UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al*., Defendants. This Document Relates To: The Standard Chartered Cases	Master File No. 09-CV-118 (VM) (FM)

STANDARD CHARTERED'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE MAGISTRATE JUDGE'S ORDER OF FEBRUARY 15, 2013

Defendants Standard Chartered Bank International (Americas) Limited, Standard Chartered International (USA) Limited, Standard Chartered Bank, and Standard Chartered PLC (together, "Standard Chartered") respectfully submit this response to plaintiffs' objection to Magistrate Judge Frank Maas's Order of February 15, 2013 (the "Order"; ECF No. 1045).

PRELIMINARY STATEMENT

After securing permission to serve rebuttal expert reports, plaintiffs now object that the Order "effectively requires" them to do so. (Pls.' Objection at 3.) The objection is not well-founded, but rather reflects plaintiffs' unhappiness with a ruling for which they at one time lobbied, but now no longer want. There is no conflict between the Order and any applicable law or rule. To the contrary, the Order is entirely consistent with the powers accorded to the Court under Rules 26 and 37 to control the course of expert discovery. Under any standard of review –

and particularly under the deferential standard applicable to a challenge to a non-dispositive ruling by the Magistrate Judge – plaintiffs' objection should be overruled and the Order affirmed.

BACKGROUND

Plaintiffs in this multidistrict litigation assert Florida common law claims, including breach of fiduciary duty, based on the allegation that Standard Chartered did not conduct sufficient due diligence on Fairfield Sentry Ltd. ("Fairfield Sentry") or Bernard L. Madoff Investment Securities LLC ("BLMIS"). Fact discovery closed on May 4, 2012, and initial expert reports were due on August 2, 2012. (Pls.' Objection at 6.)

A. Plaintiffs' Expert Reports and Their First Request for Permission To Submit Rebuttal Expert Reports

Under the terms of the scheduling order entered on February 4, 2011, initial expert reports were required to encompass "each issue to which a party bears the burden of proof at trial."[1] On August 2, plaintiffs submitted two reports from designated "due diligence" experts, setting out their opinions on what due diligence Standard Chartered should have conducted on Fairfield Sentry.[2] Among other matters, plaintiffs' experts opined that Standard Chartered's due diligence team was not entitled to rely on due diligence conducted by third parties, such as Fairfield Greenwich Group (Fairfield Sentry's creator and promoter, "Fairfield Greenwich") or PricewaterhouseCoopers (the auditor of Fairfield Sentry's financial statements, "PwC").

Standard Chartered did not serve initial expert reports on August 2 because it does not bear the burden of proof on any issue for which it will offer expert testimony. On August 20,

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[1] Second Amended Scheduling Order Regarding Standard Chartered Cases ¶ 12, ECF No. 602.

[2] The parties previously provided complete copies of their expert reports to the Magistrate Judge. Standard Chartered would be happy to furnish copies of them to the Court if desired.

(before rebuttal expert reports were due) plaintiffs sought a conference with the Magistrate Judge, arguing that Standard Chartered had violated the scheduling order because Standard Chartered bore the burden of proof on whether it was entitled to "rel[y] on third parties" in conducting due diligence.[3] Plaintiffs sought an order permitting them to either (i) move to strike objectionable portions of Standard Chartered's forthcoming expert reports, or (ii) "submit . . . reply expert reports" in response to the expert reports of Standard Chartered. (*Id.* at 4.) Plaintiffs described their proposal to submit "reply expert reports" as "a common-sense order" that was "fair to both sides and will avoid unnecessary, complicated controversy down the line." (*Id.* at 3, 4.)

On September 12, 2012, Magistrate Judge Maas ruled that he would address plaintiffs' request after Standard Chartered had served its rebuttal expert reports. (*Id.* at 1 (handwritten notation).) The Magistrate Judge thus "deferred ruling" on plaintiffs' request for permission to submit "reply" expert reports. (Pls.' Objection at 7, ¶ 1.)

B. Standard Chartered's Expert Reports and Plaintiffs' Second Request To Submit Rebuttal Expert Reports

On December 12, 2012, Standard Chartered served rebuttal reports from two experts who opined on due diligence standards in the hedge fund and private wealth management industries and Standard Chartered's adherence to those standards. In response to the proffered opinions of plaintiffs' due diligence experts, Standard Chartered's experts also discussed the widespread industry practice of relying on the work of third parties like Fairfield Greenwich and PwC as part of due diligence.

