

**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)

PRE-TRIAL ORDER

November 13, 2015

PRE-TRIAL ORDER

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B. Summary of Claims and Defenses

1. Claims

The claim to be tried against PwC Netherlands and PwC Canada is a count of negligence. To state a claim of negligence, “a plaintiff must allege ‘(1) that the defendant owed him or her a cognizable duty of care; (2) that the defendant breached that duty; and (3) that the plaintiff suffered damage as a proximate result of that breach.’” *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 432 (S.D.N.Y. 2010) (“*Anwar II*”) (quoting *Di Benedetto v. Pan Am World Serv.*, 359 F.3d 627, 630 (2d Cir. 2004)).

a. Duty of Care

“Under New York law, accountants owe a duty of care to (a) those with whom they have contracted and (b) those [third parties] with whom they have a ‘relationship so close as to approach that of privity.’” *BHC Interim Funding, L.P. v. Finantra Capital, Inc.*, 283 F.Supp.2d 968, 984 (S.D.N.Y. 2003) (quoting *Parrott v. Coopers & Lybrand*, 95 N.Y.2d 479, 483 (2000)). To establish near-privity, a plaintiff must show “that (1) the defendant had awareness that its work was to be used for a particular purpose; (2) there was reliance by a third party known to the defendant in furtherance of that purpose; and (3) there existed some conduct by the defendant linking it to that known third party evincing the defendant’s understanding of the third party’s reliance.” *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 405-06 (2d Cir. 2015) (citation omitted); see *Anwar II*, 728 F. Supp. 2d at 432 (citing *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 (1985)). Plaintiffs will present substantial evidence to satisfy these standards, including express admissions by PwC that it knew Fund shareholders were receiving and relying on its audits.

b. Breach of Duty of Care

Plaintiffs will show that PwC failed to conduct audits of the Fairfield Funds in accordance with Generally Accepted Accounting Standards (“GAAS”) and/or International Standards on Accounting (“ISAS”) and otherwise failed to meet the applicable standards of care. Among other things, accounting standards required that PwC conduct audit procedures to obtain reasonable assurance that the assets shown on the financial statements actually exist and that the transactions reflected on the income statement occurred as represented. Plaintiffs will present extensive evidence of PwC’s audit failures.

c. Damages

Plaintiffs will show that they suffered damages as the proximate result of PwC’s negligence. Plaintiffs suffered damages when, subsequent to issuance of PwC audit reports, they (i) made additional investments in the Funds that in fact worthless (“purchaser damages”); and (ii) continued to hold investments in the Funds that in fact were worthless (“holder damages”). Evidence will show that plaintiffs would not have made or held those investments absent PwC’s negligence. Plaintiffs’ damages in each category are equal to the total of the net losses of each member of the plaintiff class with respect to that category of damages.

Plaintiffs are entitled to an award of prejudgment interest on a jury verdict of damages at the statutory rate of 9%. See CPLR 5001, 5004; *de Kwiatkowski v. Bear, Stearns & Co. Inc.*, No. 96CIV.4798(VM), 2000 WL 729118 *2, (S.D.N.Y. June 6, 2000); *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 693 (2d Cir. 1983). The Court may address the determination of prejudgment interest in entering judgment following any damage verdict.

d. Claims Not to Be Tried

The following claims will not be tried: (i) gross negligence, (ii) negligent misrepresentation, (iii) third-party breach of contract, (iv) aiding and abetting breach of fiduciary

duty, (v) aiding and abetting fraud, (vi) violation of Section 10(b) of the Exchange Act and Rule 10b-5, and (vii) violation of Section 20(a) of the Exchange Act.

e. Statute of Limitations

Evidence will show that the continuous representation doctrine applies to toll the statute of limitations for plaintiffs' claims against PwC Netherlands based on the 2002, 2003 and 2004 audits.

2. Defenses

In order to prevail against either PwC Netherlands or PwC Canada, plaintiffs must prove, with respect to each defendant: “(1) that the defendant owed [the plaintiff class] a cognizable duty of care; (2) that the defendant breached that duty; and (3) that the plaintiff [class] suffered damage as a proximate result of that breach.” *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 432 (S.D.N.Y. 2010) (“*Anwar II*”) (quoting *Di Benedetto v. Pan Am World Serv.*, 359 F.3d 627, 630 (2d Cir. 2004)).

