BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE FAIRFIELD GREENWICH GROUP SECURITIES LITIGATION	)	MDL DOCKET NO. 2088

HEADWAY INVESTMENT CORPORATION'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FAIRFIELD GREENWICH ADVISORS' MOTION TO TRANSFER AND COORDINATE ACTIONS IN THE SOUTHERN DISTRICT OF NEW YORK UNDER 28 U.S.C. § 1407

In response to Movant Fairfield Greenwich Advisors' Motion to Transfer the action styled *Headway Investment Corporation v. American Express Bank, Ltd., et al.*, 09-CIV-21395 (S.D.Fla.) (J. Altonaga) ("*Headway*") to the United States District Court for the Southern District of New York under 28 U.S.C. § 1407 ("Transfer Motion"), Headway Investment Corporation ("Headway") respectfully requests that the Judicial Panel on Multidistrict Litigation (the "Panel") sever Headway's claims against American Express Bank Ltd. d/b/a Standard Chartered Private Bank a/k/a Standard Chartered Bank International (Americas) Limited

("Standard Chartered International"), Standard Chartered Bank, Carlos Gadala-Maria, Raul N. Mas, Robert Friedman, Samuel Perruchoud, Rodolfo Pages, and John G. Dutkowski (collectively, the "Miami Bank Defendants[1]") from its claims against Fairfield Greenwich Group, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, Walter M. Noel Jr., Jeffrey H. Tucker, Andres Piedrahita, and Amit Vijayvergiya (collectively, the "Fairfield Defendants"), PricewaterhouseCoopers LLP ("PWC"), and Citco Financial Services (Europe) B.V. ("Citco"), pursuant to 28 U.S.C. § 1407 and Federal Rule of Civil Procedure 21.

I. Introduction

Because Miami is the epicenter of Headway's claims against the Miami Bank Defendants, transferring of the claims to the Southern District of New York would defy the stated purpose of multidistrict litigation. The claims against the Miami Bank Defendants are different from any claims in *Anwar*. They involve different allegations, different witnesses, different evidence, and ultimately, different defendants from those named in *Anwar*. The transfer of these claims will not serve the convenience of these parties (both the Miami Bank Defendants and Headway) and witnesses (many of whom reside in Miami), nor would it promote the just and efficient conduct of the actions as required under 28 U.S.C. § 1407. For these reasons, and as explained below, the Panel should sever Headway's claims against the Miami Bank Defendants and deny the transfer of those claims for coordination and consolidation to the Southern District of New York.

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[1] Miami Bank Defendant, Standard Chartered International, maintains its principle place of business in Miami, Florida. Moreover, three of the Miami Bank Defendants reside in Miami including Raul N. Mas, John G. Dutkowski, and Rodolfo Pages. Lastly, all of the Miami Bank Defendants' communications with Headway occurred in Miami.

II. Procedural History

On April 6, 2009, Headway filed its complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The complaint states common law claims for breach of fiduciary duty, negligence, and unjust enrichment arising out of American Express Bank's recommendations to Headway to invest into the Fairfield Funds, which were ultimately invested into Madoff and BLMIS. Given the distinct allegations against each defendant, Headway brought separate claims for breach of fiduciary duty and negligence against the Miami Bank Defendants, apart from its claims against the remaining defendants.

On May 22, 2009, Defendant Standard Chartered International removed the case to the United States District Court for the Southern District of Florida, where it is currently pending before the Honorable Cecilia M. Altonaga. On May 26, 2009, the Court ordered that a Joint Scheduling Report was to be filed on June 16, 2009, as required by Local Rule 16.1. Headway, Movant, and six of the Miami Bank Defendants, including Standard Chartered International, participated in numerous conference calls in preparation of the Joint Scheduling Report, which was ultimately filed on June 16, 2009. On June 18, 2009, movant filed its Transfer Motion, which was then filed by the Panel on June 26, 2009. And on request of the movant, a stay has been entered by the District Court pending the Panel's decision on the Transfer Motion.

III. Factual Background

Headway is a foreign private investment corporation organized and existing under the laws of Panama, which maintains its administrative office in Coral Gables, Florida, and kept an account with American Express Bank[2] to make and maintain deposits denominated in Euros.

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[2] In February 2008, Standard Chartered PLC acquired from American Express Company the American Express Bank and all its subsidiaries and affiliated companies. Prior to Standard Chartered PLC's acquisition, American Express Bank International serviced Headway's accounts from its offices at 1111 Brickell Avenue,

American Express Bank through its designated relationship managers managed the relationship in Miami. American Express Bank's Miami office handled all instructions and communications regarding the Headway account. About 2002, American Express Bank representatives, in a meeting in Miami, recommended the Sentry Fund to Headway. Headway had never heard about the Sentry Fund until this Miami meeting. The American Express Bank representatives responsible for Headway's account were Miami Bank Defendants Raul N. Mas and Carlos Gadala-Maria. Mas (who resides in Miami, Florida) and Gadala-Maria have not been named in the *Anwar* consolidated actions.

American Express Bank first placed $4 million of Headway's investments into the Sentry Fund in January 2003, and an additional $2.5 million in November 2003. By the end of 2003, American Express Bank had invested for Headway a total of $6.5 million into the Sentry Fund. In the summer of 2005, consistent with the original recommendation of American Express Bank's Miami office and based on the Sentry Fund's reported "returns," American Express Bank bought for Headway an additional $2 million in the Sentry Fund, bringing the total investment in the Sentry Fund to approximately $8.5 million. In late July 2005, American Express Bank made another investment recommendation to Headway. Gadala-Maria advised Headway to buy an equity interest in the Sigma Fund. Accordingly, American Express Bank sold $6.5 million of Headway's investment in the Sentry Fund to buy 6.2 million Euros ("€") in shares of the Sigma Fund. By the end of August 2005, American Express Bank had invested and held for Headway a total of € 7.950 million of Headway's assets in the Sigma Fund, and $2.0 million in the Sentry Fund.

Miami, Florida 33131. Due to the February 2008 acquisition, Standard Chartered Bank International (Americas) Limited, which maintains its office at 1111 Brickell Avenue in Miami, now services Headway's accounts.

At the time of the sale of the Fairfield Funds' shares to Headway: (1) Miami Bank Defendant Rodolfo Pages (who resides in Miami, Florida) was head of sales for Latin America at American Express Bank; (2) Miami Bank Defendant John Dutkowski (who resides in Miami, Florida) was an "investment specialist" for American Express Bank and reported to Pages; (3) Miami Bank Defendant Friedman was head of the Global Investment Services Group at American Express Bank; and (4) Miami Bank Defendant Samuel Perruchoud was the head of American Express Bank Alternative Investments and Structured Products. None of the Miami Bank Defendants have been named in any actions consolidated in *Anwar*.[3]

IV. Argument

A. This Panel Should Sever the Claims Against The Miami Bank Defendants From *Headway* And Keep Those Claims in the Southern District of Florida Because They Do Not Meet the Requirements of 28 U.S.C. § 1407 And They Are Severable Under Fed. R. Civ. P. 21.

Under 28 U.S.C. § 1407:

> when civil actions involving one or more common questions of fact are pending in different districts, such actions *may* be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers *for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.*

(emphasis added). But where a transfer is not appropriate for an action in its entirety, 28 U.S.C. § 1407 also authorizes the Panel to separate claims from the remainder of an action. Specifically, 28 U.S.C. § 1407 states that, "*the panel may separate any claim, cross-claim, counterclaim, or third-party claim* and remand any of such claims before the remainder of the

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[3] Movant incorrectly claims that Standard Chartered International (Americas) Limited (defined here as "Standard Chartered International") is a named defendant in the action styled *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*, 09-CV-2410, which was consolidated into *Anwar*. In fact, Standard Chartered International (USA) Ltd., is a separate and distinct entity from Miami Bank Defendant Standard Chartered International (Americas) Limited. Though both share Miami Private Bank Defendant Standard Chartered Bank as a corporate parent (also a party *not* named in *Anwar*), each has a separate and distinct Federal Reserve RSSD ID number, which have been attached to this response as Composite Exhibit A.

action is remanded." (emphasis added). The Panel has acknowledged and exercised this authority throughout the course of its history. *See In re Multidistrict Private Securities Actions Involving Revenue Properties Companies Limited*, 333 F. Supp. 558, 559, n.2 (J.P.M.L. 1971) ("Section 1407 authorizes the separation of 'any claim, cross-claim, counter-claim, or third-party claim . . .' from the remainder of an action."); *see also In re Penn Central Securities Litigation,* 325 F. Supp. 309, 312 (J.P.M.L. 1971) (where the Panel separated third-party claims for transfer to the Eastern District of Pennsylvania, while transferring the remainder of the claims to the Southern District of New York).

