BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE FAIRFIELD GREENWICH LITIGATION	)	MDL DOCKET NO. _____

MEMORANDUM OF LAW IN SUPPORT OF FAIRFIELD GREENWICH ADVISORS' MOTION TO TRANSFER AND COORDINATE RELATED ACTIONS IN THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1407

Movant, Fairfield Greenwich Advisors LLC, submits this Memorandum of Law in support of its Motion to Transfer and Coordinate Related Actions in the Southern District of New York Pursuant to 28 U.S.C. § 1407. The action at issue here, *Headway Investment Corporation v. American Express Bank Ltd., et al.*, 09-CV-21395 (S.D. Fla.) ("*Headway*"), is the only one of the eleven federal court lawsuits against Movant relating to the fraud perpetrated by Bernard L. Madoff ("Madoff") and Bernard L. Madoff Investment Securities ("BLMIS") that is not in the Southern District of New York and consolidated into the action entitled *Anwar et al. v. Fairfield Greenwich Limited, et al.*, 09-CV- 00118 (S.D.N.Y) ("*Anwar*"). *Anwar* has been pending before the Honorable Victor Marrero since early January 2009. *Headway* and *Anwar* involve numerous "common questions of fact," and centralization of the actions in the Southern

District of New York will both serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407(a).[1]

First, there is no doubt that the *Anwar* and *Headway* actions involve numerous "common questions of fact." Both actions name as defendants entities and individuals affiliated with the marketing name Fairfield Greenwich Group, including Movant Fairfield Greenwich Advisors LLC (collectively, for purposes of this Motion, the "Fairfield Defendants"), and arise out of alleged losses by or on behalf of Fairfield Greenwich investors in connection with investments made through or with Madoff and/or BLMIS. The gravamen of the complaints in both actions is that the Fairfield Defendants' due diligence of Madoff and BLMIS was not as robust as it was alleged to have been in their marketing materials and, as a result, plaintiffs lost their investments. In support of this theory of liability, the complaints cite many of the same alleged 'red flags' that allegedly should have alerted Movant and other Fairfield Defendants to potential fraud, and reference the same or substantially similar representations in Fairfield Greenwich marketing material to support their allegations that they were misled as to the depth of the due diligence. In both complaints, the alleged insufficient oversight by the Fairfield Defendants gives rise to claims under theories of common law negligence or gross negligence, breach of fiduciary duty, and unjust enrichment or imposition of a constructive trust.

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[1] This Motion is supported by all other defendants that have been served in *Headway* – Standard Chartered Bank International (Americas) Limited ("Standard Chartered"), Standard Chartered Bank, Raul N. Mas, Robert Friedman, Rodolfo Pages, and John G. Dutkowski. The Motion is also supported by defendant Walter M. Noel Jr., and defendants Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Jeffrey H. Tucker, Andres Piedrahita, Amit Vijayvergiya, and Citco Fund Services (Europe) B.V., who have not yet been served in *Headway*. *Headway* defendants Samuel Perruchoud, Carlos Gadala-Maria, and PricewaterhouseCoopers LLP, who have also not been served, have not taken a position on this Motion at this time. *See* accompanying Declaration of Peter E. Kazanoff, dated June 18, 2009.

Second, centralization clearly will serve "the convenience of parties and witnesses." The parties in these cases overlap significantly. In fact, Plaintiff is already part of the putative *Anwar* class, as in one of the consolidated cases pending before Judge Marrero, *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*, 09-CV-2410, Plaintiff alleges to have made its investments through Defendant Standard Chartered. Therefore, both actions will focus on a significant number of common events, defendants, and witnesses.

Third, centralization will "promote the just and efficient conduct" of the actions. Without centralization, these cases will be heard in two different courts, each of which would have to rule on the same discovery and other issues. Even more importantly, the absence of centralization raises the prospect that inconsistent decisions could be rendered on substantive issues raised by motions to dismiss and other motions that Movant and other defendants expect to file.

Finally, the Southern District of New York is plainly the "center of gravity" for these actions and as such, is the appropriate transferee court. *Headway* is the only one of the eleven federal court actions against Movant that was not filed in or removed to the Southern District of New York and consolidated into the *Anwar* action. *Anwar* has been pending before Judge Marrero since early January 2009, three months before *Headway* was commenced in Florida state court and over four months before *Headway* was removed to the Southern District of Florida. Judge Marrero is familiar with the claims in *Anwar* and has been addressing numerous letters, motions, and other applications, including a stipulation filed by the parties to allow the *Anwar* plaintiffs to file a second consolidated amended complaint. Moreover, being required to litigate this dispute in New York should come as no surprise to the *Headway* plaintiff, which, upon information and belief, irrevocably consented to jurisdiction in New York pursuant to the

subscription agreement it executed when making its investment. *See* accompanying Declaration of Peter E. Kazanoff, dated June 18, 2009.

