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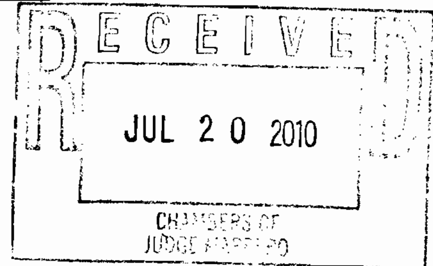
BY HAND

July 19, 2010

Re: *Anwar, et al. v. Fairfield Greenwich Limited, et al.*, Master File No. 09-CV-0118 (VM)



Hon. Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear Judge Marrero:

Defendants respectfully submit this letter brief concerning the effect of the Supreme Court's recent opinion in *Morrison v. National Australia Bank Ltd.*, No. 08-1191, 2010 WL 2518523 (June 24, 2010) on plaintiffs' claims under Section 10(b), Rule 10b-5 promulgated thereunder, and Section 20(a) of the Securities Exchange Act of 1934 (collectively, the "federal securities law claims").[1]

A straightforward application of the bright-line "transactional test" established by *Morrison* requires the dismissal of the federal securities law claims asserted by plaintiffs who purchased stock in Fairfield Sentry Limited and Fairfield Sigma Limited, offshore

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[1] This letter brief is submitted jointly on behalf of the following defendants against whom plaintiffs have asserted federal securities law claims: Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, Fairfield Risk Services Ltd., Fairfield Heathcliff Capital LLC, Walter M. Noel, Jeffrey H. Tucker, Andrés Piedrahita, Amit Vijayvergiya, Daniel E. Lipton, Mark McKeefry, Richard Landsberger, Charles Murphy, Andrew Smith, Citco Fund Services (Europe) B.V. ("CFSE"), Citco (Canada) Inc. ("CCI"), The Citco Group Limited ("CGL"), PricewaterhouseCoopers LLP ("PwC Canada"), PricewaterhouseCoopers Accountants Netherlands N.V. ("PwC Netherlands"), and PricewaterhouseCoopers International Limited ("PwC International"). *See* Counts 3, 4, 18, 19, 26 and 27 of the Second Consolidated Amended Complaint ("SCAC"). This letter brief supplements these defendants' pending motions to dismiss those claims for failure to state a claim pursuant to Rule 12(b)(6).

hedge funds that are foreign companies, managed by a foreign entity, and whose stock was not listed or traded on a U.S. exchange.[2]

The relevant record facts are as follows:

- Plaintiffs define themselves as members of a purported class of shareholders and/or equity holders of four funds: Fairfield Sentry Limited and Fairfield Sigma Limited (the "Offshore Funds") and Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P. (the "Domestic Funds"). Second Consolidated Amended Complaint ("SCAC") ¶ 2.

- Plaintiffs' alleged purchases of securities were their purchases of shares in the Offshore Funds and limited partnership interests in the Domestic Funds. SCAC ¶ 352; *see also* Plaintiffs' Consolidated Opposition to the Fairfield Greenwich Defendants' Motions to Dismiss (Docket Entry ("D.E.") 418) at 85 ("Plaintiffs' claims are based on their purchases of shares in Fairfield Sentry Limited and Fairfield Sigma Limited, both British Virgin Islands ("BVI") companies; and of limited partnership interests in Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P., which are Delaware limited partnerships.").

- The Offshore Funds, Fairfield Sentry Limited and Fairfield Sigma Limited, are both British Virgin Islands corporations not traded on any domestic exchange. SCAC ¶¶ 170-171.[3]

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[2] Notably, Fairfield Sentry Limited was listed on the Irish Stock Exchange. *See* 10/01/04 Sentry PPM (Docket Entry ("D.E.") 363-8) at iv. In *Morrison*, Ireland submitted an amicus brief arguing against the extraterritorial application of § 10(b). 2010 WL 2518523, at *12.

[3] *See also, e.g.*, Fairfield Sentry PPMs, dated July 1, 2003 (D.E. 363-8), October 1, 2004 (D.E. 363-9), and August 14, 2006 (D.E. 363-2), and Fairfield Sigma PPMs, dated February 16, 2006 (D.E. 369-16 and 369-17) and December 1, 2008 (D.E. 363-3). Copies of these PPMs, and the incorporated form subscription agreements, are attached to the Declarations of Michael Thorne, Esq., (D.E. 363) and Timothy A. Duffy (D.E. 369), submitted in support of the FG Defendants' and PwC Canada's respective motions to dismiss the SCAC. Because these documents are incorporated into the SCAC, they may be considered by the Court on this motion to dismiss. *See ATSI Commc'ns, Inc. v. Shaar Fund Ltd.*, 493 F.3d 87, 98 (2d. Cir. 2007).

