. So
24 there - - - I think it would have had to have gone
25 out of its way to do so.

1 JUDGE RIVERA: We are not bound by anything
2 that - - -

3 MR. LIU: We're not - - -

4 JUDGE RIVERA: On the federal class
5 action, in any event?

6 MR. LIU: No, you're not, Your Honor. But
7 I think it is also important to point out that every
8 federal court of appeals that has addressed this very
9 question has reached the conclusion that a class
10 action can proceed on a non-opt-out basis, so long as
11 the damages involved are incidental. And that is the
12 case even post Wal-Mart. Post Wal - - -

13 JUDGE RIVERA: Does a CPLR class action
14 statute perhaps suggest that there is a difference in
15 the way New York approaches these questions from the
16 federal approach under Federal Rule 23?

17 MR. LIU: Absolutely not. In fact, New
18 York CPLR 904 says that notice need not be given in
19 class actions brought "primarily for injunctive or
20 declaratory relief". That's exactly the case here.
21 So New York law - - -

22 JUDGE STEIN: Would it help here whether
23 the trial court actually exercised its discretion or
24 whether it thought it was required to allow the opt-
25 out under Colt?

1 MR. LIU: I think it's quite clear from the
2 record on page A792 that the trial court thought it
3 was bound by this court's decision in Colt. In fact,
4 to the extent the trial court had any discretion, it
5 exercised that in a way to deny opt-out rights.

6 This is what it said. "Where it otherwise has
7 discretion, it finds that no further exclusion of class
8 members is warranted because a class action will
9 accomplish economies of time, effort, and expense, and
10 will promote uniformity of result as to persons similarly
11 situated."

12 JUDGE STEIN: So if we conclude that the
13 court does have discretion, what is it that we should
14 do?

15 MR. LIU: I think that the proper course is
16 for this court to reverse the Appellate Division and
17 remand for certification of a non-opt-out class. We
18 already know how the trial court would have exercised
19 its discretion, and in any event, this isn't - - -

20 JUDGE STEIN: Well, if that's the case,
21 then don't we have to look and see if that would have
22 - - - that was an abuse of discretion?

23 MR. LIU: You - - - you can, Your Honor,
24 but there is no - - - there is no basis for
25 concluding that it was. My friend has never argued -

1 - -

2 JUDGE STEIN: But if it - - - my point is,
3 you are - - - I think what I'm hearing you say is
4 that we should send it back and tell them that they
5 have to certify it as an opt-out.

6 MR. LIU: Correct.

7 JUDGE STEIN: Why would we do that rather
8 than say, okay, either let's review it for an abuse
9 of discretion or send it back to exercise their
10 discretion?

11 MR. LIU: Well, two points, Your Honor.
12 The first is as I said on A792. This court already
13 knows how the trial court would exercise its
14 discretion; it's already told you.

15 The second point is that I think it would have
16 been an abuse of discretion to deny opt-out rights here -
17 - - I'm sorry, abuse of discretion to grant opt-out rights
18 here. And that's because the general rule is that opt-out
19 rights are unnecessary in these sorts of cases. And
20 that's the rule because opt-out rights impose significant
21 costs.

22 JUDGE GARCIA: But counsel, to go back to
23 your other point on that, so is your position that
24 there can never be individualized damages related to
25 a merger?

1 MR. LIU: That is correct, Your Honor.

2 JUDGE GARCIA: Never. No type of fraud
3 case, nothing could be brought that would require
4 individualized damage?

5 MR. LIU: Well, I think the fraud case
6 would be related to something that might have
7 happened during the merger, but is actually not
8 related to the merger as this settlement release is
9 construed.

10 JUDGE GARCIA: So your view would be your
11 settlement would allow those cases to go forward.

12 MR. LIU: If it were truly unrelated to the
13 merger, then yes.

14 JUDGE GARCIA: But then that's - - - so
15 then, no individualized-damage claim could ever be
16 related to a merger. So in all merger cases, like
17 that shareholder actions, you would not have an opt-
18 out right.

19 MR. LIU: That's correct. And that is
20 exactly what the Delaware Courts have said in
21 identical cases.

22 Now, of course, going back to my colloquy
23 with the Judge Stein, there is still a possibility of
24 discretionary opt-out right. But the - - - my friend
25 has never argued for a discretionary opt-out right.

