BOIES, SCHILLER & FLEXNER LLP

575 LEXINGTON AVENUE • 7TH FLOOR • NEW YORK, NY 10022 • PH. 212.446.2300 • FAX 212.446.2350

July 19, 2010

VIA HAND DELIVERY

Judge Victor Marrero
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: ***Anwar, et al.* v. Fairfield Greenwich Limited, *et al.***
Master File No. 09-CV-00118 (VM)(THK)

Dear Judge Marrero:

Pursuant to the Court's direction, plaintiffs submit this letter brief concerning the recent Supreme Court decision in *Morrison v. National Australia Bank,* 2010 WL 2518523 (June 24, 2010).

I. Because Plaintiffs' Purchases of Fairfield Fund Shares Occurred in the United States, Plaintiffs' §10(b) Claims Are Not Affected by *Morrison*

In *Morrison*, the Supreme Court held that claims of securities fraud under §10(b) of the Exchange Act are limited to fraud "in connection with the purchase or sale of a security listed on an American stock exchange, and the *purchase or sale of any other security in the United States*." *Id.*, at *14 (2010) (emphasis added). *Morrison* involved transactions in an Australian stock in which "all aspects of the purchases . . . occurred outside the United States." *Id.* The facts here, however, show that the transactions in the securities at issue – shares in the Fairfield Sentry ("FS") and Sigma Funds[1] – took place in the United States under traditional principles of contract formation.

Among other crucial differences between this case and *Morrison*, are that Fairfield Greenwich Group's ("FGG") principal place of business is in the United States, the purchaser of Fund shares was required to transfer funds into the United States, and the purchase contract was not final until accepted by the seller, which occurred at FGG's U.S. headquarters.[2] Moreover, the subscription agreements by which shares in the Sentry Fund were purchased expressly made that transaction subject to New York law, and to the jurisdiction of U.S. courts. Although plaintiffs

[1] Although Fairfield Sigma Fund was denominated in euros rather than dollars, the relevant facts concerning place of sale are the same as for Sentry. Defendants' July 1, 2010 letter to the Court recognizes that *Morrison* has no effect on plaintiffs' claims relating to the two Greenwich Sentry funds (*Morrison* "is dispositive of...claims...on behalf of investors in the *offshore* funds") (emphasis added), which were organized under U.S. law and marketed to U.S. investors.

[2] In light of the intervening change in law effected by *Morrison*, plaintiffs should be allowed to allege facts in support of the matters discussed in this letter in an amendment to the current complaint; all facts described in this letter reflect counsel's good faith belief and understanding through investigation of these matters.

believe facts such as these are dispositive of the *Morrison* issue, at the very least, the question cannot be resolved on a motion to dismiss.

To be sure, the Supreme Court in *Morrison*, in overturning the longstanding "conduct" and "effects" tests used for decades in this and other Circuits, sought to develop a "bright-line" rule to avoid "the unpredictable and inconsistent application of §10(b) to transnational cases." *Morrison*, at *8, 18-19. The Supreme Court's new standard makes it unnecessary to weigh all of the "conduct" and "effects" involved in a securities transaction. Nor does the ability to sue under §10(b) now turn on the nationality or residence of the plaintiff, but rather upon the location of the sales transaction. Nothing in *Morrison*, however, states that the questions concerning the location of a sale of securities are to be answered solely by looking to the form of the transaction, or that courts must ignore traditional indicia used to determine the place at which a sale occurs – in fact, the express holding limiting §10(b)'s coverage to non-exchange transactions "in the United States" suggests just the opposite.

Because New York law governs the Fairfield subscription agreements, New York law determines the place of sale. A sale of securities takes place when and where the contract of sale – here the Subscription Agreement – is made. *See Finkel v. Stratton Corp.*, 962 F.2d 169, 173 (2d Cir. 1992). Under New York law, a contract is made in the place where the final act necessary for the formation of the contract occurs. *See Perrin v. Pearlstein*, 314 F.2d 863, 867 (2d Cir. 1963); *Fremay, Inc. v. Modern Plastic Machinery Corp.*, 222 N.Y.S.2d 694, 697 (1st Dep't. 1961). *See also* Restatement (Second) of Contracts §64 cmt. c (1981) ("the contract is created at the place where the acceptor speaks or otherwise completes his manifestation of assent"); Corbin on Contracts §79 (1952) ("the place at which the offeree speaks the words of acceptance"); *Goshen v. Mut. Life Ins. Co. of N.Y.*, 774 N.E. 2d 1190, 1195 (N.Y. 2002) (out-of-state claimants can recover for consumer deceit under N.Y. Gen. Bus. Law §349 if "the transaction in which the consumer is deceived . . . occur[s] in New York"); *People ex rel. Spitzer v. H&R Block, Inc.*, 16 Misc.3d 1124(A), *8 (N.Y. Sup. Ct. 2007) (sale occurred in New York under §349 where "customer completed the transaction by depositing his or her funds in a New York money market account").[3]

