Anwar et al v. Fairfield Greenwich Limited et al Doc. 513

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ANWAR, et al.,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, et al.,

Defendants.

MASTER FILE NO.
09-CV-0118 (VM)

This Document Relates To: All Actions
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DEFENDANTS, CITCO FUND SERVICES (EUROPE) B.V., CITCO (CANADA) INC., CITCO BANK NEDERLAND N.V. DUBLIN BRANCH, CITCO GLOBAL CUSTODY N.V., CITCO FUND SERVICES (BERMUDA) LIMITED, AND THE CITCO GROUP LIMITED'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND REARGUMENT

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I. PRELIMINARY STATEMENT

Defendants Citco Fund Services (Europe) B.V. ("CFSE"), Citco (Canada) Inc. ("CCI"), Citco Bank Nederland N.V. Dublin Branch ("CBN"), Citco Global Custody N.V. ("CGC"), Citco Fund Services (Bermuda) Limited ("CFSB"), and The Citco Group Limited ("CGL"), make this Motion for Reconsideration and Reargument pursuant to Local Civil Rule 6.3, in order to bring to the Court's attention certain instances of clear error contained in the Court's August 18, 2010 Decision and Order (the "Opinion") on these Defendants' motions to dismiss Plaintiffs' Second Consolidated Amended Complaint (the "SCAC"). In denying in part the motions to dismiss, the Court overlooked controlling authority and pertinent portions of the factual record (as alleged in, or incorporated into, the SCAC) in connection with certain aspects of the Plaintiffs' federal securities and common law claims, as follows:

- The Court erred by applying a Rule 8(a) notice pleading standard to the ***culpable participation*** element of the § 20(a) claim against CGL. The only allegations that the Court looked to in finding that CGL acted with the requisite state of mind were allegations directed to all six "Citco Defendants" collectively. Whether or not such "lumping" is sufficient for Rule 8(a) purposes, these allegations cannot, as a matter of law, satisfy the heightened pleading standard applicable to the culpable participation element.

- The Court erred in failing to dismiss CFSB from the case once Defendants Ian Pilgrim and Brian Francoeur, CFSB's alleged employees, were dismissed. The SCAC makes clear that the only theory of liability potentially available against CFSB was one of respondeat superior "for the actions of Pilgrim and Francoeur."

- With respect to the Plaintiffs' third-party beneficiary claim for breach of the Administration Agreements, the Opinion is unclear as to whether this claim has been sustained only as to the "contracting parties" under the Administration Agreements, *i.e.*, CFSE and CCI, or if the claim must also be answered by CGL, CBN, CGC and CFSB. If the Court intended the latter result, then reconsideration is warranted, because ***only*** CFSE and CCI are alleged to have owed any obligations under the Administration Agreements.

- The Court erred in finding that CBN and CGC (referred to as the "Custodians") owed a fiduciary duty to the Plaintiffs, in light of the finding that neither CBN nor CGC had contact, or a "near-privity" relationship, with the Plaintiffs.

- The Court erred in applying a Rule 8(a) notice pleading standard to the ***actual knowledge*** element of the Plaintiffs' aiding and abetting claims against each of the six "Citco Defendants." The only allegations that the Court looked to in finding that each, separate defendant acted with the requisite state of mind were allegations directed to all six "Citco Defendants" collectively. Again, this "lumping" technique cannot satisfy the heightened pleading standard applicable to these claims' actual knowledge element.

It is respectfully requested that the Court reconsider each of these rulings, and where appropriate, grant the pertinent aspects of the motions to dismiss the SCAC.

II. APPLICABLE STANDARD FOR RECONSIDERATION AND REARGUMENT

A motion for reconsideration or reargument is governed by Rule 6.3 of the Local Civil Rules. "The major grounds justifying reconsideration are 'an intervening change in 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). "A request for reconsideration under Rule 6.3 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." *R.F.M.A.S., Inc. v. So*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009) (Marrero, J.); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Thomas v. iSTAR Fin., Inc.*, 520 F. Supp. 2d 478, 482-83 (S.D.N.Y. 2007) (Marrero, J.). 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).[1]

[1] Alternatively, a motion for clarification "affords courts a means of modifying their judgments in order to ensure that the record reflects the actual intentions of the court." *Ferguson v. Lion Holding, Inc.*, Nos. 02 Civ. 4258(PKL), 02 Civ. 4261(PKL), 2007 WL 2265579, at *3 (S.D.N.Y. Aug. 6, 2007).