1 They've gone all in on due process, and this case
2 doesn't have any special circumstances that would
3 justify a discretionary opt-out right.

4 I think it's important to remember that the opt-
5 out has to be viewed against the background of all the
6 procedural protections provided under New York Law.
7 Principal among those is the condition that the class
8 representative fairly and adequate - - - adequately
9 represent the interest of the class.

10 In that sort of situation, there is no
11 justification for giving hundreds of objectors the
12 opportunity to break away from that class and litigate
13 their claims individually. The incidental claims here are
14 unusual, and that there are no uncommon issues.

15 There are really only two issues. One that the
16 fiduciary - - - where the fiduciary duty is breached, and
17 two, what's the damages per share. And those two
18 questions are exactly the same for all the class members.
19 The class members are completely identically situated. To
20 grant opt-out rights in this case would actually impose
21 significant costs, not only on the defendants who would
22 then be in a position of having to defend against
23 potentially varying obligations across hundreds of
24 different cases, but also to the public. The public has
25 an interest in the efficient resolution of claims, that's

1 more question about damages. What - - - was there
2 any monetary damages claimed pending in any other
3 jurisdiction related to this?

4 MR. LIU: Yes. There was a complaint filed
5 in the Delaware Courts that did include a request for
6 damages. The settlement in this case would - - - was
7 negotiated among all the parties, in both actions,
8 and so those claims would be extinguished by the
9 settlement here. Those are exactly the type of
10 incidental damages the settlement has in mind on page
11 A6 - - - 169. But again, I think you look at the - -
12 - the scope of the release, and whether that covers
13 damages that are incidental.

14 Thank you.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 Mr. Karlinsky.

17 MR. KARLINSKY: Good afternoon, Your
18 Honors, and may it please the court. My name is
19 Martin Karlinsky and I have the privilege to
20 represent respondents in this court.

21 To go right to the first question the bench
22 asked today, Judge Garcia's question, this case is
23 controlled by Colt and Colt has been the law of this state
24 for twenty-five years.

25 JUDGE GARCIA: But what about this

1 distinction in the settlement terms?

2 MR. KARLINSKY: Your Honor, I'm not certain
3 what distinction you are referring to, but - - -

4 JUDGE GARCIA: You're releasing other - - -
5 your appellant just said that you're releasing much
6 narrower claims or narrower claims that are
7 incidental as opposed to the Colt settlement which
8 released - - - released broader claims. Your
9 settlement only releases his claims related to the
10 merger itself, which can only be incidental.

11 MR. KARLINSKY: I do not see any
12 distinction that matters for due-process analysis
13 between the claims asserted in Colt and the claims
14 asserted in this case.

15 JUDGE PIGOTT: What - - - what process do
16 you think that you are due that you're not going to
17 get? Isn't it true that all of your members are
18 shareholders?

19 MR. KARLINSKY: They are all shareholders,
20 Your Honor.

21 JUDGE PIGOTT: So isn't it essentially - -
22 - I'm picturing it as essentially one claim saying
23 that, you know, they are undervalued or whatever, but
24 his - - - so that - - - I lose you there because it
25 seems to me that that could be handled in the process

1 of the class action, and there is no due-process
2 problem.

3 MR. KARLINSKY: Well, it wouldn't be, Your
4 Honor, because the claim that would be asserted and
5 the claim that the 226 nonparty respondent objectors
6 wish to assert was a claim for fraud. And it wasn't
7 a claim for securities fraud, which is expressly
8 carved out of the release, it was a claim for common
9 law fraud, which can proceed with a merger claim.

10 And as we know, we have broad joinder rules
11 in the state, as most states do, and it would result
12 in a complete anomaly to say that in the case where
13 the damages claim for common law fraud is brought
14 standing alone as a class action, no opt-out right is
15 required as a matter of due process.

16 JUDGE STEIN: Are you suggesting that the
17 damages for a fraud claim would be individualized and
18 would be different from the damages from the
19 fiduciary duty claims?