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[3] Exhibit 1, at 3, ECF No. 938 (Aug. 24, 2012 Letter from Plaintiffs' Counsel).

On December 18, plaintiffs contacted Standard Chartered and requested that it agree to an extension of time for plaintiffs' experts to submit their "rebuttal reports."[4] Standard Chartered reminded plaintiffs that they were not authorized by the Court's scheduling order to submit rebuttal reports.[5] On December 19, plaintiffs agreed that Standard Chartered's articulation of the scheduling order was "probably technically correct" and requested that Standard Chartered "agree to a rebuttal report" by plaintiffs' experts.[6]

C. The Magistrate Judge's January 10 Order

Two days later, on December 21, plaintiffs requested that the Magistrate Judge strike "certain portions of the expert reports" served by Standard Chartered.[7] Again, the crux of plaintiffs' argument was that Standard Chartered bore the burden of proof on the issue of reliance on third parties in conducting due diligence and should have come forward with expert testimony on that subject when "initial expert reports were due." (*Id.* at 2.) Plaintiffs then asked Magistrate Judge Maas to "decide what remedy to enter." (*Id.* at 6.)

On January 10, 2013, Magistrate Judge Maas ruled that plaintiffs were "unable to identify any case suggesting that" Standard Chartered bore the burden of proof on "the issue of

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4 Exhibit 2, at 2 (Dec. 18, 2012 Email Message from Mr. Brodsky).

5 *Id.* (Dec. 19, 2012 Email Message from Mr. Smith).

6 *Id.* at 1 (Dec. 19, 2012 Email Message from Mr. Brodsky). In subsequent correspondence with the Magistrate Judge (dated January 24, 2013), plaintiffs represented that their request to serve rebuttal expert reports was based on a "mistaken[]" belief that plaintiffs were entitled to submit such reports under the scheduling order. This representation is contrary to both the written record between the parties and plaintiffs' August 24, 2012 request for relief from the Magistrate Judge. Although Standard Chartered requested that plaintiffs correct the record, they declined.

7 Exhibit 3, at 1 (Dec. 21, 2012 Letter from Mr. Brodsky).

reliance on third-parties."[8] Magistrate Judge Maas further ruled that plaintiffs "opened the door for Standard Chartered's rebuttal" on the question of third-party reliance by proffering opinion testimony on the subject in their initial expert reports. (*Id*.)

Finally, although the Magistrate Judge rejected plaintiffs' assertion that Standard Chartered had violated the scheduling order, he allowed that plaintiffs would be "permitted to serve one or more reply expert reports" on the subject of "Standard Chartered's reliance on third-parties." (*Id*.) Plaintiffs did not file any objection to the Magistrate Judge's January 10 order under Rule 72(a).

D. Plaintiffs' Change of Heart and the Magistrate Judge's February 15 Order

Despite having previously sought Standard Chartered's agreement – and the Magistrate Judge's permission – to serve rebuttal expert reports, once plaintiffs received permission, they decided they did not want it. On January 16, 2013, plaintiffs informed Standard Chartered that they would not submit rebuttal reports and said that their experts instead "can be deposed" concerning any additional opinions they might offer that were not contained in their original reports.[9] In response to plaintiffs' suggestion that their experts had additional undisclosed topics on which they intended to opine, Standard Chartered reminded plaintiffs that they should comply with Rule 26.[10]

Plaintiffs proceeded to seek clarification from Magistrate Judge Maas on the scope of Rule 26 and initially agreed to put expert depositions "on hold" pending his ruling.[11]

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8 Exhibit 4, at 2, ECF No. 1020 (Jan. 10, 2013 Order).

9 Exhibit 5, at 1 (Jan. 16, 2013 Email Message from Mr. Brodsky).

10 *Id.* (Jan. 22, 2013 Email Message from Ms. McGimsey).

11 *Id.* (Jan. 25, 2013 Email Message from Mr. Brodsky).

