

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PASHA ANWAR, et al.,)
))
Plaintiffs,)
))
v.)
))
) Master File No. 09-CV-118 (VM)
FAIRFIELD GREENWICH LIMITED, et al.,)
))
Defendants.)
))
This Document Relates to: *Headway Investment*)
Corp. v. American Express Bank Ltd. No. 09-CV-)
08500;)
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**PLAINTIFF HEADWAY INVESTMENT CORPORATION'S MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION**

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1. Introduction

On October 4, 2010, this Court in its Decision and Order (the “October 4, 2010 Order”) found that Headway Investment Corporation (“Headway”) abandoned its negligence claim against Standard Chartered¹ when Plaintiffs “failed to argue why Headway and Valladolid’s negligence claims should not be dismissed” in Plaintiffs’ Unified Response to Motion to Dismiss (the “Unified Response”). *See* October 4, 2010 Order at 5. The Court also dismissed all of Headway’s claims against the individual defendants—that is, Carlos Gadala Maria, Raul N. Mas, Robert Friedman, Rodolfo Pages, and John G. Dutkowski (collectively, the “Individual Defendants”)—based on the rationale that Plaintiffs’ Unified Response “makes no argument in support of the claims against the Individual Defendants.” *See* October 4, 2010 Order at 6. Headway respectfully submits that both of these issues were addressed in the Unified Response. Moreover, the Individual Defendants’ were untimely in filing their Notice of Joinder.

For the reasons stated below, Headway respectfully requests that the Court reconsider both of these rulings, and withdraw the pertinent aspects of its October 4, 2010 Order concerning dismissal of the negligence claim and the Individual Defendants.

2. Applicable Standard for Motion for Reconsideration

Under Local Civil Rule 6.3, a party may move for reconsideration of a court’s order setting forth concisely the matters or controlling decisions which the party believes the Court may have overlooked. “The provision for reargument is not designed to allow

¹ For purposes of this memorandum “Standard Chartered” shall refer to Standard Chartered Bank International (Americas) Ltd., Standard Chartered Bank, Standard Chartered PLC, and Standard Chartered International (USA) Ltd. and its predecessor, related, or affiliated American Express Bank entities. Where only one entity comprising Standard Chartered is being referred to, that entity shall be named specifically.

wasteful repetition of arguments already brief, considered and decided.” *Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990). “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. National Mediation Bd.*, 956 F. 2d 1245, 1255 (2d Cir. 1992) (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478 at 790). “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. Mimi So*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009)(Marrero, J.).

3. Argument

Headway did not abandon its negligence claim. The negligence claim is an important part of Headway’s complaint, and at no point did Headway concede that its negligence claim was insufficient. It is important first to consider that the omnibus motion to dismiss filed by Standard Chartered and the coordinate Unified Response filed by plaintiffs was an administrative solution ordained by the Court in order to address Standard Chartered’s complaint that it ought not be required to respond to, or move against each complaint filed against it. By nature of treating these pleadings in a combined fashion, it was not feasible for each individual plaintiff to address each moving ground with the specificity that would be seen if the individual plaintiff were simply defending its own complaint via individual motion. The defense of Headway’s negligence claim in passim throughout the Unified Response because the brief refutes

each of the grounds sought to dismiss that very negligence claim — economic loss rule, exculpation, and intervening cause. To the extent the Unified Response was not explicit enough, it would be unfair for Headway’s properly pled negligence claim to be dismissed. Nor should dismissal the Individual Defendants be permitted given that none of their moving grounds prevailed. The Individual Defendants merely joined in the motion and the Unified Response equally refuted their moving grounds for dismissal, which were no more than the same arguments the Court rejected when made by Standard Chartered.

A. Headway Did Not Abandon Its Negligence Claim

The October 4, 2010 Order found that Plaintiffs, in their Unified Response, failed to argue why the Court should not dismiss Headway’s negligence claim. *See* October 4, 2010 at 5. As a consequence, the Court ruled that Headway abandoned its negligence claim. *Id.* However, Plaintiffs’ in their Unified Response explicitly assert that “Headway states claims against the Standard Chartered defendants for (i) breach of fiduciary duty, (ii) *negligence*, and (iii) unjust enrichment.” *See* Unified Response at 19. (emphasis added). Had Headway intended to abandon this claim, Plaintiffs would not have stated that Headway’s negligence claim should survive.