III. ARGUMENT

A. The Court's Finding that Plaintiffs Sufficiently Alleged the Culpable Participation Element of the § 20(a) Claim Was Clear Error

The Court erred in applying a Rule 8(a) notice pleading standard to the "culpable participation" element of the § 20(a) claim against CGL. Despite expressly acknowledging that the Plaintiffs "must plead with particularity 'facts giving rise to a strong inference that [CGL] acted with the requisite state of mind,' *i.e.*, scienter," the Court concluded that this standard had been met even though the SCAC does not contain a single, pertinent allegation of fact ***specifically directed to CGL***. (Opinion at pp. 104-06). Rather, the Court improperly looked to a few generic allegations directed to all "Citco Defendants" collectively. Whether or not such generalized allegations are sufficient for Rule 8(a) purposes, they cannot, as a matter of law, satisfy the heightened pleading standard applicable to the culpable participation element.

As support for finding that culpable participation has been alleged as to CGL, the Court cites to Paragraph 338 of the SCAC, but that paragraph contains no allegations specifically directed to CGL. (Opinion at p. 106).[2] Rather, in that paragraph, the Plaintiffs "lump" together six different Citco-related defendants, including CGL, defining them collectively as "Citco," and allege, among other things, that "***Citco*** [not CGL in particular] blindly and recklessly relied on

[2] The only other paragraph of the SCAC cited by the Court in discussing CGL's alleged culpable participation is Paragraph 217 (*see* Opinion at p. 106), but that paragraph does not mention CGL and in fact is directed to the Fairfield Defendants' alleged knowledge and concealment of red flags regarding Madoff. There are no other paragraphs in the SCAC that even arguably would support a finding of culpable participation by CGL. None of the paragraphs in the § 20(a) count against CGL contain allegations that are directed to CGL's state of mind, and the allegations in the separate § 10(b) count against the purported primary violators, CFSE and CCI, are expressly directed ***solely*** to CFSE and CCI. (SCAC, Counts 26 and 27, ¶¶ 521-530).

information provided by Madoff and the Funds to calculate and disseminate the Funds' NAV." (SCAC ¶ 338).[3]

While the Court held that this "lumping" technique could be sufficient for Rule 8(a) purposes (*see* Opinion at pp. 91-94), no such finding was made in the context of meeting the heightened PSLRA pleading standard for scienter. Indeed, courts have consistently held that such inherently imprecise allegations are not sufficient to satisfy the PSLRA. *See, e.g., Cohen v. Stevanovich*, No. 09 Civ. 4003, 2010 WL 2670865, at *8-9, 14 (S.D.N.Y. July 1, 2010) (holding that plaintiffs failed to allege scienter or culpable participation where they "failed to plead any particularized facts as to any specific defendant, instead ***lumping*** [defendants] together") (emphasis added); *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 228 (S.D.N.Y. 2008); *see also Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants'.").[4] Permitting the Plaintiffs here to use this "lumping" technique as a means to allege scienter against CGL effectively renders the culpable participation element meaningless, and would improperly allow the § 20(a) claim to proceed based solely on allegations of CGL's "control" over its subsidiaries.

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[3] Read in context with the preceding paragraph (SCAC ¶ 337), the allegations contained in Paragraph 338 clearly are directed to the alleged failings of CFSE and CCI in the performance of alleged obligations called for under the Administration Agreements.

[4] The Court's suggestion that the only proper mechanism for addressing the deficiencies created by Plaintiffs' "lumping" technique would be a Rule 12(e) motion for more definite statement (Opinion at p. 93) is contrary to controlling authority. *See Atuahene v. City of Hartford*, 10 F. App'x 33, 33-34 (2d Cir. 2001) (affirming district court order granting ***motions to dismiss*** based on plaintiff's improper "lumping" of defendants).