To prevail on the Transfer Motion, Movant must meet its burden of convincing the Panel that the common factual questions that it claims exist are sufficiently central to the actions, that the convenience of parties and witnesses would be advanced, and that the accompanying discovery will be so complex as to justify the transfer of the entire action under 28 U.S.C. § 1407. *See In re Eli Lilly and Company (Cephalexin Monohydrate) Patent Litigation,* 446 F. Supp. 242, 244 (J.P.M.L.1978). Here, Movant has failed to meet that burden as to the claims against the Miami Bank Defendants and, accordingly, the Panel should sever those claims from the remainder of the action.[4] Because the Miami Bank Defendants are not named in any of the *Anwar* consolidated actions; because the claims against them involve different facts, witnesses, and evidence; and because half of the Miami Bank Defendants reside in Miami; it would be more

[4] "'A motion for severance pursuant to Rule 21 necessarily requires the Court to consider whether the party is 'indispensable' to the litigation . . . .'" *Official Comm. of Unsecured Creditors v.* Shapiro, 190 F.R.D. 352, 356-57 (E.D.Pa.2000) (*quoting Fanning v. Black & Decker,* 1999 WL 163628 at *1 (E.D.Pa. 1999). Notably, the Fairfield Defendants, PWC, and Citco are not necessary or indispensable to the claims against the Miami Bank Defendants. Under Rule 19 of the Federal Rules of Civil Procedure, an absent party is "necessary if the defendants would be subject to multiple or inconsistent obligations if the absent party was not joined." *In re Reciprocal of America (ROA) Sales Practices Litig., 2007* WL 788305, *3 (W.D.Tenn.2007). Only if the party is found necessary under Rule 19(a), does the Court need to determine whether the party is indispensable under Rule 19(b). *See Official Comm. of Unsecured Creditors,* 190 F.R.D. at 357. Here, the Fairfield Defendants, PWC, and Citco are not necessary parties because the claims against the Miami Bank Defendants are separate and independent of the actions or inactions committed by the Fairfield Defendants, PWC, and Citco.

convenient for the claims against the Miami Bank Defendants to remain in the Southern District of Florida.

Additionally, under Federal Rule of Civil Procedure 21, the claims against the Miami Bank Defendants are ripe for severance: (1) the claims against the Miami Bank Defendants do not arise out of the same transaction or occurrence; (2) they do not present common questions of fact and law; (3) severance would serve judicial economy; (4) no prejudice would be caused to the parties by severance; and (5) the claims involve different witnesses and evidence. *In re Zyprexa Products Liability Litig.*, 2004 WL 2812095, at *4 (E.D.N.Y. 2004)[5]. Therefore, the Panel should sever Headway's claims against the Miami Bank Defendants from any decision to transfer *Headway* to the Southern District of New York.

1. Only Secondary Questions of Fact And Law Exist in Common Between the Miami Bank Defendants And All Other Actions.

What few questions of fact exist in common between the Miami Bank Defendants and the remaining defendants in *Headway* are secondary to the action, would not serve the convenience of the parties and witnesses, or promote the just and efficient conduct of the litigation if transferred; and thus do not justify a transfer of the claims against the Miami Bank Defendants to the Southern District of New York.

In determining whether the Panel should transfer an action for coordination and consolidation to another district under 28 U.S.C. § 1407, the Panel is to first analyze whether the actions involve common questions of fact. Likewise, under Rule 21, courts consider whether a claim presents a common question of fact and law, whether those claims arise out of the same transaction or occurrence, and whether they involve different witnesses and evidence. *In re Zyprexa,* 2004 WL 2812095, at *4. A review of the claims brought against the Miami Bank

[5] Because the factors utilized by court in determining severance under Federal Rule 21 overlap with the requirements for transfer under Section 1407, Headway will address both in this response.

Defendants shows that: (1) they involve different witnesses and evidence from the remaining *Headway* claims and *Anwar*; (2) the claims do not arise out of the same transaction or occurrence as *Anwar* and the remaining *Headway* claims; and (3) only secondary common questions of fact exist between the claims in *Anwar* and the remaining *Headway* claims.

Movant first argues that because the *Headway* and *Anwar* complaints share the same "factual backdrop," the Panel should order the centralization of these actions. This does not hold true for the Miami Bank Defendants. The allegations and claims against the Miami Bank Defendants are unique to those defendants and rely on a different set of central facts than those in *Anwar* or the remaining *Headway* defendants. *See In re Penn,* 325 F. Supp. at 311.

Specifically, Headway alleges in its actions, among other things, how:

(1) American Express Bank representatives [in Miami, Florida] recommended to Headway to open an additional account in Geneva, Switzerland, to make and maintain deposits denominated in Euros;

(2) the relationship was managed in Miami by American Express Bank through its designated relationship managers. The Miami office of American Express Bank handled all instructions and communications regarding the Geneva account;

(3) Defendants Mas and Gadala-Maria indicated to Headway that they, as well as other investment specialists at American Express Bank, had the skills and expertise necessary to research, analyze, and monitor the investments recommended to Headway;

(4) about December 2002, American Express Bank recommended the Sentry Fund to Headway. Headway had never heard about the Sentry Fund until this meeting. American Express Bank represented to Headway that the Sentry Fund was a self-standing fund of funds with assets in bona fide investment vehicles;

(5) American Express Bank first placed $4 million of Headway's investments into the Sentry Fund in January 2003, and an additional $2.5 million in November 2003. By the end of 2003, American Express Bank had invested for Headway a total of $6.5 million into the Sentry Fund;

(6) since the inception of the accounts and, specifically, since the purchase of shares in the Sentry Fund on or about January 2003, American Express Bank has provided

Headway with monthly account statements, reporting the purported value of all of Headway's investments, including the value of the Sentry Fund;

(7) on July 20, 2004, when American Express Bank developed management and reporting capabilities in Euros at the Miami office, all assets then on deposit at Headway's Geneva account were transferred to its Miami account, and the Geneva account was closed;

(8) in the summer of 2005, consistent with the original recommendation of American Express Bank's Miami office and based on the Sentry Fund's reported "returns," American Express Bank purchased for Headway an additional $2 million in the Sentry Fund, bringing the total investment in the Sentry Fund to approximately $8.5 million;

(9) in late July 2005, American Express Bank made another investment recommendation to Headway. Gadala-Maria advised Headway to buy an equity interest in the Sigma Fund, also managed by FG Bermuda. Accordingly, American Express Bank sold for Headway $6.5 million of its investment in the Sentry Fund to purchase 6.2 million Euros ("€") in shares of the Sigma Fund;

(10) about August 2005, from its Miami office, American Express Bank purchased for Headway additional shares of the Sigma Fund at a cost of €1.750 million, bringing Headway's total investment in the Sigma Fund to €7.950 million;

(11) by the end of August 2005, American Express Bank had invested and held for Headway a total of € 7.950 million of Headway's assets in the Sigma Fund, and $2.0 million in the Sentry Fund; and

(12) at all times relevant to American Express Bank's purchase and holding of Headway's investments in the Funds, Raul N. Mas, and later Carlos Gadala-Maria, served as the relationship managers for American Express Bank with regard to Headway's account.

See Headway Complaint ¶¶ 35-46, attached as Exhibit B. None of these allegations are found in *Anwar* and any remaining allegations relating to the Fairfield Defendants, PWC, and Citco in *Headway* are unrelated to the claims against the Miami Bank Defendants and should be viewed solely as surplusage with respect to those claims.

In support of its argument that the complaints in the consolidated *Anwar* actions and *Headway* share the same factual backdrop, Movant cites *In re Bayou Hedge Funds Investment Litig.*, 429 F. Supp. 2d 1374 (J.P.M.L. 2006). In *In re Bayou,* however, the Panel ordered

centralization on the grounds that the "alleged improprieties regarding the Bayou hedge fund form the factual backdrop to *all* actions presently before the Panel." (emphasis added) *Id.* at 1376.

Movant points to three particular instances where both actions contain purportedly similar allegations in their respective complaints. Movant first argues that the "genesis of both complaints is plaintiffs' investments in certain Fairfield Greenwich funds that invested in Madoff." This is not the case. While movant seeks to argue that the central occurrence here is the investment of the Fairfield Funds into Madoff, movant misstates Headway's claims against the Miami Bank Defendants. The center of gravity relating to the claims against the Miami Bank Defendants is the negligent recommendations made by them to Headway. And whereas the genesis of *Anwar* may be in New York, the epicenter of *Headway's* allegations is in Miami. It was the Miami Bank Defendants' negligence that led Headway on the path it now finds itself, and forms the starting point of the *Headway* complaint as described above. For these reasons, Headway's claims against the Miami Bank Defendants *arise out of separate transactions or occurrences* from *Anwar* and the remaining *Headway* defendants, and thus warrant severance under Rule 21. *See In re Zyprexa,* 2004 WL 2812095, at *4.

Movant next argues that both actions rely on the same or substantially similar quotes from Fairfield marketing documents relating to its due diligence representations. Again, these claims relate to the Fairfield Defendants, PWC, and Citco. Although claims against these defendants may share common facts with the consolidated actions in *Anwar*, they do not touch upon the Miami Bank Defendants' actions and inactions. A determination of the claims against the Miami Bank Defendants center around *their* specific actions and inaction, apart from those relating with the Fairfield Defendants, PWC, and Citco.