By the express terms of the Fairfield Subscription Agreements, there was no contract and no sale unless and until the Fund accepted the subscription. *See, e.g.*, FS PPM 7/1/03, App. B at 1 ("If the Fund accepts this subscription, Subscriber shall become a shareholder of the Fund. . ."). This decision – to accept or reject subscriptions – was made by the Funds and if necessary, "in consultation" with the investment manager, FGBL. *Id.* The Fund, however, had no employees, either in the BVI or elsewhere. *See* FS Directors' Report 2007/2006, at 11. However, the Funds' principal and controlling director, Walter Noel, worked in New York. *See* SCAC ¶124. FGBL, while nominally a Bermuda company, conducted extensive operations in New York, where most of its officers and directors were based.[4] Accordingly, it is plausible to infer that the Subscription Agreements were accepted in New York where the Funds, FGBL and FGG actually ran their

[3] New York law does not determine the place of a transaction by looking at where administrative acts may occur which merely implement the completed contract of sale. Accordingly, it is irrelevant that Citco Netherlands may have recorded purchases and sales, issued shares of stock or otherwise administered the Funds. *Cf., e.g., Gordon v. Burr*, 366 F.Supp.166, 170 (S.D.N.Y. 1973) (transferring shares on a company's books is "purely ministerial").

[4] According to its SEC investment advisor application, most of FGBL's officers and directors were persons located at FGG's offices in New York. *See* FS PPM 8/14/06, Appendix 2 at 8, Item 6.

businesses (including management of worldwide marketing), and not in the BVI or Netherlands, as defense counsel suggested on the July 12 conference call.[5] In addition, the Subscription Agreement required buyers to wire payment (another essential act to completing the purchase) to HSBC Bank in New York. *See* FS PPM 7/1/03, App. B at 2. And as noted, the Agreement expressly provided it "shall be governed by and enforced with the laws of New York," and that purchasers – nearly all of them foreign according to defendants – "irrevocably submit to the jurisdiction of New York courts . . . and may not claim that a Proceeding [concerning the Subscription Agreement] has been brought in an inconvenient forum." *Id.* at 5-6.

In determining, as *Morrison* requires, whether a purchase or sale took place "in the United States," courts need not examine all of the effects of the transaction or where the fraudulent conduct occurred, but should look at the reality, not the form, of the transaction. Plaintiffs submit that when the seller's true principal place of business is in the U.S., and final acceptance of the buyer's offer to purchase shares occurs in the U.S., the transaction cannot be deemed "foreign" simply because the seller created an investment vehicle under BVI law and conducted certain ministerial acts abroad. Certainly that should be so when the sales agreement drafted by the seller specifically assured the purchaser that the sale would be governed by the law of a U.S. state and that disputes will be resolved in a U.S. court, no matter how inconvenient that might be for the purchaser. Nothing in *Morrison* requires allowing such an obvious ploy by which a U.S.-based firm could deny its customers the protections of U.S. law, let alone when – at the same time – such a firm seeks to invoke the benefits of U.S. law and courts for itself.

II. Alternatively, If Plaintiffs' Purchases of Fund Shares Did Not Occur in the United States, Defendants' Arguments Require Upholding Plaintiffs' Common Law Claims under SLUSA

If the Court were to accept defendants' argument that the sales of Fund shares occurred outside the United States (and the §10(b) claims are therefore barred under *Morrison*), then it should necessarily reject defendants' argument that plaintiffs' common law claims are pre-empted by SLUSA, 15 U.S.C. §78bb.[6]

SLUSA applies to transactions "in connection with the purchase or sale of a covered security," §78bb(f)(1), and uses language nearly identical to §10(b), which applies to transactions "in connection with the purchase or sale of any security." There is nothing in the text of SLUSA indicating that Congress intended SLUSA to apply to extra-territorial transactions. Accordingly, the same language that the Court interpreted in *Morrison* as not applicable to foreign sales under §10(b) must be given the same meaning under SLUSA. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34

[5] The heightened pleading standard of Fed. R. Civ. P. 9(b) only applies to averments of fraud and not to other allegations in a fraud complaint. *See Spira v. Nick*, 876 F.Supp. 553, 560 n.4 (S.D.N.Y. 1995). Because allegations regarding the location where sale of Fund shares occurred do not aver fraud, Rule 9(b) does not apply to them.

[6] *See* FG Motion to Dismiss ("MTD") Memo. at 20-24; PwC Netherlands MTD Memo. at 17-18; PwC Canada MTD Memo. at 15-17.

(2005). Therefore, if plaintiffs' Fund purchases are not (as defendants contend) covered by §10(b), they necessarily are not covered by SLUSA and not preempted.[7]

On the other hand, if the Court were to bar plaintiffs' common law claims based on defendants' argument that the relevant purchases for SLUSA pre-emption purposes were Madoff's purported transactions in S&P100 stocks and options (*see* note 6 above; plaintiffs vigorously oppose this argument, *see* Pl. Memo. in Opp. to FG MTD at 85-93), then those same transactions would clearly allow plaintiffs to bring §10(b) claims because plaintiffs would have been defrauded "in connection with the purchase or sale" of securities that are "listed on an American stock exchange." *Morrison*, at *14.