What’s more, in responding to Standard Chartered’s Memorandum of Law in Support of the Unified Motion to Dismiss (the “Memo of Law”), Plaintiffs counter each and every argument Standard Chartered makes for dismissing Plaintiffs’ tort claims—which necessarily includes the negligence claim. Specifically, Standard Chartered argued that Plaintiffs’ negligence claims were barred by the economic loss rule, the exculpatory clauses in Standard Chartered’s RRGAs, and Bernard Madoff’s fraud:

Plaintiffs' common-law claims for fraud, *negligence*, gross negligence and breach of fiduciary duty are barred by the economic loss rule (Memo of Law at 39);

The exculpation clauses in Standard Chartered's RRGAs relieve Standard Chartered from liability for breaches of common-law duties, including negligence (Memo of Law at 45); and

Plaintiffs' claims for fraud, negligence misrepresentation, *negligence*, gross negligence and breach of fiduciary duty also fail for the simple reason that all of Plaintiffs' losses were caused by Bernard Madoff's fraud, not the actions of Standard Chartered (Memo of Law at 51).

(emphasis added). The Plaintiffs specifically refuted each of these three separate arguments in their Unified Response to Motion to Dismiss.

(1.) *Plaintiffs Responded to Standard Chartered's Argument About the Economic Loss Rule*

At page 51 of their Unified Response, Plaintiffs state that "Standard Chartered is simply wrong that the economic loss doctrine bars all of the Plaintiffs' tort claims. It's recitation of the law surrounding this doctrine is woefully inadequate. The economic loss doctrine does not bar the Florida law tort claims advanced by Plaintiffs." The fact that Plaintiffs did not explicitly enumerate all the claims that were not barred by the economic loss rule can not be taken to mean that Headway abandoned the negligence claim. In stating that "the economic loss doctrine does not bar the Florida law tort claims advanced by Plaintiffs," Plaintiffs were merely responding in kind to Standard Chartered's assertion that "Florida's economic loss rule bars all of plaintiff's tort claims." Memo of Law at 39. Therefore, this argument against the assertion of the economic loss rule as to the tort claims evidences that Headway did not abandon its negligence claim.

(2.) *Plaintiffs Responded to Standard Chartered's Argument About the Exculpation Clauses*

Standard Chartered argued that the exculpatory clauses found within the Rules and Regulations Governing Accounts (“RRGA”) bar breach of common-law duty claims, including negligence. Plaintiffs directly responded to those arguments. First, Plaintiffs argued that it was not appropriate for the Court to consider the documents proffered by Standard Chartered at the motion to dismiss stage. *See* Unified Response at 7. This Court agreed, finding that “there are material issues of disputed fact concerning the relevance of the RRGAs that preclude accepting them at this state as incorporated in the Complaints.” *See* October 4, 2010 Order at 11.

Second, Plaintiffs argued that should the Court consider the RRGAs, which it ultimately did not, the Court should ignore the RRGAs because they are ambiguous and plainly do not state what Standard Chartered claims they state. *See* Unified Response at 59. The fact that Plaintiffs’ Unified Response attempted to bar the very documents Standard Chartered attempted to assert to limit the liability to Plaintiffs’ common-law claims, such as negligence, evidences that Headway did not abandon its negligence claim, and, in fact, affirmatively responded to Standard Chartered’s attempt to dismiss the claim. Therefore, Plaintiffs’ Unified Response to the exculpatory clause argument evidences that Headway did not abandon its negligence claim.

(3.) *Plaintiffs Responded to the Argument that Plaintiffs' Losses Were Caused by Madoff and Not Standard Chartered*

Standard Chartered argued that this Court should dismiss Plaintiffs’ tort claims, including Headway’s negligence claim, because Madoff’s fraud was so unforeseeable that it was a break in the chain in causation. *See* Unified Response at 65. In response,

Plaintiffs' Unified Response directly refuted Standard Chartered's argument and noted that under Florida law, whether an intervening cause is foreseeable is for the tier of fact and is not appropriately disposed of by motion to dismiss. *See* Unified Response at 66. In fact, Plaintiffs' cited to several cases involving negligence claims on this very point.² So while the brief does not single out Headway's negligence claim for preservation under this argument (the argument more broadly asserted that Standard Chartered's causation argument should be rejected as to all Plaintiffs' claims) the leading cases cited are negligence cases. It does not follow that the Plaintiffs would make this argument and yet at the same time Headway intended to abandon its negligence claim.