Third, according to Movant, the defendants missed or disregarded several red flags which should have alerted them to Madoff's fraud. In support of its position, Movant points to an allegedly "striking overlap" in the "red flags" identified in each complaint. But Movant's position is misguided. Taken to its logical conclusion, Movant's argument would have the Panel transfer any and all Madoff-related claims involving due diligence into one massive multidistrict litigation. Of course this would be contrary to the stated purpose of 28 U.S.C. § 1407 of promoting the just and efficient conduct of the actions. Moreover, though the allegations of red flags may provide a common factor to these actions, they do not provide ultimate questions of facts. The critical issue is not whether these red flags existed, but what each defendant did in ignoring or disregarding those red flags. The missed red flags may be similar in all of the actions, but the factual basis for missing the flags will be unique to each individual defendant. Here, because the alleged lack of due diligence in *Headway* is a separate factual question from that of the Fairfield Defendants, PWC, and Citco, this Panel should sever the claims against the Miami Bank Defendants from the rest of the action and allow those claims to remain before the Southern District of Florida.

In *In re Penn*, the Panel created an MDL in the Eastern District of Pennsylvania involving alleged securities law violations arising out of the financial difficulties of the Penn Central Transportation Company ("Penn Central"). *In re Penn*, 325 F. Supp. at 310. Subsequently, fifteen cases came before the Panel, which were than conditionally transferred to the Eastern District of Pennsylvania. *Id.* The Panel subsequently ruled that the Eastern District of Pennsylvania was not proper, and that a group of the cases should be transferred to the

Southern District of New York. *Id.* As the Panel observed, "these cases rested on a different set of primary facts than the earlier cases." *Id.*[6]

As in *In re Penn*, the claims against the Miami Bank Defendants also rest on a different set of primary facts from those of the remaining *Headway* defendants (that is, the Fairfield Defendants, PWC, and Citco), as well as the defendants named in the consolidated actions in *Anwar*. These facts turn on the Miami Bank Defendants' duties to Headway, and what due diligence was undertaken by *them*. And though *Headway* and *Anwar* share certain common questions of fact, the claims against the Miami Bank Defendants will turn on facts separate and apart from claims against the Fairfield Defendants, PWC, and Citco.

What's more, even assuming that there are some common questions of fact that exist between the actions (for instance, the missed red flags), it is still not mandatory for the Panel to transfer *Headway* in its entirety for coordinated or consolidated pretrial proceedings. *See In re Photocopy Paper,* 305 F. Supp 60, 61 (J.P.M.L. 1969) ("Of course, transfer for coordinated or consolidated pretrial proceedings is not mandated by a finding that common questions of fact permeate the actions.") As the Panel stated in *In re Photocopy*, "a transfer will not be ordered unless the convenience of parties and witnesses is served and the just and efficient conduct of the actions promoted by such a transfer." *See also In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp 906, 190 (J.P.M.L. 1977) ("Although we recognize the existence of some common questions of fact among these actions, we find that transfer under

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[6] The Panel classified those actions into three categories, with a lion's share of the cases revolving around the sale of the Penn Central by Goldman, Sachs & Co. *Id.* Specifically, plaintiffs alleged that they purchased short term notes for Penn Central from Goldman, and that the paper became worthless when Penn Central subsequently filed its petition in reorganization. *Id.* at 311. Plaintiffs alleged that Goldman violated the securities laws in connection with these sales by misstating or omitting material information it possessed concerning the financial health of Penn Central. *Id.* There the Panel found that there were common questions of fact for purposes of 28 U.S.C. § 1407, but concluded the cases should not all be transferred to the Eastern District of Pennsylvania, like the earlier cases, because they were sufficiently different and "neither the convenience of the parties and witnesses nor the just and efficient conduct of the litigation would be served by their transfer...." *In re Penn*, 325 F. Supp. at 311.

Section 1407 would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation.")

2. Convenience of the Miami Bank Defendants and Headway Will Not Be Served By Transferring the Claims Against the Miami Bank Defendants, Nor Would Severance Prejudice the Parties.

Any potential benefit of a transfer of the action against the Miami Bank Defendants is outweighed by the resulting inconvenience to the parties and witnesses. In determining whether to transfer an action in accordance with 28 U.S.C. § 1407, the Panel must determine whether such proceedings will be for the convenience of parties and witnesses. Here, for the convenience of the Miami Bank Defendants and Headway, the claims against the Miami Bank Defendants should be severed and remain in the Southern District of Florida. With the Miami Bank Defendants' extensive contact and connection to Miami, the Southern District of Florida is naturally and logistically best suited for coordinating the pretrial proceedings relating to those claims.

As noted above, Standard Chartered International maintains its principal place of business in Miami, while three of the Miami Bank Defendants reside in Miami. When Headway met with the individual Miami Bank Defendants to discuss what investments American Express Bank was going to recommend, those meetings occurred in Miami. What evidence is to be discovered as to the Miami Bank Defendants' actions or inactions will likely be in Miami. This does not only include documents, but witness testimony from current Standard Chartered International employees, as well as former employees, including executives. *See In re Marsh & McLennan Companies, Inc., Securities Litig.*, 429 F. Supp.2d 1376, 1378 (J.P.M.L. 2006) (transferred to the Southern District of New York, which was a likely source of relevant documents and witnesses, as well as the home to defendant companies' headquarters); *see also*

In re Fed. Nat'l Mortgage Ass'n Securities, Derivatives and ERISA Litig., 370 F. Supp. 2d 1359, 1361 (J.P.M.L.2005) (transferred to district that was "readily accessible for parties and witnesses"). Notably, none of the Miami Bank Defendants have been named in any of the consolidated actions in *Anwar*, and no discovery regarding the Miami Bank Defendants is reasonably anticipated in the *Anwar* consolidated actions.

By severing the claims against the Miami Bank Defendants and not transferring those claims along with any others to the Southern District of New York, Headway and the Miami Bank Defendants will have a more convenient forum in Florida for conducting the pretrial proceedings while still having the opportunity to participate in and benefit from the discovery conducted through the multidistrict litigation. Therefore, what little connection the Miami Bank Defendants may have with the Southern District of New York is outweighed by their extensive contacts with the Southern District of Florida. And though New York generally may be a convenient and central travel location, it cannot be said to be more convenient than the District where many of the Miami Bank Defendants, evidence, and witnesses reside.

What's more, the claims against the Miami Bank Defendants will involve different witnesses and evidence from those necessary to prosecute the remaining *Headway* defendants – another Rule 21 factor. *Id.* Many of the witnesses and documents related to the claims against the Miami Bank Defendants will be found in Miami, including three of the individual Miami Bank Defendants, Headway, and former American Express Bank International executives, including Sergio Masvidal, who was Head of American Express Bank International.

Additionally, severing the Miami Bank Defendants from the rest of the action will not prejudice any of the parties in *Headway,* nor will it prejudice any of the named parties in *Anwar.* Because the Miami Bank Defendants remain unnamed in *Anwar*, most of the discovery with

regards to the Miami Bank Defendants will be independent of the remaining defendants in *Headway* and those appearing in *Anwar*. Witnesses testifying to the claims against the Miami Bank Defendants will testify, among other things, to the due diligence undertaken by the Miami Bank Defendants. Witness testimony as to those questions is not necessary for purposes of adjudicating the claims against the remaining *Headway* defendants, nor the *Anwar* actions.

Because the convenience of Headway and the Miami Bank Defendants and witnesses (most of whom reside in Miami) will not be served by transfer for coordination or consolidation with the Southern District of New York, and because the parties will not be prejudiced by severance of the claims against the Miami Bank Defendants, the Panel should sever the claims from the remaining defendants in *Headway* for remainder in the Southern District of Florida.

3. Transferring the Miami Bank Defendants Will Not Promote the Just and Efficient Conduct of the Actions.

Just as the Panel must consider whether the transfer of the proceedings will be for the convenience of parties under 28 U.S.C. § 1407, the Panel must also determine whether the transfer of the proceeding will promote the just and efficient conduct of the actions. Similarly under Rule 21, courts look to whether severance would serve judicial economy. *In re Zyprexa,* 2004 WL 2812095, at *4.

Movant argues that transferring *Headway* will promote the just and efficient conduct of the actions. Yet, as to the Miami Bank Defendants—who are not named in the consolidated *Anwar* actions—any centralization of the claims against the Miami Bank Defendants would be inefficient and would add little to the consolidated proceedings. Specifically, six of the eight Miami Bank Defendants have already been served with the complaint in the action. The Southern District of Court has already ruled that 20 days after deciding on the motion to remand, the defendants in the action are to file their responses to the complaint. Indeed, the parties who

have appeared have already filed a joint scheduling report in the case. At present, the case is stayed only pending a decision of the Panel. But should the Panel sever the claims against the Miami Bank Defendants, Headway could proceed with its case in the Southern District of Florida immediately. In short, the claims against the Miami Bank Defendants are ready to proceed.

But if transferred to the Southern District of New York, the claims against the Miami Bank Defendants would be swallowed into pretrial proceedings that, except for a few secondary facts, have little connection to the claims against the Miami Bank Defendants. Additionally, while claims relating to the remaining *Headway* defendants might fall under New York and federal law, the claims against the Miami Bank Defendants will deal primarily with Florida jurisprudence. Indeed, those claims would likely be the only claims based on Florida law in *Anwar*. Thus, severance would relieve the transferee court from dealing with claims that bear no resemblance to other claims in the consolidated *Anwar* actions. And because the claims against the Miami Bank Defendants are independent of the claims against the other defendants, there is no danger of inconsistent rulings or results.