20 MR. KARLINSKY: I'm suggesting they could
21 be, Judge Stein. I am not - - - I'm not certain,
22 because it never got to that stage here. There was
23 obviously no pleading submitted by the nonparty
24 respondents, and I think that was the point of the
25 lower court, Queens County Supreme and of the Second

1 Department, the concern that there be allowance for
2 the non-party respondents to develop any claim that
3 they have.

4 I am not certain what that claim is, as I
5 stand before this court. But they - - -

6 JUDGE FAHEY: Can we - - -

7 MR. KARLINSKY: - - - they wished to
8 assert a claim and in the words of the Shutts case,
9 Phillips Petroleum v. Shutts, which, mind you, is
10 also controlling, because it was the case of the
11 Supreme Court that dictated the holding in Colt.
12 Under that case, it's the same theory. The nonparty
13 respondents wanted to go at it alone. To use the
14 words of that court, they didn't want to relinquish
15 their claim to the class representatives or to the
16 class representatives' counsel.

17 JUDGE GARCIA: Counsel - - -

18 JUDGE ABDUS-SALAAM: Do you - - -

19 JUDGE GARCIA: I'm sorry.

20 JUDGE FAHEY: What - - -

21 JUDGE ABDUS-SALAAM: Counsel - - -

22 JUDGE FAHEY: Go ahead, Judge.

23 JUDGE ABDUS-SALAAM: You wanted to - - -

24 JUDGE FAHEY: Just as - - - at the end of
25 the dissent, he talks about the in-state, out-of-

1 state class members and the practice of affording
2 out-of-state class members the ability to opt out and
3 in-state class members are not being afforded the
4 opportunity to opt out. What is your position on
5 that?

6 MR. KARLINSKY: Well, my brother has not
7 urged that position. That would be a violation, if
8 it could be proven.

9 JUDGE FAHEY: Uh-huh.

10 MR. KARLINSKY: It hints at a violation of
11 the equal protection clause, not due process, not
12 anything to do with the issues in this case. It
13 wasn't litigated in the lower courts, and it wasn't
14 raised on appeal here, and I hate to duck a question,
15 if I am - - -

16 JUDGE FAHEY: No, no, it's - - - that's
17 fair to do that. Because I try to find the
18 articulable basis for that in-state/out-of-state
19 distinction, and I suppose looking back at Phillips,
20 you could argue that it's jurisdictional. But not
21 under equal protection, I couldn't see a basis for
22 it.

23 MR. KARLINSKY: Well, I haven't really
24 explored it myself, but I think that you are correct
25 that it also goes to the jurisdictional point, which

1 underlays Shutts, and then in turn, Colt. Certainly,
2 that's the manner in which the Supreme Court regarded
3 it.

4 JUDGE ABDUS-SALAAM: Counsel, to your point
5 that this is not different than Colt, in Colt, there
6 were damages claims that were incidental to the
7 equitable relief that were based on the merger, and
8 we still said that there had to be an opt-out
9 provision. Right.

10 But leaving Colt aside, doesn't your
11 adversary make some logical arguments about these
12 damages being incidental to equitable relief, and
13 that you don't need opt-out provisions to protect
14 everyone in a situation like this, where the damages
15 are going to be pretty much the same; as Judge Pigott
16 mentioned, they are all shareholders, they are
17 basically going to - - - even the - - - even the
18 fraud claims that you mentioned that might be
19 different, they're basically going to be based on the
20 merger itself.

21 MR. KARLINSKY: Judge Abdus-Salaam, the
22 point really is that if the class action here were to
23 have been certified, given the fact that there was no
24 opt-out right afforded, if that were the case, that
25 the objectors who wish to preserve a damage claim

1 would not be able to.

2 So what you've got is you've got a forced
3 relinquishment of a right that that the objectors
4 have, a right that under both Shutts and Colt, the
5 Supreme Court and this court respectively have said
6 is a due-process property right that should be
7 respected.

8 JUDGE PIGOTT: How do you - - - how do you
9 understand that coming forward then? You've got On2
10 that wants to merge with Google, and I assume there
11 is some timing, you know, requirements here because
12 technology moves as fast as it does - - -

13 MR. KARLINSKY: They have merged with
14 Google, Your Honor.

15 JUDGE PIGOTT: And your complaint though is
16 what, that - - - when you say fraud, are you saying
17 that there was collusion, that there was, you know -
18 - - do you have any proof? I mean, is there some
19 point at which a court can say, all of this makes
20 absolute sense to me and I don't see a problem. Tell
21 me, you opt-outees, what your issue is.