I. BACKGROUND

On December 11, 2008, Madoff admitted to having orchestrated the largest Ponzi scheme in history, defrauding thousands of investors of billions of dollars. On December 19, 2008, the first action was filed against Movant and other Fairfield Defendants by plaintiffs seeking to recover funds allegedly lost in Madoff's fraud. Over the following sixth months, eleven other such actions were filed. Of the twelve actions, all but *Headway* were filed in New York.[2] Of the eleven actions filed in New York, all but one were filed in or have since been removed to the Southern District of New York and consolidated into the *Anwar* action currently pending before Judge Marrero, and the eleventh action will be removed to that Court on or about June 19, 2009.[3]

On April 24, 2009, the *Anwar* plaintiffs filed a Consolidated Amended Complaint. (The *Anwar* Consolidated Amended Complaint is Exhibit A to the Declaration of Peter E.

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[2] Movant is also aware that Fairfield Greenwich Group (FGG) has been named in a *pro se* lawsuit filed in the United States District Court for the Northern District of Texas. *See Chavez v. Picard, et al.*, 5:09-mc-00006-C (N.D. Tex.). FGG is only a marketing name and not a legal entity that can be served. In any event, *Chavez* does not appear to have been active since early March 2009.

[3] The ten consolidated cases are: *Anwar, et al. v. Fairfield Greenwich Group et al.* (09 CV 00118); *Zohar, et al. v. Fairfied Greenwich Group, et al.* (09 CV 4031); *Pierce et al. v. Fairfield Greenwich Group et al.* (09 CV 2588); *Laor et al. v. Fairfield Greenwich Group et al.* (09 CV 2222); *The Knight Services Holdings Limited et al. v. Fairfield Sentry Limited et al.* (09 CV 2269); *Ferber et al. v. Fairfield Greenwich Group et. al.* (09 CV 2366); *Inter-American Trust, et al. v. Fairfield Greenwich Group, et al.* (09 CV 00301); *Pacific West Health Medical Center Inc. Employees Retirement Trust v. Fairfield Greenwich Group et al.* (09 CV 00134); *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.* (09 CV 2410); *Morning Mist Holdings Limited et al. v. Fairfield Greenwich Group et al.*, (09-CV-5012). The only New York action not currently in the Southern District is the recently-filed case, *Fairfield Sentry Limited v. Fairfield Greenwich Group et. al.*, Index No. 09601687, pending in the Supreme Court for the State of New York, County of New York. Movant intends to remove that action to the Southern District of New York on or around June 19, 2009, and request that it be referred to Judge Marrero as related to *Anwar*.

Kazanoff). On June 10, 2009, Judge Marrero so-ordered a stipulation pursuant to which the parties agreed that the *Anwar* plaintiffs shall file a second consolidated amended complaint.

On April 6, 2009, over three months after the first complaint was filed in New York, plaintiff in *Headway* filed its complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. (The *Headway* complaint is Exhibit C to the Declaration of Peter E. Kazanoff). On May 22, 2009, Defendant Standard Chartered removed *Headway* to the Southern District of Florida. The case is currently pending before the Honorable Cecilia M. Altonaga and is still in its infancy. The majority of defendants have not yet been served, no responses to the complaint have been filed by any defendant, and no discovery has occurred.[4]

II. ARGUMENT

A. *Headway* Is Appropriate for Transfer Under 28 U.S.C. § 1407

The statute addressing transfer by the Panel, 28 U.S.C. § 1407, authorizes transfer if actions in different districts involve "one or more common questions of fact" and the Panel determines that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). These requirements are all satisfied here. *Anwar* and *Headway* both involve factual questions relating to whether the Fairfield Defendants, and other defendants named in both actions, performed adequate due