For these reasons, in the interest of judicial economy, and because transferring the claims against the Miami Bank Defendants will not promote the just and efficient conduct of the actions, the Panel should sever the claims from the remaining *Headway* claims.

Finally, to alleviate any concerns as to third-party discovery, and to promote judicial economy, there are more suitable alternatives to a 28 U.S.C. § 1407 transfer, which are available to minimize any duplicative discovery, including, filing notices of particular depositions in all of the actions; thereby making the deposition applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all

the actions; and the parties could seek orders from the different courts directing the parties to coordinate their pretrial efforts. *In re Eli Lilly,* 446 F. Supp. at 244; s*ee also In re New Century Mortgage Corp. Prescreening Litigiation*, 473 F. Supp. 2d 1383, 1384 (J.P.M.L. 2007) ("alternatives to transfer exist that can minimize whatever possibilities there might be for duplicative discovery and/or inconsistent pretrial rulings"); *see also In re Zyprexa,* 2004 WL 2812095 at *5 ("Without objections of any of the parties, the severed defendants may participate in the Zyprexa-related discovery conducted in connection with MDL 1596").

V. Conclusion

Headway respectfully requests that the Panel sever the claims against the Miami Bank Defendants from the remaining *Headway* defendants. Because only secondary questions of fact exist in common, a transfer under 28 U.S.C. § 1407 would not serve the convenience of the parties and witnesses, nor would it promote the just and efficient conduct of the litigation. Rather, severance is proper here because the claims against the Miami Bank Defendants arise out separate transactional issues from the remaining claims in *Headway*, none of the parties in any of the actions will be prejudiced by severance, the claims contain different witnesses and evidence from the remaining *Headway* claims, and severance would promote judicial economy. Indeed, given all the connections the Miami Bank Defendants have with Miami, the Southern District of Florida is a logical and natural choice for any subsequent actions that may be filed against any of the Miami Bank Defendants. Therefore, Headway respectfully requests that the Panel should sever Headway's claims against the Miami Bank Defendants and deny the transfer of those

claims for coordination and consolidation to the Southern District of New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of this opposition in the above-referenced matter upon the persons indicated on the attached service list via U.S. Mail this 16th day of July, 2009.

_____
Jorge A. Mestre

Judicial Panel on Multidistrict Litigation - Panel Service List
for
MDL 2088 - IN RE: Fairfield Greenwich Group Securities Litigation

***** Report Key and Title Page *****

Please Note: This report is in alphabetical order by the last name of the attorney. A party may not be represented by more then one attorney. See Panel rule 5.2(c).

Party Representation Key

* Signifies that an appearance was made on behalf of the party by the representing attorney.
# Specified party was dismissed in some, but not all, of the actions in which it was named as a party.
All counsel and parties no longer active in this litigation have been suppressed.

This Report is Based on the Following Data Filters

Docket: 2088 - Fairfield Greenwich Group SEC

For Open Cases

Docket: 2088 - IN RE: Fairfield Greenwich Group Securities Litigation
Status: Pending on / /
Transferee District: Judge: Printed on 07/14/2009

ATTORNEY - FIRM	REPRESENTED PARTY(S)
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Composite Exhibit A

National Information Center

A repository of financial data and institution characteristics collected by the Federal Reserve System

STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LIMITED
MIAMI, FL, UNITED STATES 33131

Institution Type: Edge Corporation - Banking

Primary Federal Regulator: FEDERAL RESERVE

RSSD ID: 169877
Routing Transit Number (RTN): 000000000
Activity: INTERNATIONAL TRADE FINANCING

Financial Data

Financial statements for this institution type are not available.

National Information Center

A repository of financial data and institution characteristics collected by the Federal Reserve System

STANDARD CHARTERED INTERNATIONAL (USA) LTD.
NEW YORK, NY, UNITED STATES 10010

Institution Type: Agreement Corporation - Banking

Primary Federal Regulator: FEDERAL RESERVE

RSSD ID: 695107

Routing Transit Number (RTN): 000000000

Activity: INTERNATIONAL TRADE FINANCING

Insurance:
APPLICABI
NOT
AVAILABLE
NOT INSUI
FDIC
Certificate #

Financial Data

Financial statements for this institution type are not available.

Exhibit B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 09-27777 CA 25

HEADWAY INVESTMENT CORPORATION,
a Foreign Corporation,

Plaintiff,

v.

AMERICAN EXPRESS BANK LTD. d/b/a STANDARD CHARTERED PRIVATE BANK a/k/a STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LIMITED, STANDARD CHARTERED BANK, CARLOS GADALA-MARIA, RAUL N. MAS, ROBERT FRIEDMAN, SAMUEL PERRUCHOUD, RODOLFO PAGES, JOHN G. DUTKOWSKI, FAIRFIELD GREENWICH GROUP, FAIRFIELD GREENWICH LIMITED, FAIRFIELD GREENWICH (BERMUDA) LTD., FAIRFIELD GREENWICH ADVISORS LLC, WALTER M. NOEL JR., JEFFREY H. TUCKER, ANDRES PIEDRAHITA, AMIT VIJAYVERGIYA, PRICEWATERHOUSECOOPERS LLP, and CITCO FUND SERVICES (EUROPE) B.V.,

Defendants.

COMPLAINT

Headway Investment Corporation ("Headway") sues American Express Bank Ltd. d/b/a Standard Chartered Private Bank a/k/a Standard Chartered Bank International (Americas) Limited, Standard Chartered Bank, Carlos Gadala-Maria, Raul N. Mas, Robert Friedman, Samuel Perruchoud, Rodolfo Pages, John G. Dutkowski, Fairfield Greenwich Group, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, Walter M. Noel Jr., Jeffrey H. Tucker, Andres

Piedrahita, Amit Vijayvergiya, PricewaterhouseCoopers LLP, and Citco Financial Services (Europe) B.V.

Nature of Claims

1. This case is about Defendants' negligent participation in the massive fraudulent scheme perpetrated by Bernard Madoff. It is not about market risk. Despite warnings about Madoff, Defendants ignored these red flags and permitted Plaintiff's investment assets to be placed not into the investment marketplace at all, but rather, into the largest Ponzi scheme in U.S. history. The magnitude of Madoff's theft is matched only by the degree of Defendants' stunning negligence, which allowed that fraud to continue unchecked for years. Headway trusted Defendants to place and monitor its investment assets, and when the Defendants failed to act on their fiduciary and professional responsibilities, millions of dollars of Headway's investments disappeared.

The Parties

2. Headway is a foreign private investment corporation organized and existing under the laws of Panama. Headway's administrative office is located in Coral Gables, Florida, from which its assets are administered. Headway is the owner of shares (the "Shares") in the Fairfield Sentry Limited Fund (the "Sentry Fund") and in the Fairfield Sigma Limited Fund (the "Sigma Fund") (collectively referred to as the "Funds"). The Shares were purchased for Headway by American Express Bank, Ltd., in Miami, Florida, where Headway maintained account relationships. A substantial portion of the Sentry Fund and the Sigma Fund assets were invested in, delivered to and managed by, Madoff.

3. Defendant Standard Chartered Bank ("Standard Chartered") is a subsidiary of Standard Chartered PLC, and is organized and existing under the laws of The United

Kingdom with its principal place of business at 1 Aldermanbury Square, London EC2V 7SB, England.

4. Defendant American Express Bank Ltd. ("American Express Bank") is a foreign company, which at all relevant times, was registered to do business in the State of Florida. American Express Bank is a subsidiary of Standard Chartered PLC.

5. In February 2008, Standard Chartered PLC acquired from American Express Company the American Express Bank and all its subsidiaries and affiliated companies. Prior to Standard Chartered PLC's acquisition, American Express Bank serviced Headway's accounts from its offices at 1111 Brickell Avenue, Miami, Florida 33131. Due to the February 2008 acquisition, Standard Chartered, which maintains its office at 1111 Brickell Avenue in Miami, now services Headway's accounts.

6. At the time of the sale of the Shares to Headway, Defendant Robert Friedman was head of the Global Investment Services Group at American Express Bank. Upon information and belief, as the chief investment officer for American Express Bank, Friedman was responsible for the approval of all products offered to its clients and oversaw the due diligence process.

7. At the time of the sale of the Sentry Fund shares to Headway, Defendant Samuel Perruchoud was the head of American Express Bank Alternative Investments and Structured Products. Upon information and belief, Perruchoud was responsible for creating financial products and locating products outside the American Express Bank family of funds, such as the Funds, and reported to Defendant Friedman.

8. At the time of the sale of the Shares to Headway, Defendant Rodolfo Pages was head of sales for Latin America at American Express Bank. Upon information and belief, Pages currently resides in Miami, Florida.

9. At the time of the sale of the Shares to Headway, Defendant John G. Dutkowski was an "investment specialist" for American Express Bank, and reported to Defendant Pages. Upon information and belief, as an investment specialist, Dutkowski urged the relationship managers to peddle certain funds, including the Funds. Dutkowski currently resides in Miami, Florida.

10. At the time of the sale of the Shares to Headway, Defendant Carlos Gadala-Maria was a relationship manager in charge of Headways' several investment accounts at American Express Bank. Upon information and belief, Gadala-Maria currently resides in New York, New York.