22 MR. KARLINSKY: Well, the court could have
23 done that, I suppose, but that would have been - - -
24 normally speaking, that would have been after
25 discovery, and at a much later point in the case.

1 And Queens County Supreme would have certainly had to
2 defer any ruling on whether to approve the class-
3 action settlement.

4 Now, I suppose that could be done, but, you
5 know, not without a real departure from the normal
6 course of these cases. In point of fact, what the
7 objectors believed - - - and I believe this is in the
8 record in the submission made in Queens County - - -
9 it should be in there - - - in that submission. What
10 the objectors believed is that there was a sellout on
11 the part of management of On2 Technologies.

12 And part of the motivation for it was to
13 cover up, if you will, a fraud that had been
14 perpetrated for many years in connection with the
15 trading in On2 Technologies' stock. Now, of course
16 that's un - - -

17 JUDGE GARCIA: Counsel, I'm sorry to
18 interrupt you on that, but if we go back to basic
19 point, individualized versus incidental. And as
20 anything that isn't going to be calculated on an
21 individual basis, particular harm, is it your v - - -
22 do you agreed that that would be incidental?

23 So if we have 200 million shares, everybody's
24 going to get the same amount, it could be a dollar, it
25 could be a hundred dollars a share, whatever it is, that

1 would be incidental.

2 MR. KARLINSKY: Well, Judge Garcia, I don't
3 accept the premise. I don't accept the premise that
4 where incidental damages are concerned, we lose our
5 respect for due process. That's not what Colt said
6 at all.

7 JUDGE GARCIA: Would those be incidental
8 damages? What I'm looking for is a definition of
9 incidental damages. So - - -

10 MR. KARLINSKY: And I was too, Your Honor,
11 I was too. And I struggled a long time trying to
12 come up with what I thought was some sound definition
13 of it, knowing that it was my brother's strong point,
14 or at least first point. And I haven't found one. I
15 don't know what incidental damages are.

16 JUDGE PIGOTT: I looked at it in terms of
17 what your opponent is saying. In other words, you're
18 fighting over value here. Forget the fraud for a
19 minute. I don't mean to downplay it, but it's
20 incidental because the questions of value of the
21 merger and things like that.

22 It would not be incidental if there was a
23 settlement of, let's say, the airbag cases that are
24 going on now, and somebody came up with a global
25 settlement of X number of dollars, and there are

1 people that are saying, wait a minute, that can't
2 possibly be me, because my damages are substantially
3 different and substantially more than a person who
4 just had their car and never had their airbag
5 deployed, and yet is going to get the same money as
6 me. I picture that kind of a difference; am I in the
7 ballpark or - - -

8 MR. KARLINSKY: I'm not certain that is a
9 difference or rather maybe it is a difference without
10 a distinction. Again, we're still focusing on the
11 question of forcing absent class members to
12 relinquish a claim. And again, and I hate to sound
13 like a one-note Johnny here, but again that
14 implicates due process and - - -

15 JUDGE PIGOTT: Well, quite often - - -

16 MR. KARLINSKY: - - - that's precisely what
17 animated this court in Colt.

18 JUDGE PIGOTT: Quite often you will have a
19 - - - you'll have a lawsuit involved a restraint of
20 trade, let's say, involving delivery services or
21 something. So then there is a proposed settlement of
22 X number of dollars, and I'm going to get Y number of
23 dollars, but I say, well, hell, if I - - - if I
24 simply object to this and say I've got a fraud claim,
25 I can hold this up and I'll bet I'll get Y plus ten

1 dollars.

2 Is that sufficient, in your view, to hold
3 up something like that, or is that, as Mr. Liu is
4 arguing, I assume that it's incidental. I mean, now
5 we're just fighting over the dollars.

6 MR. KARLINSKY: Again, I know of no
7 category of damages which is generally accepted
8 anywhere in any jurisdiction that is called
9 incidental damages.

10 JUDGE STEIN: Well, even if you can't agree
11 on what - - - how to define that - - - that concept,
12 why - - - I mean, why would we and other courts use
13 the term - - - again, even if it's imprecise - - -
14 you know, predominantly equitable relief or whatever;
15 why wouldn't we just say if it's only equitable
16 relief, and thereby signal that anything to do with
17 money damages requires this opt-out provision. And I
18 just - - - I don't see that in any of the case law
19 that's available to us.