B. <u>The Court Erred in Not Dismissing All Claims Asserted Against CFSB</u>

The Court erred in failing to dismiss CFSB from the case once Defendants Ian Pilgrim and Brian Francoeur, CFSB's alleged employees, were dismissed. In the only paragraphs of the SCAC specifically directed to CFSB, Plaintiffs assert that CFSB "directed [Pilgrim and Francoeur] to serve as directors of FGBL," and that "[a]s their employer, CFSB is legally responsible for the actions of Pilgrim and Francoeur" under the "doctrine of respondeat superior." (SCAC ¶¶ 161, 559-60, 563). Despite the dismissal of these individuals (*see* Opinion at pp. 139-40, 198), this Court appears to have held that CFSB remains a Defendant with respect to the Plaintiffs' third-party beneficiary breach of contract count and the aiding and abetting counts, which have been sustained as to the "Citco Defendants." (Opinion at pp. 114, 148).[5]

This Court clearly erred in finding that Plaintiffs, through the use of the term "Citco," alleged a basis for ***primary*** liability against CFSB. (Opinion at pp. 92-94). In justifying this finding, the Court stated that "Plaintiffs distinguish the conduct of each of the Citco Defendants. When Plaintiffs do make certain allegations against the Citco Defendants as a whole, Plaintiffs assert a factual basis for doing so." (*Id*. at 92). But that is simply not true with respect to CFSB – the Plaintiffs do not allege that CFSB provided ***any*** services for the Funds. The Administration Agreements and Custodian Agreements do not identify CFSB as a contracting company. (*See, e.g.,* D.E. 331-1 at p. 3 of 30; D.E. 342-1 at p. 3 of 19). The PPMs do not identify CFSB as a service provider for the Funds. (*See, e.g.*, D.E. 363-1 at pp. 7-8 of 31; D.E. 363-2 at pp. 38-39 of 293). Moreover, there are no allegations of fact suggesting that any of the other Defendants were acting as CFSB's ***agent***, and this Court made no such finding. (Opinion at pp. 126-30 (finding

[5] In the context of the Rule 8(a) discussion, the Court explained that "to the extent that the Court finds below that Plaintiffs state plausible claims against the Citco Defendants, Plaintiffs state plausible claims against Citco as defined in the SCAC." (Opinion at pp. 93-94). The SCAC defines "Citco" to include CFSE, CCI, CGL, CBN, CGC and CFSB. (SCAC at p. viii , ¶ 162).

only that, in the context of negligence-based claims, Plaintiffs had sufficiently alleged that CFSE and CCI were acting as the agents of the parent company, Defendant CGL)). Accordingly, because CFSB was named as a Defendant in this case solely because of its status as employer of Pilgrim and Francoeur, CFSB should be dismissed from this case now that Pilgrim and Francoeur are no longer Defendants.

C. The Court's Ruling Regarding Plaintiffs' Third-Party Beneficiary Breach of Contract Claim Requires Clarification or Reconsideration

In its Opinion, the Court held that Plaintiffs may sue as third-party beneficiaries under the Administration Agreements, but not under the Custodian Agreements. (Opinion at pp. 111-14). However, there is a lack of clarity as to whether the Plaintiffs' third-party beneficiary breach of contract claim has been sustained only as to CFSE and CCI – the only Defendants who could be deemed contractually obligated to provide services pursuant to the Administration Agreements – or whether it has been sustained as against ***all*** of the other Citco-related corporate Defendants as well, namely CGL, CBN, CGC and CFSB.

The lack of clarity results from the Court's use of the collective term "Citco Defendants." In particular, after observing that "the Administration Agreements require ***the Citco Defendants*** to render certain specific performance directly to Plaintiffs," the Court held that it was denying "***the Citco Defendants***' motion to dismiss Plaintiffs' third-party beneficiary breach of contract claim with respect to the Administration Agreements." (Opinion at pp. 113-14 (emphasis added)). Because the Court uses the term "Citco Defendants" to refer to all six Citco-related

corporate Defendants, the Court's finding arguably could be read to mean that each of those Defendants must answer the breach of contract claim.[6]