11. At the time of the sale of the Sentry Fund shares to Headway, Defendant Raul N. Mas was a relationship manager in charge of Headways' several investment accounts at American Express Bank. Upon information and belief, Mas currently resides in Miami, Florida

12. Collectively, American Express Bank, Standard Chartered, Friedman, Perruchoud, Pages, Dutkowski, Gadala-Maria, and Mas, will be referred to as the "Private Bank Defendants."

13. Defendant Fairfield Greenwich Group ("FGG") was founded in 1983 and has its principal place of business in New York City. FGG is an asset manager that manages its own hedge funds as well as certain externally managed funds. According to information available on its website (www.fggus.com), FGG is "a global family of

companies with offices in New York, London, and Bermuda." The website also states that Fairfield Greenwich Bermuda and Fairfield Greenwich Advisors are all FGG member companies.

14. Defendant Fairfield Greenwich Limited ("FG Limited") is a company organized under the laws of the Cayman Islands and previously served as the Funds' investment manager. FG Limited is identified as a FGG company in FGG promotional materials.

15. Defendant Fairfield Greenwich (Bermuda) Ltd. ("FG Bermuda") was organized as a corporation under the laws of Bermuda on June 13, 2003. FG Bermuda is a wholly-owned subsidiary of FG Limited, and is registered as an investment advisor under the Investment Advisers Act of 1940, as amended, effective April 20, 2006. FG Bermuda subsequently managed the Funds and was specifically responsible for managing the Funds' investment activities, monitoring its investments, and maintaining the relationship between the Funds and the escrow agent, custodian, administrator, and transfer agent. According to the Funds' Private Placement Memorandums, FG Bermuda is described as an FGG affiliate.

16. Defendant Fairfield Greenwich Advisors LLC ("FG Advisors") is a member company of FGG and is wholly owned by FG Limited. FG Advisors has its principal offices at 55 East 52nd Street, New York, New York. FG Advisors provides the Funds with administrative services and back-office support. According to publicly available information, FG Advisors is a U.S. Securities and Exchange Commission ("SEC") registered investment advisor.

17. Defendant Walter M. Noel Jr. is an FGG founding partner who, according to FGG, continues to oversee all of FGG's activities with Defendants Piedrahita and Tucker. Noel is a Director of the Funds. Noel is also a member of the Board of Directors of FGG and a Director of FG Limited. Upon information and belief, Defendant Noel resides at Park Avenue in New York City. According to the Uniform Application for Investment Advisor Registration filed by FG Bermuda about February 2005, Noel is a control person of FG Bermuda. Upon information and belief, Noel was paid portions of the management and incentive fees from the Funds' investments with Madoff.

18. Defendant Jeffrey Tucker is an FGG founding partner and a member of FGG's Board of Directors. Tucker directs FGG's business and operations activity. Tucker has a residence in New York, New York. According to the Uniform Application for Investment Advisor Registration filed by FG Bermuda about February 2005, Defendant Tucker is a control person of FG Bermuda. Upon information and belief, Tucker was paid portions of the management and incentive fees from the Funds' investments with Madoff.

19. Defendant Amit Vijayvergiya is FGG's Chief Risk Officer and is FG Bermuda's Vice President and Head of Risk Management. Upon information and belief, Vijayvergiya was paid portions of the management and incentive fees from the Funds' investments with Madoff.

20. Defendant Andres Piedrahita is an FGG partner and a member of FGG's Executive Committee, as well as a Director and the President of FG Bermuda. According to FGG, he is currently responsible for FGG's European and Latin American activities. Piedrahita is also Defendant Noel's son-in-law. Upon information and belief, Piedrahita

was paid portions of the management and incentive fees from the Funds' investments with Madoff.

21. Collectively, FGG, FG Limited, FG Bermuda, FG Advisors, Noel, Tucker, Vijayvergiya, and Piedrahita will be referred to as the "FG Defendants."

22. Defendant PricewaterhouseCoopers LLP ("PWC") is listed as the Independent Auditor for both Funds. Upon information and belief, Defendant PWC is an Ontario limited liability partnership and is a member of PricewaterhouseCoopers International Limited.

23. Defendant Citco Fund Services (Europe) B.V. ("Citco FS") is the Funds' administrator. Under an agreement between Defendant Citco FS and the Funds, Citco FS serves under the direction of the Funds' Board of Directors.

Jurisdiction and Venue

24. All conditions precedent to bringing this action have been satisfied, waived, excused, performed, or otherwise have occurred.

25. This Court has jurisdiction over the Defendants in accordance with §§ 48.193(1)(a) and (b), and 48.193(2), Fla. Stat., in that, among other things: (1) the Private Bank Defendants and the FG Defendants operated, conducted, engaged in, or carried on a business or business venture in Florida and have an office in Miami, Florida; (2) the Defendants committed a tortious act within Florida; and (3) the Defendants engaged in substantial and not isolated activity within Florida.

26. The Funds communicated with shareholders in Florida either directly or indirectly through an intermediary private bank—here, American Express Bank. What's

more, American Express Bank sent information relating to the Funds, such as offering materials, to investors located in Miami, Florida.

27. FG Defendants' wrongful and tortious acts caused injuries to Headway by depleting its investment accounts in Miami, and the FG Defendants should have reasonably expected its actions to have consequences in Miami. Moreover, FGG has an office location at 1001 Brickell Bay Drive, Suite 2406, Miami, Florida 33131.

28. Headway signed all relationship documents with American Express Bank and the Funds' subscription agreements at Headway's office in Coral Gables, Florida.

29. PWC provides auditing and accounting services to thousands of companies throughout the world, including many based in, or having substantial contacts with, the United States. As a result of such regular, systematic, and continuous business activities, PWC derives substantial revenue from the United States, including in Miami, Florida, where its maintains an office at 1441 Brickell Avenue.

30. PWC, through its clients and professional relationships, derives substantial revenue from activities throughout the United States, including in Florida.

31. Citco FS derives substantial revenue from international commerce. It administers hedge funds all over the world. Specific information regarding Citco FS's finances is not readily available because it is privately held. However, upon information and belief, Citco FS has generated tens of millions of U.S. dollars in revenues. Citco FS practices under the umbrella of the Citco Group Limited, which, according to its website, www.citco.com, is described as a "worldwide group of independent financial service providers serving the world's elite hedge funds, private equity and real estate firms, institutional banks, Global 1000 companies and high net worth individuals."

32. Citco FS maintains an affiliate office at 701 Brickell Avenue, Miami, Florida.

33. Upon information and belief, Citco FS performs fund administration services for many hedge funds throughout the world, including those managed in the United States. Through this regular, systematic, and continuous business activity, Citco FS receives substantial revenue from its activities in and directed at Florida and the United States.

34. Under § 47.105, Fla. Stat., venue is proper in Miami-Dade County, Florida because, among other things: (1) Standard Chartered, Citco FS, and FGG maintain offices in Miami-Dade County, Florida: (2) Defendants Pages, Dutkowski, and Mas maintain residences in Miami-Dade County, Florida; and (3) the cause of action accrued in Miami-Dade County, Florida.

Background Facts

Headway's Account with American Express Bank

35. In approximately 1997, Headway opened accounts at American Express Bank through its office located in Miami, Florida. In the early part of 1999, from its Miami office, American Express Bank arranged for Headway to open another account with American Express Bank's affiliate in Geneva, Switzerland. This additional account was recommended to accommodate Headway's requirements to make and maintain deposits denominated in Euros.

36. The relationship was managed in Miami by American Express Bank through its designated relationship managers. The Miami office of American Express Bank handled all instructions and communications regarding the Geneva account.

37. Defendants Mas and Gadala-Maria indicated to Headway that they, as well as other investment specialists at American Express Bank, had the skills and expertise necessary to research, analyze, and monitor the investments recommended to Headway.

38. About December 2002, American Express Bank recommended the Sentry Fund to Headway. Headway had never heard about the Sentry Fund until this meeting. American Express Bank represented to Headway that the Sentry Fund was a self-standing fund of funds with assets in bona fide investment vehicles. Unbeknownst to Headway, the management of the Sentry Fund—FGG's flagship fund—had been handed over to Madoff, who effectively controlled approximately 95% of the Sentry Fund's total assets.

39. American Express Bank first placed $4 million of Headway's investments into the Sentry Fund in January 2003, and an additional $2.5 million in November 2003. By the end of 2003, American Express Bank had invested for Headway a total of $6.5 million into the Sentry Fund.

40. Since the inception of the accounts and, specifically, since the purchase of shares in the Sentry Fund on or about January 2003, American Express Bank has provided Headway with monthly account statements, reporting the purported value of all of Headway's investments, including the value of the Sentry Fund. Curiously, Headway never received the monthly Net Asset Value ("NAV") statements (also called "term sheets") directly either from FGG, or from Citco FS. Instead, Headway would have to contact American Express Bank each month and request the NAV statements, which American Express Bank would then forward to Headway. Upon information and belief, FGG sent the NAV statements directly to American Express Bank, and American

Express Bank purposefully acted as an intermediary between FGG and Headway to continually justify collecting commissions from FGG.

