UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: *Headway Investment Corp. v. American Express Bank Ltd., et al.*, No. 09-CV-08500	MASTER FILE NO. 09-CV-0118 (VM)

MEMORANDUM OF LAW OF FAIRFIELD GREENWICH ADVISORS LLC, WALTER M. NOEL, JR., AND JEFFREY TUCKER IN OPPOSITION TO PLAINTIFF HEADWAY INVESTMENT CORPORATION'S MOTION FOR LEAVE TO AMEND COMPLAINT

Defendants Fairfield Greenwich Advisors LLC, Walter M. Noel, Jr., and Jeffrey Tucker respectfully submit this memorandum of law in opposition to the motion of Plaintiff Headway Investment Corporation ("Headway") for leave to file an amended complaint (the "Motion") as to Fairfield Greenwich Advisors LLC, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Limited, Walter M. Noel, Jr., Jeffrey Tucker, Andrés Piedrahita, and Amit Vijayvergiya (collectively, the "Fairfield Defendants").[1] Headway's Motion must be denied because it flies in the face of this Court's prior orders consolidating the Headway action into *Anwar, et al. v. Fairfield Greenwich Limited, et al.* ("*Anwar*" or the "Consolidated Action") and providing that Defendants shall respond only to the *Anwar* consolidated complaint.[2]

BACKGROUND

Headway, a Panamanian corporation, is one of dozens of plaintiffs that filed complaints against the Fairfield Defendants over alleged losses in connection with investments made in funds that had assets invested through or with Bernard L. Madoff and/or his firm, Bernard L. Madoff Investment Securities LLC ("BLMIS").[3] When Headway filed its original complaint on April 6, 2009, this Court had already consolidated numerous similar actions into the earlier-filed *Anwar* action, and had issued an order providing for further consolidation of related actions and appointing co-lead counsel. *See* January 30, 2009 Consolidation Order and Order for Appointment of Interim Co-Lead Counsel (the "Consolidation Order"), Dkt. # 40; *see also* July

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[1] Headway also seeks to amend its complaint as to Defendant Fairfield Greenwich Group ("FGG"). FGG is not a legal entity but rather a marketing name for a group of Fairfield Greenwich entities. *See* Declaration of Michael Thorne in Support of the FG Defendants' Motion to Dismiss the Second Consolidated Amended Complaint at ¶ 2, Dkt. # 363. Unless otherwise specified, docket citations herein refer to *Anwar, et al. v. Fairfield Greenwich Limited, et al.*, No. 09-CV-0118 (VM). Headway's March 16, 2012 Memorandum of Law in Support of Its Motion for Leave to Amend Complaint is abbreviated herein as "Headway MOL."

[2] The Fairfield Defendants preserve all rights and defenses, including any defenses they may have to the personal jurisdiction or subject matter jurisdiction of the District Court for the Southern District of Florida.

[3] Headway invested in the offshore funds Fairfield Sentry Limited ("Sentry") and Fairfield Sigma Limited ("Sigma").

7, 2009 Order, Dkt. # 178 (appointing lead counsel). The Court had also entered a Civil Case Management Plan and Scheduling Order ("CMO") to efficiently manage the consolidated litigation. *See* March 11, 2009 CMO, Dkt. # 69. The CMO provides that "[a]ll subsequently filed or transferred cases…concerning losses by or on behalf of Fairfield Greenwich investors arising from or relating to the facts and claims alleged in the Consolidated Action…shall be consolidated, for all purposes, with the Consolidated Action." CMO at ¶ 1.

In its complaint dated April 6, 2009, Headway asserted claims against the Fairfield Defendants for breach of fiduciary duty, negligence, and unjust enrichment based on purported shortcomings in the Fairfield Defendants' due diligence of Madoff and BLMIS, as well as claims against, *inter alia*, PricewaterhouseCoopers LLP ("PwC Canada") and Citco Fund Services (Europe) B.V. ("Citco"). *See* Exhibit A to Memorandum of Law in Support of Defendant Fairfield Greenwich Advisors' Motion to Stay Proceedings Pending Determination by the Judicial Panel on Multidistrict Litigation in the Proper Venue for this Action, No. 09-CV-21395 (S.D. Fla. June 22, 2009), Dkt. # 19-1. Given the similarities between Headway's action and the Consolidated Action, the United States Judicial Panel on Multi-District Litigation transferred *Headway* to this Court.[4] *See* October 14, 2009 Memo Endorsement on Transfer Order, Dkt. # 281. On October 13, 2009, Judge Marrero endorsed the Transfer Order and directed the Clerk of the Court to consolidate *Headway* into the Consolidated Action "for all pretrial purposes." *See id.* On October 14, 2009, pursuant to the CMO in the Consolidated Action, Judge Marrero issued a formal order consolidating *Headway* into *Anwar*, concluding that "the complaints describe the same or substantially similar underlying events and operative facts, and assert claims arising out of the same or substantially similar actions against all or most of the same