[4] The activity to date in the *Headway* case can be summarized as follows: On May 22, 2009, Defendant Standard Chartered filed a Notice of Removal and on June 9, 2009, it filed a Status Report on Removal. On June 8, 2009, Movant and Defendant Standard Chartered filed a joint motion to extend the date to respond to the complaint until twenty (20) days after any motion to remand was decided, which the Court granted on June 10, 2009. On June 16, 2009, the *Headway* plaintiff, Fairfield Greenwich Advisors LLC, Standard Chartered Bank International (Americas) Ltd., Standard Chartered Bank, Raul N. Mas, Robert Friedman, Rodolfo Pages, and John G. Dutkowski filed a Preliminary Joint Scheduling Report, corporate disclosure statements and statements of interested parties. (The *Headway* docket is Exhibit D to the Declaration of Peter E. Kazanoff).

diligence concerning investments with Madoff and BLMIS. Moreover, the just and efficient conduct of the actions would be promoted by centralization under Section 1407 because it would "eliminate duplicative discovery; avoid inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary." *In Re Tremont Group Holdings, Inc., Securities Litigation*, No. 09-MDL-2052 (J.P.M.L. June 11, 2009).

1. The Actions Involve Numerous Common Questions of Fact

The Panel has ordered centralization where, as here, the complaints share the same "factual backdrop." *See In re Bayou Hedge Funds Investment Litig.*, 429 F. Supp. 2d 1374, 1376 (J.P.M.L. 2006) (ordering centralization of cases on the grounds that "[t]he alleged improprieties regarding the [defendant hedge funds] forms the factual backdrop to all actions presently before the Panel."). Indeed, in a recent decision involving facts similar to the ones at issue here, the Panel transferred two actions against another hedge fund group relating to investments in Madoff from the District of Massachusetts to the Southern District of New York, where eleven other actions against the hedge fund group were already pending, on the grounds that the adequacy of the hedge fund group's due diligence of Madoff and BLMIS was the "common denominator" in all the actions. *In Re Tremont Group Holdings, Inc., Securities Litigation*, No. 09-MDL-2052.

The complaints in *Anwar* and *Headway* unquestionably share the same factual backdrop. *First*, the genesis of both complaints is plaintiffs' investments in certain Fairfield Greenwich funds[5] that invested in Madoff. *Anwar* Compl. ¶ 95, *Headway* Compl. ¶ 1. *Second*, both complaints involve an alleged disparity between the extent of due diligence the Fairfield

[5] *Headway* concerns investments made in the Fairfield Sentry Limited Fund ("Sentry") and Fairfield Sigma Limited Fund ("Sigma"). *See Headway* Compl. ¶ 2. Plaintiffs in *Anwar* purport to represent all investors in Sentry, Sigma and two other Fairfield Greenwich funds, Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. *See Anwar* Compl. ¶ 2.

Defendants represented was being done in marketing materials and the due diligence actually undertaken. *See Anwar* Compl. ¶ 123 (Fairfield's claims of maintaining full transparency to Madoff accounts allegedly "were knowingly false when made because there was no transparency (much less 'full'), and no access (much less 'privileged') to Madoff's operations."); *Headway* Compl. ¶ 83 ("FGG's claim of seeking full transparency from its managers is nothing short of disingenuous given the reported secrecy of Madoff and BMIS."). In support of their allegations, the complaints refer to the same or substantially similar quotes from marketing documents. *See e.g. Anwar* Compl. ¶ 122; *Headway* Compl. ¶ 83. *Third*, both complaints claim that defendants missed or disregarded several alleged red flags which allegedly should have alerted them to Madoff's fraud. *See e.g. Anwar* Compl. ¶ 202 (Fairfield Defendants failed to "follow-up on 'red flags' that would have caused them to discover that Madoff was conducting [a] Ponzi scheme."); *Headway* Compl. ¶ 72 ("[T]he Defendants had more than enough warning signs that Madoff-related funds should be viewed with a heightened sense of skepticism."). Indeed, there is striking overlap in the alleged 'red flags' identified in each complaint. *See e.g.* Compl. *Headway* ¶ 69 (citing, *inter alia*, Madoff's alleged need for secrecy and the size of Madoff's auditors as red flags); *Anwar* Compl. ¶¶ 113, 115 (same).

Anwar and *Headway* thus are based on the same core questions of fact, including but not limited to, the following:

(1) Whether the Fairfield Defendants performed appropriate due diligence on Madoff. *Anwar* Compl. ¶ 159(c)(vi); *Headway* Compl. ¶ 119(e).