20 MR. KARLINSKY: Well, not as articulated,
21 Your Honor. Certainly Judge Wachtler didn't - - -
22 then Chief Judge Wachtler didn't articulate it in
23 that fashion at all. But I think it needs to be read
24 in that fashion. My adversary pins his hopes on the
25 notion that if it's predominantly equitable in

1 nature, that means there must be some legal claim
2 left over.

3 JUDGE STEIN: So your argument is that
4 there is a due process problem if money enters into
5 it in any way, whether everybody is equally situated,
6 or no matter what the circumstances are, if anybody
7 has a potential claim for monetary relief, they must
8 have the option to opt out, that's it.

9 MR. KARLINSKY: That is my position, Your
10 Honor; that is my position.

11 If the court has no further questions, I
12 would yield the balance of my time.

13 CHIEF JUDGE DIFIORE: Thank you, sir.

14 Mr. Liu.

15 MR. LIU: Thank you, Your Honor.

16 I'd like to begin by answering Judge
17 Garcia's question about the definition of incidental
18 damages. We take the definition from Wal-Mart v.
19 Dukes, on page 2960.

20 It's the definition that says, incidental
21 means damages that "flow directly from liability of
22 the class as a whole on the claims forming the basis
23 of the injunctive or declaratory relief."

24 JUDGE GARCIA: Right - - -

25 JUDGE STEIN: So what if there is a damages

1 claim for fraud, the exact claim that is asserted - -
2 - potentially asserted here. How do we know - - -
3 how does the court know whether there's a potential
4 there for individualized damages? Or are you saying
5 it doesn't matter because it's related to the - - -
6 to the - - -

7 MR. LIU: Judge Stein, you have to look at
8 the nature of the claim itself. And I think it's
9 important to pin down what my friend calls a fraud
10 claim. If he's - - - if he's thinking about the
11 claim that the directors failed to disclose
12 information prior to the consummation of the merger,
13 that is not an individualized claim. We know that
14 because Turner v. Bernstein says it's not.

15 If it's a claim that there was some problem
16 with On2's accounting prior to the merger, we have
17 conceded, they can proceed; that's A785. If it's a
18 claim that it's federal securities law fraud, again,
19 everyone agrees they can proceed; that is A169.

20 But if it is a sort of fraud that arises in
21 every merger case - - - it's not really fraud, it's
22 just the failure to disclose all material information
23 - - - that's - - -

24 JUDGE STEIN: But how does the court know
25 that until these members are given an opportunity to

1 case whether there are any forms of incidental
2 monetary relief, right? So aren't they suggesting
3 there are various forms of incidental relief? So
4 it's not just individualized versus one form of
5 incidental, meaning non-individualized; it's
6 different forms of incidental relief. Isn't that
7 what Wal-Mart is suggesting?

8 MR. LIU: I think Wal-Mart applies a single
9 definition, a single principle underlying what is
10 individualized and incidental, and applies - - - and
11 says you can apply that to different factual
12 scenarios. But the - - - I think the underlying
13 principle is the same.

14 My friend is right that it doesn't appear
15 on the face of Colt, but Colt was decided seven years
16 before the Fifth Circuit's decision in Allison
17 Petroleum (sic), which is the leading case on this.
18 And - - -

19 JUDGE GARCIA: But I think in Wal-Mart, in
20 the section I was citing from, they cite to Allison,
21 right, and it - - - I think it's in a way that cuts
22 against what you're arguing because - - - I think as
23 the Chief Judge might have been saying earlier, that
24 were - - - they could have followed it, but they say,
25 look, we're not deciding, and then they use this

1 language, whether any form of incidental relief.

2 So it seems to me they are suggesting there
3 are various degrees of incidental damages that could
4 flow.

5 MR. LIU: Well, Your Honor, we acknowledge
6 that - - - that Wal-Mart didn't decide the issue, but
7 I think it's important to remember that courts, even
8 since Wal-Mart, have reaffirmed their view that
9 incidental damages can proceed as non-opt-out
10 classes. That's the Second, the Fourth, and the
11 Seventh Circuits.

12 Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: Thank you, sir.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Jiannaras v. Alfant, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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