In short, defendants cannot have it both ways. The nearly identical "in connection with" language that appears in §10(b) and SLUSA must be interpreted and applied to the facts here *in pari materia*. However, in contrast to defendants' position (which turns on interpretation of the "in connection with" language), plaintiffs' view of the application of SLUSA to the facts here (*i.e.*, that plaintiffs did not purchase SLUSA "covered securities" because Fund shares are not traded on the stock exchanges specified in SLUSA) does logically enable the Court both to uphold plaintiffs' §10(b) claims and to find that SLUSA preemption is not applicable.

III. Alternatively, If Plaintiffs' Federal Securities Claims Are Not Actionable, Plaintiffs Should Be Granted Leave to Assert RICO Claims

Wire fraud and mail fraud are predicate acts for liability (if other applicable requirements are met) under 18 U.S.C. §1962 (a) (c) and (d) ("RICO"). Although the facts here would clearly support a RICO claim, plaintiffs did not plead it previously because the Private Securities Litigation Reform Act ("PSLRA") provides that "no person may rely upon any conduct that would have been *actionable as fraud in the purchase or sale of securities* to establish a [RICO violation]." 18 U.S.C. § 1964(c) (emphasis added). If, however, as defendants have argued, *Morrison* renders the conduct that plaintiffs allege not "actionable" as securities fraud, then the PSLRA preclusion of RICO claims does not apply and plaintiffs should be allowed to amend to plead an alternative claim for violation of RICO.

The limitations on extraterritoriality adopted in *Morrison* do not bar such a RICO claim. Section 10(b), at issue in *Morrison* requires that fraud occur "in connection with the purchase or sale of [a] security" and involves a judicially-implied remedy under Rule 10b-5. RICO, by contrast, does not require that predicate acts of fraud occur in connection with a securities transaction, and it includes an express private remedy. Moreover, 18 U.S.C. §1962(a) expressly covers predicate acts by an "enterprise" which "is engaged in, or the activities of which affect, interstate or *foreign* commerce" (emphasis added). Here, defendants "engaged in . . . foreign commerce" from their base in the United States, and their U.S. activities affected foreign

[7] As Justice Breyer recognized in his concurrence in *Morrison*, "state law . . . may apply to the fraudulent activity," even if the federal securities laws do not. *Morrison*, at *14 (Breyer, J., concurring). Although the Supreme Court in *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006), found that SLUSA applied even though the plaintiff had no federal securities claims, it did so only because it found that the "holder" claims which plaintiff was asserting were "in connection with the purchase or sale of a security" under §10(b). *Id.* at 84-87. Here, however, if defendants' §10(b) argument were accepted, plaintiffs by definition did not acquire their Fund shares "in connection with" a purchase or sale covered by §10(b).

commerce. The wire fraud statute similarly applies to foreign commerce. *See* §18 U.S.C. §1343. Because of these differences, RICO applies where, as here, the defendants' actions "evidence a clear connection between the alleged fraud and United States interests." *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663-64 (9th Cir. 2004)); *Liquidation Com'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008) ("We have no doubt that under these circumstances, Congress would intend [plaintiff] to have recourse to American courts and remedies.").[8]

Indeed, in *Morrison* itself, the Court recognized that the wire fraud statute (the violation of which would be among the predicate acts in the proposed RICO claim) does not require any connection to securities transactions in the United States. The Court distinguished *Pasquantino v. United States*, 544 U.S. 349 (2005), where defendants were convicted for ordering liquor over the phone from Maryland with the intent to smuggle it into Canada, because "Section 1343 prohibits 'any scheme or artifice to defraud,' – fraud *simpliciter*, without any requirement that it be 'in connection with' any particular transaction or event." *Morrison*, at *13. Just as here, the "offense [under §1343] was complete the moment [defendants] executed the scheme inside the United States, . . . it was '[t]this domestic element of [defendants'] conduct'" which gives rise to the liability. *Id.*; *see also Id.* at *14 (Breyer, J. concurring) (while §10(b) does not apply to non-U.S. transactions, "other federal fraud statutes, *see, e.g.*, 18 U.S.C. §1341 (mail fraud), §1343 (wire fraud), may apply").

Because the Fairfield and Citco defendants extensively used the U.S. wires (and mail) to engage in a pattern of fraudulent conduct, and did so as part of an enterprise, RICO claims appropriately may be asserted. This is not a "garden-variety" case of misrepresentations or omissions in a single securities offering, but involves defendants' alleged U.S.-based fraudulent solicitation of billions of dollars that was purportedly to be invested in this country, over the course of more than a decade, to finance the largest financial fraud ever committed. The RICO claim should be allowed as an alternative claim in the event plaintiffs do not have actionable claims under §10(b).

Respectfully yours,

David A. Barrett

cc: All counsel in *Anwar*

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by plaintiffs.

SO ORDERED.

2-27-10
DATE

VICTOR MARRERO, U.S.D.J.

[8] Although the cited decisions treat the applicability of RICO as an issue of subject matter jurisdiction, an approach that might be reconsidered in light of *Morrison* (at *4-5), the cases' basic holdings that Congress intended RICO to apply to the conduct alleged clearly remain applicable.