(2) Whether the Fairfield Defendants would have been able to discover the Madoff fraud had they followed up on the alleged 'red flags.' *Anwar* Compl. ¶ 202; *Headway* Compl. ¶ 72, and

(3) Whether the Fairfield Defendants made misleading statements in marketing materials regarding the scope of due diligence on Madoff. *Anwar* Compl. ¶¶ 125-142, 164-195; *Headway* Compl. ¶¶ 81-85.

In addition to sharing common factual allegations, both complaints seek recovery under theories of negligence/gross negligence, unjust enrichment/imposition of constructive trust, and breach of fiduciary duty. *Anwar* Compl. ¶¶ 196-209, 216-22; *Headway* Compl. ¶¶ 115-126, 146-150. That *Anwar* contains additional claims and legal theories does not make transfer improper. *See e.g. In re M3Power Razor Sys. Marketing & Sales Practices Litigation*, 398 F. Supp.2d 1363, 1364 (J.P.M.L. 2005) ("The presence of differing legal theories is outweighed when the underlying actions...arise from a common factual core.").

Given these core similarities, *Headway* should be coordinated or consolidated with *Anwar* in the Southern District of New York.

2. Centralization Will Further the Convenience of the Parties and Witnesses

The *Headway* plaintiff is already part of the putative *Anwar* class, as in one of the consolidated cases pending before Judge Marrero, *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*, 09-CV-2410, the *Headway* plaintiff alleges to have made its investments through Defendant Standard Chartered. Especially given their factual overlap, the actions "will likely focus on a significant number of common events, defendants and/or witnesses." *In Re Tremont Group Holdings, Inc., Securities Litigation*, No. 09-MDL-2052. Moreover, as reflected in the chart below, there is significant overlap among the defendants in *Anwar* and *Headway*. Virtually all of the defendants named in *Headway* are named in actions that have been consolidated into *Anwar*.

***Headway* Defendant**	**Also Named in Actions Consolidated Into *Anwar***
Fairfield Greenwich Group	Yes
Fairfield Greenwich Advisors	Yes
Fairfield Greenwich Limited	Yes
Fairfield Greenwich (Bermuda) Ltd.	Yes
Walter M. Noel, Jr.	Yes
Jeffrey Tucker	Yes
Andres Piedrahita	Yes
Amit Vijayvergiya	Yes
Citco Fund Services (Europe) B.V.	Yes
PricewaterhouseCoopers LLP	Yes
Standard Chartered	Yes
Standard Chartered Bank	No
Standard Chartered Individuals	No

As a result of the significant party and factual overlap, depositions of many of the same individuals are almost certain, and many of the same documents also will almost certainly be demanded for inspection. For the same discovery to be conducted across different judicial districts would be both duplicative and wasteful of the parties' and the witnesses' resources. Furthermore, given the size of Madoff's fraud and the fact that the Fairfield Greenwich funds represented the largest "feeder-funds" into BLMIS, there is a possibility that new tag-along actions will be brought against Movant and other defendants. The potential tag-along actions present an additional risk that judicial resources will be wasted in the absence of centralization.

See In re Indus. Wine Contracts Secs. Litig., 386 F. Supp. 909, 912 (J.P.M.L. 1975) (noting the potential for tag-along actions as a consideration in favor of centralization).

If the actions are centralized, counsel will be able to "apportion their workload and otherwise combine forces to effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities." *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981). Most documents and witnesses are in New York, but to the extent that parties, witnesses and documents are located elsewhere, New York is also a convenient and central travel destination. *See In re Fed. Nat'l Mortgage Ass'n Secs., Derivatives and ERISA Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) (transferring to a district that was "readily accessible for parties and witnesses").

3. Centralization Will Promote the Just and Efficient Conduct of the Actions

Centralization will promote the just and efficient conduct of the actions. *Headway* is in its procedural infancy – the majority of defendants have not yet been served, no defendant has responded to the complaint, and no discovery has occurred. As such, the *Headway* Court has not had to invest significant time and resources becoming familiar with and managing the case. Furthermore, if the case is transferred to the Southern District of New York, it could easily be placed on the same pretrial program that all the other federal court lawsuits against Movant are following according to Judge Marrero's orders in *Anwar*. *See In re Lehman Brothers ERISA Litigation*, 598 F. Supp. 2d 1362, 1364 (J.P.M.L. 2009) (Transfer to a single district has the "salutary effect of placing all related actions before one court which can formulate a pretrial program that...ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.").