However, as the Plaintiffs expressly acknowledge, only CFSE and CCI were the "contracting companies" under the Administration Agreements. (SCAC ¶ 327; *see also* SCAC ¶¶ 157-158 (defining CFSE and CCI as administrator and sub-administrator, respectively)). It is also clear from the face of the Administration Agreements, which are incorporated into the SCAC, that CGL, CBN, CGC, and CFSB are ***not*** parties to those agreements. (*See, e.g.,* D.E. 331-1 at p. 3 of 30). The SCAC thus lacks any alleged factual basis for finding that CGL, CBN, CGC or CFSB were obligated to provide, or actually performed, any services pursuant to the Administration Agreements.[7] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (for Rule 8(a) purposes, conclusory or speculative allegations are insufficient); *see also In re Elan Corp. Sec. Litig.*, 543 F. Supp. 2d 187, 206 (S.D.N.Y. 2008).

Permitting the breach of Administration Agreement claim to proceed against CGL, CBN, CGC or CFSB would also be contrary to this Court's rulings with respect to the breach of contract claims asserted against the Fairfield Defendants. There, the Court held that Plaintiffs had sufficiently alleged a third-party beneficiary breach of contract claim under the Investment Management Agreements, but limited the reach of that cause of action to only the parties to the contracts:

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[6] *See supra* note 5. The breach of contract count (Count 20) is asserted against "Citco," and alleges that "***Citco*** entered into contracts with the Funds…" and "***Citco*** breached the Administration Agreements…" (SCAC ¶¶ 474, 484 (emphasis added)).

[7] Moreover, CFSE and CCI cannot be viewed as having acted as the agents of CBN, CGC or CFSB. As noted above, the Court's ruling regarding agency was limited to a finding, in the context of the negligence-based claims, that the SCAC sufficiently alleged a "plausible agency relationship between Citco Group [*i.e.*, CGL] and the Administrators." (Opinion at pp. 126-30).

> The SCAC does not suggest how any defendant, aside from FGBL and FGL, had obligations to Plaintiffs under the Investment Management Agreement. To that extent, the claims against all Fairfield and Fairfield Fee Defendants except FGBL and FGL are dismissed.

(Opinion at p. 84). The same result is required for the claim based on the Administration Agreements – *i.e.*, only the "contracting companies," CFSE and CCI, should be required to answer this claim. Accordingly, to the extent that the Court did not intend to sustain the breach of contract claim against CGL, CBN, CGC and CFSB, clarification of the Opinion is requested. On the other hand, if the Court intended to sustain this count against CGL, CBN, CGC and CFSB, then such ruling constitutes clear error for the reasons stated above, and reconsideration under Rule 6.3 is warranted.

D. The Court's Finding that Plaintiffs Alleged a Fiduciary Relationship with CBN and CGC Was Clear Error

The Court held that Plaintiffs sufficiently alleged a breach of fiduciary duty claim against CFSE and CCI (referred to as the "Administrators") and CBN and CGC (referred to as the "Custodians"). (Opinion at pp. 132, 140-44). However, the Court's finding that CBN and CGC owed a fiduciary duty to the Plaintiffs is contrary to the law and is inconsistent with the Court's earlier finding, in the context of its rulings on the negligence-based claims, that Plaintiffs failed to allege a "near-privity" relationship with CBN or CGC.

The Court properly recognized that some level of contact or communication between a plaintiff and defendant is necessary in order to allege a fiduciary relationship. (*Id.* at 138-40). Without such contact, a plaintiff cannot be deemed to have "reposed trust or confidence" in a defendant, nor can the defendant be deemed to have "accepted" that trust. *See Thermal Imaging, Inc. v. Sandgrain Sec., Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001); *see also Pandozy v.*

Tobey, 335 F. App'x 89, 91 (2d Cir. 2009). Indeed, in finding no fiduciary duty as to Defendants Pilgrim and Francoeur, the Court observed:

> [t]he SCAC does not allege that the Individual Defendants ever communicated with Plaintiffs.… Given that Plaintiffs allege no contact between themselves and the Individual Defendants … the Court finds that Plaintiffs fail to plausibly allege that they reposed trust and confidence in the Individual Defendants.