41. On July 20, 2004, when American Express Bank developed management and reporting capabilities in Euros at the Miami office, all assets then on deposit at Headway's Geneva account were transferred to its Miami account, and the Geneva account was closed.

42. In the summer of 2005, consistent with the original recommendation of American Express Bank's Miami office and based on the Sentry Fund's reported "returns," American Express Bank purchased for Headway an additional $2 million in the Sentry Fund, bringing the total investment in the Sentry Fund to approximately $8.5 million.

43. In late July 2005, American Express Bank made another investment recommendation to Headway. Gadala-Maria advised Headway to buy an equity interest in the Sigma Fund, also managed by FG Bermuda. Accordingly, American Express Bank sold for Headway $6.5 million of its investment in the Sentry Fund to purchase 6.2 million Euros ("€") in shares of the Sigma Fund.

44. About August 2005, from its Miami office, American Express Bank purchased for Headway additional shares of the Sigma Fund at a cost of €1.750 million, bringing Headway's total investment in the Sigma Fund to €7.950 million.

45. By the end of August 2005, American Express Bank had invested and held for Headway a total of € 7.950 million of Headway's assets in the Sigma Fund, and $2.0 million in the Sentry Fund.

46. At all times relevant to American Express Bank's purchase and holding of Headway's investments in the Funds, Raul N. Mas, and later Carlos Gadala-Maria, served as the relationship managers for American Express Bank with regard to Headway's account.

Fairfield Greenwich Group and Bernie Madoff

47. In 1983, Walter M. Noel Jr. founded Defendant Fairfield Greenwich Group. Today, FGG claims to have over 100 employees, has offices in New York, London, and Bermuda, and representative offices in the United States (including an office in Miami, Florida), Europe, Asia, and an office for a joint venture in Singapore. According to FGG marketing materials, at one point FGG had $16.3 billion in client and firm assets under management. Prior to the discovery of Madoff's Ponzi scheme, FGG had approximately $14.1 billion in client and firm assets under its management. Approximately half of those assets were invested through the Funds in vehicles connected to Madoff's investment firm, Bernard L. Madoff Investment Securities, LLC ("BMIS").

48. For more than twenty years, Defendant Noel had a business relationship with Madoff and BMIS, which helped earn Noel's investment firm, FGG, hundreds of millions of dollars in fees. As the 1990s progressed, and through as recently as December 2008, FGG and FG Defendants raised large sums of money to invest with Madoff and BMIS.

49. Reports based on FGG internal documents state that FGG has taken more than $500 million in fees since 2003 alone from the money it placed with Madoff. Upon information and belief, FGG generated $250 million in revenue and $200 million in profit for the year that ended in September 30, 2007. Almost 65% of that money came from

fees on the Sentry Fund, and nearly all the profits were distributed among the firm's 21 partners. Moreover, *Bloomberg News* reported on December 15, 2008, that if not for the revelation of the Madoff fraud, FGG would have collected about $135 million in fees in 2008.

50. According to the Private Placement Memorandum for the Sentry Fund, FG Bermuda received a monthly management fee in an amount equal to one-twelfth of one percent (0.0833%) (1% per annum) of the Sentry Fund's Net Asset Value before performance fees. FG Bermuda also received quarterly performance fees of 20% of the new net realized and net unrealized appreciation in the Net Asset Value of the Fund for each quarter.

51. According to the Sigma Fund's Financial Statements for the years ended December 31, 2007 and 2006, the Sigma Fund pays FG Advisors an annual expense reimbursement charge of fifteen basis points (.15%), payable quarterly in an amount equal to one-thirty seventh and one half of one percent (0.0375%) of the Fund's Net Asset Value as of the last day of each calendar quarter, for providing administrative services and back-office support to the Sigma Fund. FG Advisors also receive a similar reimbursement from the Sentry Fund for providing administrative services and back-office support to the Sentry Fund.

52. According to the Funds' Private Placement Memorandums, Citco FS "receives a monthly fee based on the Net Asset Value of the Fund[s] as of the last business day of each month at a rate of 6 basis points (.06%) per annum," totaling millions of dollars per year.

Bernard Madoff and His $50 Billion Fraud

53. This action arises out of the Defendants' participation, negligent or intentional, in the massive fraudulent scheme perpetrated by Madoff through his investment firm, BMIS.

54. On December 10, 2008, Madoff informed certain senior employees at BMIS that his investment advisory business was a fraud. Madoff stated that he was "finished," that he had "absolutely nothing," that "it's all just one big lie," and that it was "basically, a giant Ponzi scheme." In substance, Madoff communicated to his senior employees that, for years, he had been paying returns to certain investors out of the principal received from other, different investors. Madoff stated that the business was insolvent and that it had been so for years. Madoff also stated that he estimated the losses from this fraud to be approximately $50 billion.

55. On December 11, 2008, the SEC charged Madoff and BMIS with securities fraud for a multi-billion dollar Ponzi scheme, and requested that the court halt ongoing fraudulent offerings of securities and investment advisory fraud by Madoff and BMIS. *SEC v. Bernard L. Madoff,* 08-CIV-10791 (S.D.N.Y. Dec. 11, 2008). Madoff's biggest client is FGG, which had maintained, upon information and belief, $6.9 billion to $7.3 billion of client assets with BMIS. More than half of FGG's $14.1 billion in assets were invested with Madoff, including approximately 95% in the Sentry Fund.

56. Also on December 11, 2008, the United States Attorney's Office of the Southern District of New York criminally charged Bernard Madoff and BMIS with securities fraud. According to the SEC's complaint and the U.S. Attorney's criminal

complaint, since at least 2005, Madoff and BMIS have been conducting a Ponzi scheme through BMIS's investment adviser services.

57. Headway had investments in both Funds at the time of Madoff's arrest.

58. Headway still held equity interests in the Funds through December 10, 2008, the last day before the revelations regarding the massive fraudulent activities of Madoff and BMIS began to be made public.

59. On March 12, 2009, Madoff pleaded guilty to 11 felony charges, including securities and wire fraud. In the plea allocution, Madoff stated that he never invested the funds in the securities as he had promised, and that those funds were deposited in a bank account at Chase Manhattan Bank.

60. As part of the fallout from Madoff's arrest, it is clear that Defendants should have identified and avoided drawing Headway into Madoff's $50 billion fraud.

Missed Red Flags

61. By his own admission, since the early 1990s, Madoff never made the investments he promised his clients.

62. According to James Hedges, President and founder of LJH Global Investments, when Madoff explained his investment strategy, it did not line up and make sense: "I saw no correlation between the strategy and how he delivered returns."

63. In May 1999, Harry Markopolis, a Boston investment manager, presented information to the SEC's Boston office claiming that Madoff was a fraud.

64. Though information is slowly seeping out, it would appear that FGG knew that several individuals and institutions' were skeptical about Madoff's returns as early as 2000. According to a news account published by *Bloomberg News* on January 7, 2009,

FGG representatives attended a meeting in 2000 with Madoff and Credit Suisse Group AG representatives, including Oswald Gruebel, who at the time headed Credit Suisse's private banking unit. Based on that meeting, *Bloomberg* reported, Credit Suisse "urged customers . . . to withdraw cash from [Madoff's] firm because the bank couldn't determine how he made money." The article stated that the Credit Suisse clients "proceeded to redeem about $250 million from Madoff-run funds."

65. A 2001 article published in *Barron's,* entitled "Don't ask, don't tell," publicly questioned Madoff's investment run. The article pointed out that, oddly, Madoff did not charge fees for his money-management services, "nor does he take a cut of the 1.5% fees marketers like Fairfield Greenwich charge investors each year." The article also noted that Madoff requested that his investors (mainly, the "feeder funds" such as the Funds) not reveal that he managed their money. Madoff allegedly said that it was no one's business what went on there. More than a year later, American Express Bank would recommend the Sentry Fund to Headway.

66. On information and belief, in 2004 a private equity group looked into purchasing FGG, but had major concerns with the money that was placed with Madoff. When the concerns were presented to FGG, the talks were immediately shut down. These concerns included: (1) Madoff's claimed volume in the options market was way too large based on the actual size of those markets; (2) the split-strike strategy (Madoff's purported investment strategy) could not have produced Madoff's results; and (3) nobody at FGG had actually observed Madoff's trading operations.

67. Confronted with such a lack of transparency, several major investment firms, including Goldman Sachs & Co., also came to the conclusion that it was inappropriate to invest in Madoff's funds.

68. In 2005—the very year that American Express Bank recommended that Headway purchase $2.0 million in the Sentry Fund and €6.2 million in the Sigma Fund—Harry Markopolos submitted a 17-page report, along with attachments, to the SEC New York branch, denouncing Madoff's arrant fraud.

69. Among Markopolos' 29 red flags as to why Madoff's earnings were suspicious, Markopolos identified Madoff's need for secrecy and his refusal to allow outsider performance audits. Indeed, on information and belief, the auditor for Madoff's securities, Friehling & Horowitz, consisted of only three employees, of which one was 78 years old and living in Florida, one was a secretary, and one was an active 47-year-old accountant. The office itself was only 13 feet by 18 feet, and the whole operation was glaringly inadequate given the supposed volume of Madoff's trading and investment activities.

