UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, et al.,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, et al.,

Defendants.

09-cv-118 (VM)

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Defendants Standard Chartered Bank International (Americas) Ltd., Standard Chartered International (USA) Ltd., Standard Chartered Bank, and Standard Chartered PLC (collectively, "Standard Chartered Defendants") move for reconsideration of this Court's Decision and Order dated July 29, 2015 (Dkt. No. 1396, the "Decision"), insofar as it denied the Standard Chartered Defendants' motion to dismiss the "Due Diligence Claims" brought by the Standard Chartered Plaintiffs.[1] (Dkt. Nos. 1399, 1400.) The Court assumes familiarity with the relevant facts as described in the Decision.

[1] As discussed more fully in the Decision, the term "Standard Chartered Plaintiffs" denotes the 74 plaintiffs in the 56 cases asserting claims against the Standard Chartered Defendants, and which were consolidated in this Court for pretrial purposes. (See Decision at 58.)

I. LEGAL STANDARD

Reconsideration of a previous order by the court is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys. Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (internal citations and quotation marks omitted). "The provision for reargument is not designed to allow wasteful repetition of arguments already briefed, considered and decided." Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990). "The major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18 C. Wright, et al., Federal Practice & Procedure § 4478 at 790 (2d ed.)).

To these ends, a request for reconsideration under Local Rule 6.3 ("Rule 6.3") of the Southern District of New York must demonstrate controlling law or factual matters put before the court in its decision on the underlying matter that the movant believes the court overlooked and that might reasonably be expected to alter the conclusion reached by the court. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Rule 6.3 is intended to "'ensure the finality of

decisions and to prevent the practice of a losing party . . . plugging the gaps of a lost motion with additional matters.'" SEC v. Ashbury Capital Partners, L.P., No. 00 Civ. 7898, 2001 WL 604044, at *1 (S.D.N.Y. May 31, 2001) (quoting Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)). A court must narrowly construe and strictly apply Rule 6.3 so as to avoid duplicative rulings on previously considered issues and to prevent Rule 6.3 from being used to advance different theories not previously argued, or as a substitute for appealing a final judgment. See Montanile v. Nat'l Broad. Co., 216 F. Supp. 2d 341, 342 (S.D.N.Y. 2002); Shamis v. Ambassador Factors Corp., 187 F.R.D. 148, 151 (S.D.N.Y. 1999).

II. DISCUSSION

The Standard Chartered Defendants argue that reconsideration of the Decision is warranted for three primary reasons: (1) that the Court "misapplied Kingate by considering only the Madoff fraud in assessing conduct"; (2) that the Court "overlooked controlling precedent [i.e., Romano v. Kazacos, 609 F.3d 512 (2d Cir. 2010); Hanly v. SEC, 415 F.2d 589 (2d Cir. 1969)] establishing that Plaintiffs' 'Due Diligence Claims' rest on the Bank providing false and misleading investment recommendations"; and (3) that the Court "overlooked that the unique due diligence claim in the

Saca action is expressly and exclusively based on an alleged omission by the Bank." (Dkt. No. 1400.)

Upon review of the Motion for Reconsideration, the Court finds that, as to their first two arguments, the Standard Chartered Defendants urge reconsideration on the basis of essentially the same arguments that were raised in briefing on the original motion to dismiss. There has been no "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Virgin Atl. Airways, 956 F.2d at 1255.

First, the Standard Chartered Defendants are incorrect that the Court considered only the Madoff fraud, rather than conduct of the Standard Chartered Defendants more generally, in assessing false conduct under the Kingate standard. The Court directly quoted Kingate's requirement that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, § 101, 112 Stat. 3227 (1998), 15 U.S.C. §§ 77p(b), 78bb(f)(1), only precludes conduct "by the defendant" (Decision at 17), and indicated that in performing its analysis of the Standard Chartered claims, it considered allegations involving the Madoff fraud or "some other false conduct . . . by the Standard Chartered Defendants." (Decision at 53.)