On February 13, 2013, however, plaintiffs announced that they had "changed their mind[s]" and wanted to proceed with expert depositions even before the Magistrate Judge had a chance to rule.[12] This led to the Order of February 15. Magistrate Judge Maas ruled that if plaintiffs' experts have additional opinions that they wish to offer beyond those included in their initial reports, they "would be well advised to include" those opinions in a further rebuttal report or otherwise assume the risk that the Court may "preclude them from proffering" such testimony. (Order at 1.) Plaintiffs' objection to the Order followed.

ARGUMENT

Plaintiffs acknowledge that this Court's review of the Order at issue here is governed by the standard of review applicable to "non-dispositive" orders by a magistrate judge. (Pls.' Objection at 4.) Plaintiffs also concede that in this Court the non-dispositive orders of a magistrate judge "should be afforded substantial deference and be overturned only if found to be an abuse of discretion." *R.F.M.A.S., Inc.* v. *So*, 748 F. Supp. 2d 244, 248 (S.D.N.Y. 2010) (Marrero, J.) (quoting *U2 Home Entm't, Inc.* v. *Hong Wei Int'l Trading Inc.*, No. 04 Civ. 6189 (JFK), 2007 WL 2327068, at *1 (S.D.N.Y. Aug. 13, 2007)) (cited at Pls.' Objection at 10 n.5).[13]

There was no abuse of discretion here. The Order properly places the burden on plaintiffs to assess whether their experts' initial reports – without supplementation – satisfy their

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[12] Exhibit 6, at 2 (Feb. 13, 2013 Letter from Mr. Brodsky).

[13] Citing a case from the Northern District of Iowa, plaintiffs attempt to turn the standard of review on its head by arguing that a magistrate judge's decision "cannot stand" unless it is supported by "a substantial reason." (Pls.' Objection at 10 (citing *Benedict* v. *Zimmer, Inc.*, 232 F.R.D. 305 (N.D. Iowa 2005)).) That is a misreading of *Benedict*. Although the court there considered whether the conduct of *the plaintiff* was "substantially justified," *id.* at 316, the court nevertheless "deci[ded] to review the magistrate order for clear error," *id.* at 314. And even if the court had used a different standard of review, the decision in *Benedict* is not controlling in this Court.

disclosure obligations under Rule 26. If not, plaintiffs should supplement them. The Order does nothing more than remind plaintiffs that if their disclosures are inadequate, the Court possesses the authority to bar plaintiffs from using their expert witnesses "to supply evidence on a motion, at a hearing, or at a trial." FED. R. CIV. P. 37(c)(1); *see also In re Kreta Shipping, S.A.*, 181 F.R.D. 273, 275 (S.D.N.Y. 1998) ("Expert testimony exceeding the bounds of the expert's report is excludable pursuant to Rule 37(c)(1)."); *Great Am. Ins. Co. of N.Y.* v. *Summit Exterior Works*, No. 3:10 CV 1669 (JGM), 2012 WL 459885, at *7 (D. Conn. Feb. 13, 2012) (precluding testimony "not previously disclosed in expert reports").

Plaintiffs fail to identify any law or rule that conflicts with the Order. They assert that the Order is inconsistent with Rule 26(a)(2)(D) (Pls.' Objection at 10); but just the opposite is true. The Court holds broad discretion to manage pretrial discovery, and Rule 26(a)(2)(D) expressly authorizes the Court to direct the parties to submit expert reports "at the times and in the sequence that the court orders." Moreover, nothing in the rules requires that expert discovery be limited to "two rounds of expert reports" (Pls.' Objection at 2), followed by depositions. *See*, *e.g.*, *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, No. 08 Civ. 7611 (BSJ), 2011 WL 4063297, at *1 (S.D.N.Y. Aug. 15, 2011) (describing three-round expert disclosure process consisting of "opening expert reports," "rebuttal expert reports," and "reply expert reports").