B. *Headway* Should be Transferred to the Southern District of New York

Movant respectfully requests that the Panel transfer *Headway* to the Southern District of New York and, with the consent of that Court, to Judge Marrero. *Headway* is the only one of the eleven federal court actions against Movant that is not already in the Southern District of New York and consolidated before Judge Marrero. Moreover, many of the parties, witnesses, and documents are located in and around that District.

1. Every Federal Court Action Against Movant Has Been Consolidated Before Judge Marrero in the Southern District of New York Except for *Headway*

Multidistrict litigation cases are frequently transferred to a forum where one or more of the actions is already pending. *See e.g. In re Lehman Brothers ERISA Litig.*, 598 F. Supp. 2d at 1364 (transferring to the Southern District of New York, where eight of the seventeen actions were already pending); *In re Fed. Nat'l Mortgage Ass'n Secs., Derivatives and "ERISA" Litig.*, 370 F. Supp. 2d at 1361 (transferring to a court where seven out of ten cases were already pending); *In re Marsh & McLennan*, 429 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006) (transferring a case from the Eastern District of New York to the Southern District of New York where six other cases were already pending). Here, every federal court lawsuit against Movant is before Judge Marrero in the Southern District of New York and has been consolidated into *Anwar* except for *Headway*.

Cases also are generally centralized in the district where "first-filed and most procedurally advanced actions" are located. *See e.g. In re Land Rover LR3 Tire Wear Products Liability Litig.*, 598 F. Supp. 2d 1384, 1386 (J.P.M.L. 2009). *Anwar* is more advanced than *Headway*, since it was removed to the Southern District of New York in early January 2009, three months before *Headway* was filed in Florida state court and over four months before

Headway was removed to the Southern District of Florida. Judge Marrero is already familiar with the claims made in *Anwar*. The parties have held a Rule 26(f) conference and filed a joint Rule 26(f) Report. Briefing on the appointment of lead plaintiff and lead counsel for federal securities law claims pursuant to the Private Securities Litigation Reform Act ("PSLRA") has been completed, and the parties are awaiting a ruling. On June 10, 2009, Judge Marrero so-ordered a stipulation pursuant to which the parties agreed that plaintiffs shall file a second consolidated amended complaint.

By contrast, *Headway* has not been active with the exception of scheduling matters. In fact, the *Headway* plaintiff has yet to serve a majority of the named defendants, and the parties have not appeared before the court. For these reasons as well, transfer of *Headway* to the Southern District of New York for coordination or consolidation with *Anwar* is appropriate.

2. Many of the Witnesses, Documents and Parties are Located in New York

Movant and other defendants, as well as many of the potential witnesses and relevant documents, are located in the Southern District of New York. By contrast, none of the Fairfield entities named in *Headway* are based in Florida and none of the Fairfield individuals named in *Headway* reside in Florida (in fact, several have no contacts with Florida at all). Moreover, even the *Headway* plaintiff is a *Panamanian* corporation – although it purports to have an "administrative office" in Coral Gables, Florida. *See Headway* ¶ 2. Therefore, the Southern District of New York is the appropriate court for pre-trial proceedings in these actions. *See e.g. In re Lehman Brothers ERISA Litigation*, 598 F. Supp. 2d at 1364 (transferring to the Southern District of New York because the parties, witnesses and documents were likely to be located there); *see also In re Marsh & McLennan*, 429 F. Supp. 2d at 1378 (same).

Furthermore, it can come as no surprise to the *Headway* plaintiff that New York is a forum in which it must litigate a dispute arising out of its investment in certain Fairfield Greenwich funds because, upon information and belief, it irrevocably submitted to the jurisdiction of the New York courts when signing the subscription agreement pursuant to which it invested. *See* accompanying Declaration of Peter E. Kazanoff, dated June 18, 2009.

III. CONCLUSION

For all of the foregoing reasons, transfer of *Headway* to the Southern District of New York will further the "convenience of [the] parties and witnesses and will promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). Therefore, Movant respectfully requests that this Panel enter an order transferring *Headway* to the Southern District of New York, and, with the consent of that Court, to Judge Marrero, for coordinated or consolidated pretrial proceedings with *Anwar*, according to Judge Marrero's discretion. *See, e.g.*, *In re Franklin Nat'l Bank Secs. Litig.*, 393 F. Supp. 1093, 1095 (J.P.M.L. 1975) ("[W]hether and to what extent the pretrial proceedings should be coordinated or consolidated is strictly the province of the transferee judge.").

Dated: June 18, 2009
New York, New York

Respectfully submitted,

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