Second, the Court did not overlook controlling precedent in its Decision. The Court made explicit reference to Romano in its Decision (see Decision at 8, 11) -- just not for the proposition that the Standard Chartered Defendants argue follows from Romano. Indeed, the Court did not then and still does not read Romano to hold that claims predicated on the failure to conduct due diligence, including those related to investment recommendations, necessarily turn on false conduct for purposes of SLUSA.

The argument put forth by the Standard Chartered Defendants that Romano suggests otherwise is a red herring. In Romano, the Second Circuit found that the plaintiffs' claims involving investment advice were all "in connection with covered securities." 609 F.3d at 521-24. As in Romano, the Decision found that the Standard Chartered Plaintiffs' claims were "in connection with covered securities." (Decision at 17.) However, Romano does not hold that due diligence claims based on investment recommendations necessarily involve misstatements or omissions for purposes of SLUSA. Romano, unlike Kingate, does not discuss how courts should distill allegations within each claim to determine whether those claims are necessarily predicated on false conduct contemplated by the federal securities laws. (See Dkt. No. 1391 ("Standard Chartered Pls.' June 8 Letter").)

Instead, Romano found that allegations of misstatements or omissions were included in those plaintiffs' complaints -- including allegations that the defendants made uniform misrepresentations to plaintiffs about whether they could afford to retire early, and that defendants communicated "inaccurate, incomplete, or erroneous information" to plaintiffs. 609 F.3d at 521.

Similarly, in their submissions accompanying their motion to dismiss, the Standard Chartered Defendants pointed to Hanly for the proposition that broker/dealer investment recommendations necessarily include implied representations that the broker/dealer has conducted due diligence, and that its failure to have done so properly is actionable under the federal securities laws. (Dkt. Nos. 1384 at 3-4 (the "Standard Chartered Defs.' May 29 Letter"), 1390 at 3 (the "Standard Chartered Defs.' June 8 Letter").)

The Court did not discuss Hanly in its Decision; however, this does not mean that the Court did not consider Hanly in reaching its determination. See Ferrand v. Credit Lyonnais, 292 F. Supp. 2d 518, 521-22 (S.D.N.Y. 2003) ("What [the party] offers instead is not new authority the Court failed to consider, but [the party's] differing proposition of what these cases stand for. Moreover, that the Court did not specifically reference every factual detail or incident

. . . does not necessarily establish that the Court did not consider that particular matter."). Indeed, insofar as the Standard Chartered motion papers included discussion of Hanly, the Court did consider that case, and concluded that, as argued by the Standard Chartered Plaintiffs in their June 8, 2015 Letter (Dkt. No. 1391), Hanly was not applicable to the case at hand. Hence, the Court determined that Hanly did not necessitate discussion in the Decision.

First, Hanly itself is inapposite to the instant action. In Hanly, which was decided almost three decades prior to the passage of SLUSA, the Second Circuit affirmed an SEC order sanctioning and barring five securities salesmen from further association with any broker or dealer after it was determined that the salesmen had made investment recommendations without conducting due diligence. See 415 F.2d at 592. However, the Second Circuit indicated that such due diligence claims might not fall under the federal securities laws in civil actions or be applicable outside the limited circumstances presented in Hanly involving SEC sanctions on salesmen. See id. at 596-97 ("While this implied warranty may not be as rigidly enforced in a civil action where an investor seeks damages for losses allegedly caused by reliance upon his unfounded representations, its applicability in the instant proceedings cannot be questioned." (footnotes omitted)).

Nor was the Standard Chartered Defendants' argument that "[s]ince Hanley [sic], the SEC and private plaintiffs have routinely asserted claims under the anti-falsity provisions based on conduct that is identical to the Bank's conduct challenged here" persuasive. (Standard Chartered Defs.' May 29 Letter at 3-4.) All but one of the cases cited by the Standard Chartered Defendants were orders issued by the SEC and are not binding on the Court. The Standard Chartered Defendants cited to only one case decided by an Article III court in support of their argument, and that single case -- South Cherry St., LLC v. Hennessee Grp. LLC, 573 F.3d 98 (2d Cir. 2009) -- undermines their argument. In South Cherry, the Second Circuit considered two types of claims brought by the plaintiffs: federal securities law claims and state law breach of contract claims, both premised on the failure to conduct due diligence. See 573 F.3d 98. The Second Circuit affirmed the district court's dismissal of both types of claims -- but on completely different grounds. There, the plaintiffs could not adequately plead federal securities law claims based on failure to conduct due diligence because such claims do not demonstrate scienter (i.e., a type of false conduct); however, the state law breach of contract claims failed because they were based on an unenforceable oral contract under New York's Statute of Frauds. Id. at 114-15.