a. Duty of Care

To impose liability for negligence under New York law, plaintiffs must demonstrate that the plaintiff class had a “contractual relationship or its equivalent” with each of the PwC Defendants; they must prove “a bond so closely approaching privity that it was, in practical effect, virtually indistinguishable therefrom.” *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 545-46, 550 (quoting *State St. Trust Co. v. Ernst*, 278 N.Y. 104, 111 (1938)). Plaintiffs must prove “all three elements of the *Credit Alliance* analysis.” *Sec. Pac. Bus. Credit v. Peat Marwick*, 79 N.Y.2d 695, 704 (1992); *see also Sykes v. RFD Third Ave. 1 Assoc., LLC*, 15 N.Y.3d 370, 373 (2010). Plaintiffs will not be able to establish a duty of care to the plaintiff class on the part of either of the PwC Defendants, as there is no evidence that the PwC Defendants were aware their audit opinions were to be used by the plaintiff class for the purpose of making investments, that the plaintiff class would rely on their audit opinions, or that there was any conduct linking them to the plaintiff class.

b. Breach of the Duty of Care

The PwC Defendants maintain that they did not breach any asserted duty of care to the plaintiff class, as they performed their audits of the financial statements of the relevant funds in accordance with applicable professional standards.

c. Damages

The PwC Defendants expect that the plaintiffs will be able to prove that the members of the plaintiff class suffered injury when their interests in the funds lost value when the Madoff fraud was revealed. They will not, however, be able to prove that these losses were incurred in any way other than the diminution in the net asset values of the funds or that any member of the plaintiff class was injured in any way or to any extent beyond the pro rata effect of the

diminution of the value of interests in the funds. As such, plaintiffs' damages are derivative in nature and not recoverable in a direct action against the PwC Defendants.

1. Causation

The plaintiffs must prove that the conduct of each of the PwC Defendants was both the “but for” or “transaction” causation and “legal” or “proximate” causation of the alleged injuries to the plaintiff class. This “but for” or “transaction” causation requires plaintiffs to prove that each member of the plaintiff class personally received and relied upon a misrepresentation made by one of the PwC Defendants. *See McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008); *see also* Plaintiffs' Second Consolidated Amended Complaint at ¶¶ 435-37 (alleging that the PwC Defendants knew the members of the plaintiff class would rely on the audit reports, the members of the class did so rely, and this caused their injuries). The “legal” or “proximate” causation requires plaintiffs to prove that the reliance by the members of the plaintiff class was a “substantial factor” in causing the losses incurred. Plaintiffs cannot meet either burden, as they have no evidence that each member of the class relied on the PwC Defendants' audit reports in making their investment decisions or that any such reliance was a substantial factor in their decision to acquire any interests in the funds or causing the loss in value of their interests in the funds.

2. Purchaser Damages

The Court has previously ruled that the plaintiff class may only pursue claims for “purchaser” damages based on subsequent investments in the funds. Any amounts otherwise recoverable as purchaser damages must be reduced by the allocation of responsibility for such losses to the FGG and Citco defendants.

3. Holder Damages

For the reasons stated in the PwC Defendants prior filings with the Court, plaintiffs' claims for “holder” damages are barred as a matter of law. In addition, plaintiffs have no proof they could have recovered their interests in the funds had the PwC Defendants acted as plaintiffs claim they should have acted with respect to their audit work and the Madoff fraud.

d. Other Defenses

1. Statute of Limitations

Plaintiffs' claims against PwC Netherlands are limited to those arising from audit reports issued on or after April 23, 2006.

2. SLUSA

Plaintiffs may not prove or attempt to prove any element of their claim of negligence on the part of PwC Netherlands or PwC Canada based on any alleged misrepresentation by the PwC Defendants, as such claims are barred under SLUSA. *See In re Kingate Management Ltd. Litig.*, 784 F.3d 128 (2d Cir. 2015).

e. **Claims Not to Be Tried**

All plaintiffs' claims other than their claims for negligence against the PwC Defendants shall not be tried.

C. Jury

The case is to be tried to a jury. Plaintiffs estimate that 20-25 trial days will be needed. Plaintiffs request a jury of 6 with appropriate alternates.

The PwC Defendants estimate that the trial will require, at a minimum, the full 34 trial days currently scheduled. The PwC Defendants request a jury of 12 with two alternates.

D. Magistrate Judge

The parties have not consented to a trial before the magistrate judge assigned to this case.

E. Witnesses

The Plaintiffs' witness list is attached as Exhibit A and the Defendants' witness list is attached as Exhibit B. The witness lists identify all witnesses whose testimony will be offered in the party's case in chief. Plaintiffs intend to move to call certain members of the PwC audit teams as adverse witnesses in their case in chief.

F. Deposition Testimony

Plaintiffs' designations of deposition testimony to be offered in their case in chief are consolidated with Defendants' counter-designation and affirmative designations in attached Exhibit C.

G. Exhibits

The exhibit lists to be offered by each party are to be provided to the Court on November 20, 2015.

Dated: November 13, 2015

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