70. Notably, Markopolos observed in 2005 that, "[i]t is mathematically impossible for a strategy using index call options and index put options to have such a low correlation to the market where its returns are supposedly being generated from."

71. Despite these red flags, Defendants failed to scrutinize the Funds and did nothing to protect Headway's investment.

Defendants' Wrongdoing

72. Between the public reports regarding Madoff, and what was, on information and belief, a well known topic of conversation on Wall Street, the Defendants had more

than enough warning signs that Madoff-related funds should be viewed with a heightened sense of skepticism. Unfortunately for Headway and many other investors, Defendants failed to act on their fiduciary and professional responsibilities, and steered Headway in the path of Madoff's theft of millions of dollars.

The Private Bank Defendants

73. The Private Bank Defendants owed Headway a fiduciary duty of utmost good faith, loyalty, and due care based upon their relationship, the Private Bank Defendants' superior knowledge and skill, and Headway's trust and confidence in them to prudently manage its investment assets.

74. The fiduciary duty obligated the Private Bank Defendants to provide the highest duty of care, undivided loyalty, fairness, and full and complete disclosure to Headway, who placed its trust and confidence in the Private Bank Defendants.

75. Nevertheless, without regard for due diligence, Freidman, Perruchoud, Pages, and Dutkowski pushed the relationship managers to promote and recommend the Funds, which the relationship managers did recommend to Headway.

76. Headway relied on the professional competence of American Express Bank and Standard Chartered's relationship managers, including Mas and Gadala-Maria, to handle its assets.

77. Based upon the relationship managers' claimed superior knowledge, judgment, skill, and years of experience, Headway relied upon Mas and Gadala-Maria to ensure that the Funds were, at a minimum, bona fide investment vehicles.

78. The Private Bank Defendants failed to act on their duties in that they failed to discover, or simply disregarded, the countless red flags surrounding Madoff, BMIS, and any of BMIS' feeder funds, including the Funds run by the FG Defendants.

79. Given their superior knowledge, judgment, skill, and years of experience, had the Private Bank Defendants undertaken the appropriate due diligence, Headway's investment assets never should have been placed, or allowed to remain in, the Funds.

FG Defendants

80. The Funds' Board of Directors have overall management responsibility for the Funds including establishing investment, dividend, and distribution policy, and having the authority to select and replace the Funds' administrators, registrars, transfer agents, any officers of the Funds, and any other persons or entities with management or administrative responsibilities to the Funds.

81. According to information available on its website (www.fggus.com), FGG states that its "[d]ue diligence process is deeper and broader than a typical Fund of Funds, resembling that of an asset management company acquiring another asset manager, rather than a passive investor entering a disposable investment."

82. When explaining its approach on diligence, FGG states in its marketing materials that "particular attention is paid to the extent to which each manager's controls are reasonably suited to maintain operational, market and credit risks at an appropriate level and as represented by the manager." FGG further states "during this period, FGG personnel also have an opportunity to evaluate a manager's attitudes and receptiveness (as opposed to his proclaimed intention) towards providing FGG with full transparency of its security level trading activity and access to its investment thought process."

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 fact, one cannot help but appreciate the irony in FGG's own marketing material: "[t]he inadequacy or lack of independence or transparency of valuation procedures, contingency plans, and other trading and settlement procedures may cause FGG to reject an otherwise appealing manager."

84. According to the FGG website, as part of the FGG's ongoing oversight, due diligence and risk monitoring, as implemented by FGG, employs a variety of techniques that probe deeply into all key elements of risk, including manager style, market risk, operation risk, credit risk, and legal risk.

85. Specifically, FGG states that the key elements it looks at in determining operational risk include: reviewing audited financials and auditor's management letter comments; looking for affiliated party loans and pledged assets or collateralized loans; reviewing accounting controls from trade execution to trade capture to trade reconciliation with the street, administrator, and fund; reviewing bank reconciliations for irregular or outstanding items; reviewing pricing procedures and valuation procedures and inquire about frequency of pricing disputes; reviewing revenue recognition policies; reviewing broker reconciliations to ensure completeness and existence of all securities; and infrastructure adequacy evaluation and disaster recovery plans.

86. The FG Defendants had responsibilities to establish appropriate procedures to conduct due diligence for all fund managers with whom it invested client assets. These procedures were to be applied in creating general oversight and transparency regarding

how the Funds' assets were being invested. The FG Defendants were also responsible for seeing that these procedures and guidelines, if any, were in fact being followed.

87. The FG Defendants failed to live up to their standards, and failed to perform even minimal diligence with regard to Madoff and BMIS.

Citco FS

88. As administrator, Citco FS has the responsibility for furnishing the day-to-day administrative services that the Funds might require, such as: accounting services; maintaining the Funds' books and records; preparation of reports and accounts; calculation of Net Asset Value (to be calculated on a monthly basis) and fees; communications with shareholders and governmental bodies; paying the Funds' expenses; providing suitable facilities and procedures for handling dividends and distributions (if any) and the Funds' orderly liquidation, if required.

89. Despite this, they continued to prepare and distribute NAV statements based on valuations they knew or should have known were wrong.

90. Citco FS should have seen the red flags indicating the possibility of fraudulent conduct or negligence on the part of the Funds' management.

91. Citco FS knew or should have known that valuations it received from FGG were false and misleading, yet Citco FS accepted them and disseminated the monthly NAV statement.

92. Citco FS knew or should have known that this information would mislead and damage Headway.

PWC

93. Defendant, PWC is listed as the Funds' independent auditor.

94. PWC was responsible to conduct an independent audit of the Funds' financial statements in accordance with auditing standards generally accepted in the United States of America. This audit includes an evaluation of the internal accounting controls and examining, on a test basis, sufficient evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by the Company's management, and evaluating the overall financial statement presentation.

95. PWC failed to perform its work as the Funds' auditors in a manner consistent with the standards of the auditing profession and as required by generally accepted auditing standards ("GAAS").

96. According to the Sentry Fund's December 31, 2006 and 2007 financial statements audited by PWC, 97% of the net assets of the Fund in 2007, and 95% of the net assets of the Fund in 2006 were comprised of United States Treasury Bills. In fact, the Funds' assets as of the stated dates could not have been comprised of treasury bills or of any securities whatsoever. Madoff admitted as much on March 12, 2009.

97. Had PWC properly performed its due diligence under GAAS, it would have learned that the Funds' assets were largely non-existent, and certainly not comprised of treasury bills.

98. PWC negligently disregarded the Funds' concentration of investments in a single third-party investment manager—that is, with Madoff.

99. PWC negligently disregarded that the Funds violated their own stated general principles of investment diversification.

100. PWC negligently disregarded the materially heightened risk to the Funds' assets from such reliance on Madoff, particularly given the lack of transparency.

101. PWC negligently disregarded the impossibly positive results reportedly obtained by Madoff.

102. PWC negligently disregarded the inconsistencies between BMIS's publicly available financial information concerning its assets and the purported amounts that Madoff managed for clients such as FGG.

103. PWC negligently disregarded the fact that BMIS itself was audited by a small, obscure accounting firm, Friehling & Horowitz, which has its offices in Rockland County, New York, and had no apparent experience and capability to audit entities of the purported size and complexity of BMIS.

104. By failing to investigate these red flags, among others, and the suspicious nature of Madoff's operations and investment results, PWC's audits violated GAAS and constituted an extreme departure from the standards of the accounting and auditing profession. In particular, PWC has violated GAAS by failing to use due professional care in performing its work; failing to properly plan the audits; failing to maintain an appropriate degree of skepticism during the audits; and failing to obtain sufficient competent evidential matter to support the conclusions of the audit reports.

105. If PWC had made an appropriate inquiry into these red flags, the investigation would have raised questions regarding the true value and existence of the Funds' reported invested assets, as well as the serious deficiencies in the Funds' own internal controls and policies designed to reduce the risk of loss.

106. Headway has engaged Rivero Mestre & Castro ("RMC") as its counsel to prosecute this action, and is obligated to pay RMC's reasonable legal fees and costs.

COUNT I
(Breach of Fiduciary Duty against the Private Bank Defendants)

107. Headway realleges paragraphs 1 through 106 as though stated here.

108. Headway entrusted to the Private Bank Defendants its confidence in them to prudently manage Headway's investment assets.

109. The Private Bank Defendants owed Headway a fiduciary duty of utmost good faith, loyalty, and due care based upon their relationship.

110. As investment management professionals, the Private Bank Defendants knew or should have known precisely how to perform their fiduciary role in monitoring the safety and performance of Headway's assets in a prudent and professional manner.

111. The Private Bank Defendants owed Headway, among other things, the following duties:

(a) To take all reasonable steps to oversee that Headway's investments were made and maintained in a prudent and professional manner;

(b) To take reasonable steps and observe the strictest of formalities in seeking to preserve for Headway the value of its investments;

(c) To refrain from entrusting Headway's assets to any fund manager whose interests were diametrically opposed to or otherwise in conflict with Headway's interests;

(d) To perform all necessary due diligence and to remain ever vigilant to ensure that the performance results of any fund in which Headway's assets were placed were being accurately and timely

reported, and to maintain oversight and transparency as to the activities of any fund manager investing any of Headway's assets; and

(e) To exercise generally the degree of prudence, caution, and good business practices that would be expected of reasonable investment professionals overseeing client funds.