In so finding, the Second Circuit explicitly reaffirmed that "[a]t bottom, this was a contract case." Id. at 115.

Further, although the Court did not specifically address the arguments put forth by the Standard Chartered Defendants with respect to Romano and Hanly, the Court did explicitly address (and reject) a substantially similar argument made by the Standard Chartered Defendants with respect to Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318 (2015). (See Decision at 44-46.) Thus, the Court still holds that the Due Diligence Claims are not predicated on allegations of either complicity in the Madoff fraud or any other conduct by the Standard Chartered Defendants involving falsity as an element.

Third, the Standard Chartered Defendants argue that the allegations predicated on a failure to disclose investment risk, as pleaded in Saca v. Standard Chartered Bank Int'l (Americas) Ltd., No. 11-CV-3480 ("Saca"), should be dismissed. The Court is persuaded that this particular issue warrants further consideration. In its Decision, the Court noted that the Standard Chartered Plaintiffs acknowledged that some broker-dealer fiduciary duties, such as the duty of full disclosure, might involve misrepresentations. (See Decision at 45.) Additionally, in its analysis finding that the Standard Chartered Plaintiffs' breach of fiduciary duty

claims survive, the Court focused its analysis on allegations regarding the failure to conduct due diligence and the failure to continue monitoring certain investments. (See id. at 45-46.) The Court recognizes that a duty to disclose investment risk may be predicated on allegations of false conduct if those allegations necessarily concern the valuation of the Madoff feeder funds and the risk therein of investing in those funds. Therefore, the Standard Chartered Plaintiffs are ordered to show cause, in response to the Standard Chartered Defendants' instant motion, as to why allegations predicated on the failure to disclose investment risk should not be precluded by SLUSA. The Court notes, however, that even if it were to dismiss such allegations as regards Saca, all of the Standard Chartered Plaintiffs would have surviving Due Diligence Claims based on duties independent of any duty to disclose investment risk.

For the foregoing reasons, the Court also declines to certify the Decision for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). The Court is not persuaded that there is controlling question of law as to which there is substantial ground for difference of opinion, or that an immediate appeal may materially advance the ultimate termination of this litigation.

III. ORDER

Accordingly, for the reasons stated above, it is hereby

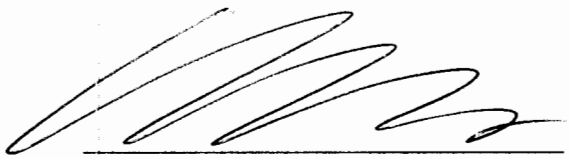
ORDERED that the Motion (Dkt. No. 1399) of defendants Standard Chartered Bank International (Americas) Ltd., Standard Chartered International (USA) Ltd., Standard Chartered Bank, and Standard Chartered PLC (collectively, "Standard Chartered Defendants") for reconsideration of the Court's July 29, 2015 Decision and Order is **DENIED** with respect to the Standard Chartered Defendants' arguments that the Court misapplied Kingate by considering only the Madoff Fraud in assessing conduct, and that the Court overlooked controlling precedent establishing that the "Due Diligence Claims" rest on the bank providing false and misleading investment recommendations; and it is further

ORDERED that the Standard Chartered Plaintiffs show cause within seven days from the date of this Decision and Order as to why the Court should not dismiss allegations that are predicated on a duty to disclose investment risk and support breach of fiduciary duty claims, as argued in Saca v. Standard Chartered Bank Int'l (Americas) Ltd., No. 11-CV-3480; and it is further

ORDERED that the motion (Dkt. No. 1399) of the Standard Charted Defendants for certification of an interlocutory appeal is **DENIED**.

SO ORDERED.

Dated: New York, New York
13 August 2015



VICTOR MARRERO
U.S.D.J.