Because Plaintiffs' Unified Response responds directly to each argument Standard Chartered makes that would seek the dismissal of Headway's negligence claim (that is, the economic loss rule, exculpatory clauses, and Madoff), the negligence claim should survive the motion to dismiss.

B. Headway Did Not Abandon Its Claims Against the Individual Defendants

In its October 4, 2010 Order, the Court dismissed the Individual Defendants named by Headway because Plaintiffs' response to Standard Chartered's Unified Motion to Dismiss "makes no argument in support of the claims against the Individual Defendants." *See* October 4, 2010 Order at 6. The finding that Headway abandoned its claims against the Individual Defendants, based on the conclusion that Plaintiffs' failed to explicitly acknowledge by name the Individual Defendants in their Unified Response is form over substance. The Individual Defendants joined in the Unified Motion to Dismiss

² *See Sosa v. Coleman*, 646 F. 2d 991 (5th Cir. Unit B 1981) (*See* Unified Response at 66); *Coral Gables Federal Sav. & Loan Ass'n v. City of Opa-Locka*, 516 So.2d 989 (Fla. 3d DCA 1987) (*See* Unified Response at 67).

and Memorandum of Law filed by the Standard Chartered Defendants and stated that they “believe that the Motion and Memorandum of Law set forth valid bases for dismissing Plaintiff’s complaint in *Headway Investment Corp. v. American Express Bank, Ltd.*, No. 09-CV-8500.” See Individual Defendants Notice of Joinder at 1. In joining Standard Chartered’s Unified Motion to Dismiss, the Individual Defendants not only adopted Standard Chartered’s arguments, but failed to assert any arguments of their own as to why the Court should dismiss Headway’s claims against them. Their arguments in favor of dismissal were thus one in the same with Standard Chartered’s. Accordingly, Plaintiffs’ Unified Response to Standard Chartered’s Unified Motion to Dismiss, while it did not specify each Individual Defendant, sufficiently addressed the Individual Defendants arguments.³ By the Court’s dismissal of claims against the Individual Defendants based on the formality of those Individual Defendants not being specifically addressed by name, despite their having adopted the very same arguments Plaintiffs have properly responded to, Headway is being unjustly prejudiced. Headway would be forced to replead claims that have already been upheld by this Court and the Individual Defendants would most likely attempt to reargue issues that have also already been decided.⁴

Because Plaintiffs’ Unified Response responds directly to the very same claims the Individual Defendants have joined in and adopted, the Court should find that

³ While the Individual Defendants were not specifically identified in the Plaintiffs’ Unified Response, Headway’s Complaint collectively defined the two Standard Chartered entities it named in its complaint—Standard Chartered Bank International (Americas) Ltd. and Standard Chartered Bank—with the Individual Defendants as the “Private Bank Defendants.” Headway Comp. at ¶ 12.

⁴ It should be also noted that the Individual Defendants filed their Notice of Joinder on March 16, 2010, six days after the deadline for filing motions to dismiss on Plaintiffs’ Complaint. See Initial Scheduling order Regarding Standard Chartered Cases at ¶ 2.

Headway has not abandoned its claims against defendants Carlos Gadala Maria, Raul N. Mas, Robert Friedman, Rodolfo Pages, and John G. Dutkowski, and furthermore, find that Headway's claims for breach of fiduciary duty and negligence survive the motion to dismiss.

4. Conclusion.

For the reasons set forth here, Headway respectfully requests that this Court reconsider the instances of error in the October 4, 2010 Order discussed within, and amend it October 4, 2010 Order to uphold Headway's negligence claim and deny the Individual Defendants' Motion to Dismiss.

Dated: October 18, 2010

Respectfully submitted,

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