112. The Private Bank Defendants breached each and every one of these duties.

113. As the individual Private Bank Defendants' employer, American Express Bank and Standard Chartered are liable for the actions of its agents and employees.

114. As a direct and proximate result of the Private Bank Defendants' breaches of fiduciary duties, Headway has suffered damages and is entitled to recover its damages from the Defendants, as well as a return of all fees paid to the Defendants.

COUNT II
(Breach of Fiduciary Duty against FG Defendants)

115. Headway realleges paragraphs 1 through 106 as though stated here.

116. Headway entrusted its assets to the FG Defendants by investing in the Funds.

117. Because Headway entrusted its assets to the FG Defendants, the FG Defendants owed fiduciary duties to Headway.

118. As investment management professionals, the FG Defendants knew or should have known precisely how to perform their fiduciary role in monitoring the safety and performance of Headway's assets in a prudent and professional manner.

119. The FG Defendants owed Headway, among other things, the following duties:

(a) As investment managers with discretionary control over the assets entrusted to them by Headway, to act with loyalty and in good faith towards Headway;

(b) To take all reasonable steps to oversee that the investment of the assets of Headway were made and maintained in a prudent and professional manner;

(c) To take reasonable steps and observe the strictest of formalities in seeking to preserve for Headway the value of its investments;

(d) To refrain from entrusting Headway's assets to any fund manager whose interests were diametrically opposed to or otherwise in conflict with Headway's interests;

(e) To perform all necessary due diligence and to remain ever vigilant to ensure that the performance results of any fund in which Headway's assets were placed were being accurately and timely reported, and to maintain oversight and transparency as to the activities of any fund manager that is investing any of Headway's assets; and

(f) To exercise generally the degree of prudence, caution, and good business practices that would be expected of reasonable investment professionals overseeing client funds.

120. The FG Defendants breached each and every one of these duties.

121. As a direct and proximate result of the FG Defendants' breaches of fiduciary duties, Headway has suffered damages and is entitled to recover its damages from the FG Defendants, as well as a return of all fees paid to the FG Defendants.

COUNT III
(Negligence against FG Defendants)

122. Headway realleges paragraphs 1 through 106 as though stated here.

123. The FG Defendants, by virtue of their superior knowledge, judgment, skill and experience in rendering investment advice and in the sale of securities, and the standard of care existing in the securities industry as set forth, among other things, by the rules of the NASD, NYSE, SEC, FINRA, and Florida and Federal Law, owed Headway a duty of fair dealing and due care.

124. The FG Defendants breached this duty of care.

125. By failing to carry out, among other things, the following duties, the FG Defendants further breached their duty of care:

(a) To take all reasonable steps to oversee that the investment of Headway's assets were made and maintained in a prudent and professional manner;

(b) To take reasonable steps in seeking to preserve for Headway the value of its investments;

(c) To refrain from entrusting Headway's assets to any fund manager whose interests were diametrically opposed to or otherwise in conflict with Headway's interests;

(d) To perform all necessary due diligence and to remain ever vigilant to ensure that the performance results of any fund in which

Headway's assets were placed were being accurately and timely reported, and to maintain oversight and transparency as to the activities of any fund manager investing any of Headway's assets; and

(e) To exercise generally the degree of prudence, caution, and good business practices that would be expected of reasonable investment professionals overseeing client funds.

126. As a direct and proximate result of the FG Defendants' negligence, Headway has suffered damages and is entitled to recover its damages from the FG Defendants, as well as a return of all fees paid to the FG Defendants.

COUNT IV
(Negligence against the Private Bank Defendants)

127. Headway realleges paragraphs 1 through 106 as though stated here.

128. The Private Bank Defendants, by virtue of their superior knowledge, judgment, skill, and experience in rendering investment advice and in the sale of securities, and the standard of care existing in the securities industry as set forth, among other things, by the rules of the NASD, NYSE, SEC, FINRA, and Florida and Federal Law, owed Headway a duty of fair dealing and due care.

129. The Private Bank Defendants had a duty to recommend purchasing an investment only after sufficient, careful, and diligent studying of such investment, and a duty to manage and monitor Headway's investments with reasonable care as previously alleged here.

130. The Private Bank Defendants had a duty to perform due diligence and to remain ever vigilant to ensure that the performance results of any fund in which

Headway's assets were placed were being accurately and timely reported, and to maintain oversight and transparency as to the activities of any fund manager that was investing any of Headway's assets.

131. The Private Bank Defendants failed to perform due diligence despite the numerous red flags surrounding Madoff, BMIS, and the BMIS feeder funds, including the recommended Funds.

132. The Private Bank Defendants breached each of these duties.

133. As the employer of the individual Private Bank Defendants, American Express Bank and Standard Chartered is liable for the actions of its agents and employees.

134. As a direct and proximate result of the Defendants negligence, Headway has suffered damages and is entitled to recover its damages from the Defendants, as well as a return of all fees paid to the Defendants.

COUNT V
(Negligence against Citco FS)

135. Headway realleges paragraphs 1 through 106 as though stated here.

136. Citco FS, as the Funds' administrator, had a duty to calculate and verify the Funds' NAV statements each month.

137. Upon information and belief, Citco FS, as the Funds' administrator, had a duty to Headway and the Funds' investors to independently value the Funds' portfolios.

138. Citco FS performed its duties negligently in that it failed to ensure the accuracy of the values provided by the Funds' investment manager, FG Limited, in determining the independent value of the Funds' NAV statements.

139. Citco FS' failure to inquire into many facts which, in the exercise of ordinary care, it should have investigated constitutes a breach of its duty to Headway.

140. As a direct and proximate result of the Citco FS' negligence, Headway has suffered damages and is entitled to recover its damages from Citco FS.

COUNT VI
(Negligence against PWC)

141. Headway realleges paragraphs 1 through 106 as though stated here.

142. PWC, as the Funds' independent auditors, had a duty to independently audit the Funds' books and records. The audit reports prepared by PWC were specifically addressed and distributed to the Funds' Directors and Shareholders.

143. PWC performed its duties negligently in that it failed to properly audit the Funds' financial records.

144. PWC breached its duty to Headway, among other things, by:

(a) failing to perform its work as the Funds' auditor in a manner consistent with the standards of the auditing profession and as required by GAAS;

(b) negligently disregarding the concentration of the Funds' custody of its assets with a single third-party investment manager;

(c) negligently disregarding the Funds' violation of their own stated general principles of investment diversification;

(d) negligently disregarding the materially-heightened risk to the Funds' assets from such reliance on Madoff, particularly given the lack of transparency;

(e) negligently disregarding the impossibly positive results reportedly obtained by Madoff;

(f) negligently disregarding the inconsistencies between BMIS' publicly-available financial information concerning its assets and the purported amounts that Madoff managed for clients such as FGG; and

(g) negligently disregarding the fact that BMIS itself was audited by a small, obscure accounting firm, Friehling & Horowitz, which has its offices in Rockland County, New York, and lacked the requisite experience for auditing entities of BMIS's apparent size and complexity.

145. As a direct and proximate result of PWC's negligence, Headway has suffered damages and is entitled to recover its damages from PWC.

COUNT VII
(Unjust Enrichment against FG Defendants)

146. Headway realleges paragraphs 1 through 106 as though stated here.

147. Headway has conferred a benefit on the FG Defendants in the form of commissions and the FG Defendants had knowledge of the benefits it received.

148. The FG Defendants voluntarily accepted and retained the benefits conferred.

149. The circumstances under which the FG Defendants received the benefit—that is, the FG Defendants' abject failure to perform their functions in a reasonably diligent fashion—render the FG Defendants' retention of the benefit inequitable.

150. As a direct and proximate result of the FG Defendants' unjust enrichment, Headway has suffered damages and is entitled to recover its damages from the FG Defendants.

COUNT VIII
(Unjust Enrichment against American Express Bank and Standard Chartered)

151. Headway realleges paragraphs 1 through 106 as though stated here.

152. Headway has conferred a benefit on American Express Bank and Standard Chartered in the form of commissions and American Express Bank and Standard Chartered had knowledge of the benefits they received.

153. American Express Bank and Standard Chartered voluntarily accepted and retained the benefits conferred.

154. The circumstances under which American Express Bank and Standard Chartered received the benefits—that is, American Express Bank and Standard Chartered's abject failure to perform their functions in a reasonably diligent fashion—render American Express Bank and Standard Chartered's retention of the benefits inequitable.

155. As a direct and proximate result of the American Express Bank and Standard Chartered's unjust enrichment, Headway has suffered damages and is entitled to recover its damages from American Express Bank and Standard Chartered.

PRAYER FOR RELIEF

WHEREFORE, Headway requests a judgment as follows:

(a) Enjoining the FG Defendants from using the Funds' assets to defend this action or to otherwise seek indemnification from the Funds for reckless and negligent conduct as alleged here;

(b) On all Counts:

(i) damages to be determined by this Court;

(ii) pre-and post-judgment interest;

(iii) costs; and

(iv) such other and further relief as this Court deems appropriate and proper.

DEMAND FOR JURY TRIAL

Headway demands trial by jury as to all issues so triable as a matter of right.

Dated: April 6, 2009

Respectfully submitted,

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