In entering the Order, the Magistrate Judge noted that if Standard Chartered had served expert reports on August 2 – *i.e.*, "on the schedule the plaintiffs deem appropriate" – then plaintiffs "would have had to submit opposition reports in order to have their experts testify to any additional opinions not set forth in their experts' original reports." (Order at 1.) Plaintiffs "have no quibble" with this logic. (Pls.' Objection at 11.) They assert, however, that since Standard Chartered did not serve expert reports on August 2, there is no basis for the Magistrate

Judge's decision. (Pls.' Objection at 11-12.) Plaintiffs are incorrect. Based on their own misinterpretation of Florida law and the scheduling order, plaintiffs assumed that Standard Chartered would serve expert reports on August 2, giving plaintiffs an opportunity to submit a second set of expert reports in rebuttal. When plaintiffs learned that Standard Chartered had not submitted expert reports on August 2 and would instead just rebut plaintiffs' reports, they quickly let it be known that their experts had more they wanted to say: They asked the Magistrate Judge to enter "a common-sense order" authorizing rebuttal reports;[14] and they asked Standard Chartered (twice) for permission to submit rebuttal reports. Plaintiffs' course of conduct gives the Court ample reason to conclude – as a factual matter – that plaintiffs' experts likely did not disclose all of their anticipated testimony on August 2. Rather than penalizing plaintiffs for their mistaken assumption about the timing of Standard Chartered's expert reports, however, the Order permits plaintiffs to supplement their opening expert reports with additional opinions to the extent that is necessary for them to comply fully with Rule 26.

Plaintiffs ask the Court to "consider what would have transpired" had plaintiffs never accused Standard Chartered of violating the scheduling order. (Pls.' Objection at 12.) They assert that plaintiffs "would not be required to submit" rebuttal expert reports "because the issue would not have come up." (Pls.' Objection at 12.) Plaintiffs' hypothetical argument misses the point. The relevant issue is not whether plaintiffs' experts submit one expert report or two, but rather whether they provide a complete written disclosure of their opinions in advance of any deposition. "[S]ubsequent deposition testimony cannot properly cure a deficiency in an expert's written report." *Ferriso* v. *Conway Org.*, No. 93 Civ. 7962 (KMW), 1995 WL 580197,

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[14] Exhibit 1, at 3.

at *2 (S.D.N.Y. Oct. 3, 1995). Accordingly, had plaintiffs never sought relief from the Magistrate Judge in the first place, their experts would not be permitted to offer new opinions at their depositions. To do so, plaintiffs' experts must set forth now, in writing, "a complete statement of all opinions" they intend to offer "and the basis and reasons for them." FED. R. CIV. P. 26(a)(2)(B)(i); *see also* FED. R. CIV. P. 26(b)(4)(A) ("[T]he deposition may be conducted only after the [expert] report is provided."). The Order permits plaintiffs to do this.

Lastly, plaintiffs complain that they will suffer "prejudice" if they submit rebuttal expert reports because of the cost and time involved and the fact that Standard Chartered will have an "advance look" at their experts' opinions. (Pls.' Objection at 13.) If it truly will cost plaintiffs "tens of thousands of dollars" to prepare rebuttal reports (*id.*), that is proof enough that their initial expert reports were inadequate. Moreover, plaintiffs are ill-positioned to assert prejudice, given that they previously told the Magistrate Judge that giving them time to serve rebuttal reports would be "fair to both sides."[15] And the fact that Standard Chartered will see in advance what plaintiffs' experts have to say does not confer a "litigation advantage" (Pls.' Objection at 13); rather, it ensures that expert discovery proceeds in the open and forthright manner contemplated by Rules 26 and 37. *See Deluca* v. *Bank of Tokyo-Mitsubishi UFJ, Ltd.*, No. 06 Civ. 5474 (JGK), 2008 WL 857492, at *12 (S.D.N.Y. Mar. 31, 2008) (noting that purpose of expert disclosures "is to prevent the practice of 'sandbagging' an opposing party with new evidence"). Encouraging plaintiffs to provide appropriate expert disclosures thus does not amount to prejudice.

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[15] Exhibit 1, at 4.

CONCLUSION

Plaintiffs have demonstrated no basis for overturning the Order. To the contrary, the Order gives plaintiffs what they previously requested and ensures that plaintiffs' experts do not evade the disclosure requirements of Rule 26. Plaintiffs' objection to the Order thus should be overruled and the Order affirmed.

Dated: February 27, 2013
New York, New York

Respectfully submitted,

/s/ Sharon L. Nelles

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