- Plaintiffs purchased their shares in the Offshore Funds by submitting their completed subscription agreements to the Offshore Funds through their administrator, Citco Fund Services (Europe) B.V. ("CFSE"), *in Amsterdam*, and sending a copy of the completed agreement to the Offshore Funds' investment manager, FGBL, *in Bermuda*. 2/16/06 Sigma PPM (D.E. 369-16) at 13; 10/01/04 Sentry PPM (D.E. 363-9) at 13; 08/14/06 Sentry PPM (D.E. 363-2) at 14; form subscription agreements incorporated in 12/01/08 Sigma PPM (D.E. 363-3) at 2 and 7/01/03 Sentry PPM (D.E. 363-8) at 3. Plaintiffs confirm this procedure: "Plaintiffs sent their subscription documents directly to [CFSE] ... and received investment confirmations from [CFSE]." SCAC ¶ 328.

- Plaintiffs' purchases occurred when the Offshore Funds accepted the subscription agreements. *See* form subscription agreements incorporated in 7/01/03 Sentry PPM (D.E. 363-8) at 2 and 12/01/08 Sigma PPM (D.E. 363-3) at 1.

- The shares in the Offshore Funds issued to a subscriber were "issued in registered, book-entry form" and maintained by the Funds' registrar, CFSE, *in Amsterdam*. *See* form subscription agreements incorporated in 7/01/03 Sentry PPM (D.E. 363-8) at 6 and 12/01/08 Sigma PPM (D.E. 363-3) at 8; *see also* SCAC ¶ 157 (CFSE "served as the... registrar... for Fairfield Sentry and Fairfield Sigma").

- Subscribers sent redemption requests to CFSE *in Amsterdam*. *See* form subscription agreements incorporated in 7/01/03 Sentry PPM (D.E. 363-8) at RR-1 and 12/01/08 Sigma PPM (D.E. 363-3) at RR-1.

Thus, each step necessary for plaintiffs to complete their purchases of shares in the Offshore Funds – from delivery of their subscription agreements to acceptance of their subscriptions to registry of the foreign shares – occurred outside the territory of the United States. This transactional process is the "exclusive focus" of *Morrison*'s bright-line "transaction test." *See* 2010 WL 2518523, at *12.

Plaintiffs admit that the transactions with respect to the Offshore Funds were foreign. *See* SCAC ¶ 170 ("investments in Fairfield Sentry were made from outside New York"); SCAC ¶ 171 ("Fairfield Sigma was marketed to foreign investors, and the investments were made from outside New York."); Plaintiffs' Consolidated Opposition to the Fairfield Greenwich Defendants' Motions to Dismiss (D.E. 418) at 103 ("[The Fairfield] Defendants here did not issue, sell, or distribute securities to plaintiffs 'within or from' New York.");[4]

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[4] This allegation was made in connection with plaintiffs' effort to save their state law claims from Martin Act preemption, but *Morrison* has no bearing on the application here of

Plaintiffs' Memorandum in Opposition to Motions to Dismiss by the Citco Defendants, Pilgrim and Francoeur (D.E. 420) at 40 ("The Citco Defendants are not alleged to have issued, sold, or distributed shares of the Funds within or from New York. Indeed, all of Citco's operations involved in this case were run from outside the United States.").

