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November 17, 2014

By Hand

The Honorable Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
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JUDGE MARRERO

Anwar, et al. v. Fairfield Greenwich Limited, et al.,
No. 09-cv-118 (S.D.N.Y.) (VM)(FM)

Dear Judge Marrero:

We represent the Citco Defendants in the action referenced above. A recent precedential decision of the Second Circuit, Pennsylvania Public School Employees' Retirement System v. Morgan Stanley & Co., Inc., No. 13-2095-cv(L), 2014 WL 5487666 (2d Cir. Oct. 31, 2014) (copy enclosed), further demonstrates that plaintiffs' pending motion for class certification should be denied.

In particular, Pennsylvania Public School further supports the Citco Defendants' argument that the issue of reasonable reliance raises numerous individual

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issues of fact and thus precludes any finding that common issues predominate.<sup>1</sup> In *Pennsylvania Public School*, the Second Circuit affirmed the denial of class certification.<sup>2</sup> Three plaintiffs brought a putative class action alleging claims for common-law fraud under New York law against ratings agencies and Morgan Stanley. According to plaintiffs, the defendant ratings agencies knowingly used outdated models and data to rate certain securities. Plaintiffs argued that the commonality element required for class certification under Rule 23 was satisfied by the “recently created ‘fraud-created-the-market’ theory, *i.e.*, but for the defendant’s fraud, no market for the notes would have existed at all.” *Id.* at \*6.

Judge Winter, writing for a unanimous panel, rejected plaintiffs’ argument, noted that four other Circuits have rejected or questioned the fraud-created-the-market theory, and held that New York law would not recognize that theory as a substitute for proof of actual reliance by each member of the putative class. *See id.* (noting that fraud-created-the-market theory has been rejected or questioned by the Third, Sixth, Seventh, and Ninth Circuits). As Judge Winter explained:

While the [fraud-created-the-market] theory is used to argue that none of the notes would have been sold but for the fraud, that argument establishes only “but-for” causation; it does not establish reliance. It is quite possible that some buyers of the notes might have known the underlying facts, believed in the models, and held the same rosy view of the residential housing market as did many government and private financial officers. Appellants thus seek to use the theory to eliminate the need to prove reliance, a traditional element of common law fraud. No hint has been offered by New York courts that such a radical doctrinal shift is in the offing.

*Id.*

Because the fraud-created-the-market theory could not overcome individual issues of reliance, the Second Circuit affirmed the district court’s denial of class certification. Those individual issues of reliance arose from, among other factors, “significant differences in the investment decision processes of the various putative class members,” *id.* at \*7, “the sophistication of the parties,” and “the variances in each putative class member’s investment strategy and decision-making process,” *id.* at \*7 n.4.

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<sup>1</sup> See the Citco Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Class Certification (“Citco’s Opposition Brief” or “Citco Opp. Br.”), filed under seal on Sept. 15, 2014, at 2-7, ECF No. 1323.

<sup>2</sup> Citco’s Opposition Brief, at pp. 4, 9, and 13, cites the district court’s underlying class-certification decision, *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 269 F.R.D. 252 (S.D.N.Y. 2010).

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Plaintiffs here have argued that the shares at issue would have been unmarketable if Citco's NAV statements had been accurate. (See Citco Opp. Br. 13.) *Pennsylvania Public School* holds that such an argument cannot displace the requirement that each member of the putative class must prove actual and reasonable reliance in support of the putative class member's claims under New York law. The reasoning and language of *Pennsylvania Public School* indicates that this proposition is also true for claims by members of the putative class under the federal securities laws. Finally, *Pennsylvania Public School* demonstrates that where, as here, significant differences among the members of the putative class exist concerning, among other factors, the putative class member's investment decision process, sophistication, investment strategy, and knowledge concerning the investment at issue, reasonable reliance presents individual issues, and class certification should accordingly be denied.

Respectfully submitted,



Walter Rieman

Enclosure

cc: All counsel in *Anwar* (by e-mail)

<p><i>Plaintiffs etc</i> directed to respond by <u>11-25-14</u> by letter not to exceed <u>three</u> <u>(3)</u> pages, to the matter set forth above by <u>Citco Defendants</u>.</p> <p>SO ORDERED.</p> <p><u>11-20-14</u> DATE <u>[Signature]</u> VICTOR MARRERO, U.S.D.J.</p>
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