(Opinion at pp. 138-40).

However, even though no direct contact is alleged as to CBN or CGC, the Court found that Plaintiffs sufficiently alleged that CBN and CGC owed a fiduciary duty to the Plaintiffs. (Opinion at p. 143). In so holding, the Court found that CBN and CGC "had a direct relationship" with the Plaintiffs (*id*.), but this finding simply cannot be reconciled with the Court's reasoning for dismissing the negligence claims against the Custodians. In that context, the Court properly held that the SCAC is "absent allegations as to Plaintiffs' relationship with the Custodians," and thus found that Plaintiffs failed to allege that CBN and CGC owed a duty of care to the Plaintiffs, because no facts were alleged "that would plausibly support a finding of near-privity." (*Id.* at p. 120).

Moreover, the Court's conclusion that the Custodians had a "direct relationship" with the Plaintiffs is erroneously based on allegations that relate primarily to CFSE's and CCI's obligations under the Administration Agreements, such as the allegation that the Administrators "accepted money from Plaintiffs, sent investment confirmations to Plaintiffs, and calculated the NAV on which Plaintiffs relied." (Opinion at p. 143, citing to, *e.g.*, SCAC ¶¶ 327-328). In contrast to the Administration Agreements, the Custodian Agreements did not call for any communication between the Custodians and investors. (*See, e.g.*, SCAC ¶ 330; D.E. 342-1 at pp. 5-7 of 19). And the Plaintiffs fail to allege that any such communications took place.

Accordingly, the SCAC provides no basis for finding the existence of a ***relationship***, fiduciary or otherwise, between the Custodians and Plaintiffs, and this claim thus should have been dismissed as to CBN and CGC.

E. The Court's Finding that Plaintiffs Alleged Actual Knowledge in Support of the Aiding and Abetting Claims Was Clear Error

The Court erred in applying a Rule 8(a) notice pleading standard to the ***actual knowledge*** element of the Plaintiffs' aiding and abetting claims against each of the six "Citco Defendants." In addressing these claims, the Court recognized that the Plaintiffs must "allege a strong inference of actual knowledge or conscious avoidance" and that the particularity requirements of Rule 9(b) apply. (Opinion at pp. 145-46). However, as with the § 20(a) claim against CGL (discussed above), the Court erroneously found that Plaintiffs satisfied this standard through allegations against all of the "Citco Defendants" collectively. In particular, the Court looked to allegations in the SCAC directed to "Citco," not to any of the individual Defendants in particular. (Opinion at pp. 146-47, citing SCAC ¶¶ 341, 512). Again, regardless of whether this "lumping" technique is sufficient to satisfy Rule 8(a), it does not satisfy the heightened pleading requirements of Rule 9(b). *See, e.g.*, *Filler v. Hanvit Bank,* 156 F. App'x 413, 417 (2d Cir. 2005) ("the particularity requirements of Rule 9(b) apply to claims of aiding and abetting fraud no less than to direct fraud claims"); *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (Rule 9(b) requires particularized allegations directed to each defendant); *Cohen*, 2010 WL 2670865, at *7-9, 15 (dismissing § 10(b) and common law fraud claims because, among other reasons, plaintiffs improperly lumped defendants together in trying to plead the requisite state of mind).

Moreover, even if CFSE and CCI, as the Administrators, could be deemed to have acted with the requisite state of mind based on the Court's finding of *scienter* as to those two

Defendants (Opinion at pp. 94-96), that state of mind cannot be attributed to CGL, CBN, CGC and CFSB merely by lumping them all together within the definition of the collective term "Citco." Particularized allegations directed to each such defendant is required. Accordingly, dismissal of the aiding and abetting claims should have been granted, at the very least, with respect to CGL, CBN, CGC and CFSB.

IV. CONCLUSION

For the reasons set forth herein, Defendants CFSE, CCI, CBN, CGC, CFSB, and CGL respectfully request that this Court reconsider the instances of error in its Opinion discussed herein, and, where appropriate, grant the pertinent aspects of these Defendants' motions to dismiss the SCAC.

Dated: September 1, 2010

Respectfully submitted,

By: /s/ Lewis N. Brown

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