Plaintiffs likely will seize upon some aspects of the record that are associated with the United States to support their argument that this Court should create the first exception to the clear holding in *Morrison.* But *Morrison* requires exclusive focus on the place of the transactions, not a trolling through the record for U.S. contacts as under the now over-ruled "conduct" test and "effects" test. As Justice Scalia observed in *Morrison*: "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 2010 WL 2518523, at *11.[5]

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During the July 6 conference call with the Court, Your Honor asked if, after *Morrison* is applied, there would be enough plaintiffs to support the application of SLUSA, which requires more than 50 plaintiffs. The short answer is yes. Dismissal of the federal securities law claims asserted by plaintiffs who invested in the Offshore Funds would have no impact on the *Anwar* class size. Those plaintiffs still would be asserting state law causes of action. *Cf. In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 440, 442-43 (S.D.N.Y. 2001) (Marrero, J.) (dismissing federal securities claims for failure to adequately plead reasonable reliance and dismissing state law causes of action under SLUSA); *Cinicolo v. Morgan Stanley Dean Witter & Co.*, No. 01 Civ. 6940(GBD), 2004 WL 2848542, at *5-6 (S.D.N.Y. Dec. 9, 2004) (dismissing state law claims on SLUSA grounds in action where no

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the Martin Act, a state statute that applies when "a substantial portion of the events giving rise to a claim occurred in New York." Unlike the pure transactional inquiry required under *Morrison*, the jurisdictional analysis under the Martin Act considers factors beyond the location of plaintiffs' securities purchases, including any alleged misconduct that occurred in New York. *See, e.g.*, Reply Memorandum in Further Support of the Motion to Dismiss the SCAC on behalf of the FG Defendants (D.E. 472) at 8-9 (citing, *inter alia*, *Meridian Horizon Fund, LP v. Tremont Group Holdings, Inc.*, No. 09 Civ. 3708(TPG), 2010 WL 1257567, at *8 (S.D.N.Y. Mar. 31, 2010)).

[5] Thus, under *Morrison*, it is now irrelevant whether some alleged misconduct took place in the United States or whether some of the parties are located in the United States. This point is driven home by Justice Stevens' concurrence, wherein he observed that "under the Court's new test," hypothetical investors in a fraud masterminded and implemented in New York would "be barred from seeking relief under § 10(b)" where their purchases were abroad. 2010 WL 2518523, at *19.

federal securities claims alleged); *Winne v. Equitable Life Assurance Soc'y*, 315 F. Supp. 2d 404, 416-18 (S.D.N.Y. 2003) (same).

In addition, there are more than enough plaintiffs who did not invest in the Offshore Funds to meet the 50 person SLUSA requirement. Plaintiffs propose a single class including both investors in the Offshore Funds *and* investors in the Domestic Funds. *See* SCAC ¶ 2. As established in the briefing in this action on certain plaintiffs' remand motions, plaintiffs who invested in the Domestic Funds total over 50 persons and therefore satisfy the "covered class action" element of SLUSA even without counting the investors in the Offshore Funds.

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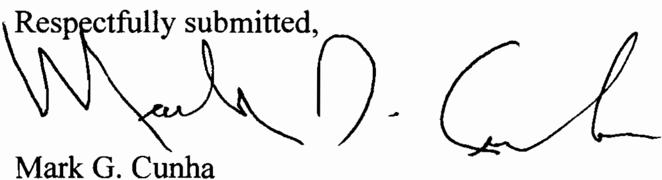
Adherence to the bright-line rule announced in *Morrison* prohibits the extraterritorial application of § 10(b) to the transactions in the Offshore Funds. This conclusion is mandated by the record before the Court, and there is nothing that plaintiffs can allege by amendment that would change those record facts and recast what are indisputably foreign transactions in foreign securities to avoid the effects of the *Morrison* decision.

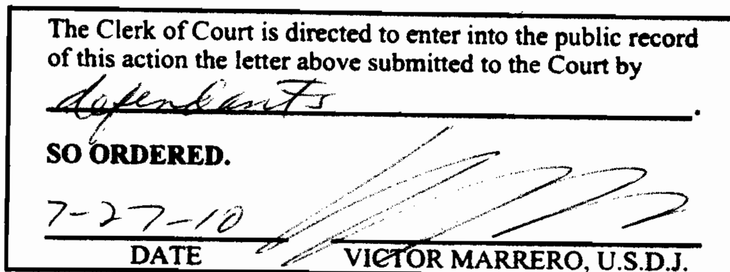
For the reasons set forth herein and based on the record before the Court, it is respectfully requested that the Court dismiss with prejudice the federal securities law claims asserted by plaintiffs who purchased shares in the Offshore Funds.

Respectfully submitted,



Mark G. Cunha

cc: United States Magistrate Judge Theodore H. Katz (by hand)
All Counsel in *Anwar* (by email)



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

SO ORDERED.

7-27-10
DATE

VICTOR MARRERO, U.S.D.J.