[4] Headway's action, originally filed in Florida state court, was removed to Florida federal court, from where the Panel transferred it to this Court. *See* Notice of Removal, No. 09-CV-21395 (S.D. Fla. May 22, 2009), Dkt. # 1.

defendants and that the defendants in these cases are represented by the same counsel." *See* October 14, 2009 Order, Dkt. # 282.

The CMO unambiguously provides that the Defendants to the Consolidated Action "shall respond only the Consolidated Amended Complaint; no response by Defendants is due to any individual complaints that are consolidated into the Consolidated Action."[5] CMO at ¶ 6. Accordingly, on December 22, 2009, the Fairfield Defendants (and separately PwC Canada and Citco) filed a motion to dismiss the Second Consolidated Amended Complaint ("SCAC") in the Consolidated Action.[6] *See* December 22, 2009 Notice of Motion, Dkt. # 360. In compliance with the CMO, the Fairfield Defendants, PwC Canada and Citco did not move to dismiss or otherwise respond to the individual *Headway* complaint or to any of the other individual complaints in actions that had similarly been consolidated into *Anwar*.[7] On October 15, 2010, after this Court granted in part and denied in part the Fairfield Defendants' motion to dismiss the SCAC, the Fairfield Defendants filed their Answer to the SCAC. *See* FG Defendants' Answer to the Second Consolidated Amended Complaint, Dkt. # 545.

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[5] Headway also named as defendants in its complaint Standard Chartered International (USA) Ltd. (f/k/a American Express Bank Ltd.) and related entities and individuals (collectively, the "Standard Chartered Defendants"), who served as the investment advisors and managers for Headway's investments in Sentry and Sigma. Numerous other actions have been filed against the Standard Chartered Defendants in connection with alleged losses by investors in Sentry and Sigma. As the Court is aware, *Headway* and those cases are proceeding on a separate track as to the Standard Chartered Defendants pursuant to separate case management and scheduling orders between plaintiffs and the Standard Chartered Defendants to which the Fairfield Defendants are not a party. *See* February 22, 2011 Second Amended Scheduling Order Regarding Standard Chartered Cases, Dkt. # 609; February 1, 2010 Amended Scheduling Order Regarding Standard Chartered Cases, Dkt. # 376; January 29, 2010 Initial Scheduling Order Regarding Standard Chartered Cases, Dkt. # 375. Under those orders—unlike the CMO applicable to the Fairfield Defendants, PwC Canada, and Citco—the Standard Chartered Defendants are required to answer or otherwise respond to each of the individual complaints. *See* January 29, 2010 Initial Scheduling Order Regarding Standard Chartered Cases at ¶¶ 2, 5. Notably, Headway is the *only* plaintiff to assert claims against both the Standard Chartered Defendants and the Fairfield Defendants.

[6] The *Anwar* Consolidated Amended Complaint was filed on April 24, 2009 and the SCAC was filed on September 29, 2009. *See* Consolidated Amended Complaint, Dkt. # 116; Second Consolidated Amended Complaint, Dkt. # 273.

[7] While Headway now feigns ignorance, the Fairfield Defendants made it abundantly clear that they would not be responding to individual complaints, including the *Headway* complaint, consistent with this Court's directive in the CMO. *See, e.g.*, January 28, 2010 Letter from M. Cunha to J. Katz (attached as Exhibit A).

ARGUMENT

Now, nearly three years after filing its complaint and two and a half years after its action was consolidated into *Anwar*, Headway seeks leave to sidestep this Court's orders and amend its complaint to add new defendants and new claims, including three new claims against the Fairfield Defendants (*i.e.*, claims for fraudulent misrepresentation, negligent misrepresentation, and violations of Florida's Securities & Investor Act). *See* Headway MOL at 2.

The relief Headway seeks is improper and requires denial of the Motion. As noted *supra*, under the Consolidation Order, the CMO and Judge Marrero's October 2009 orders specific to *Headway*, that action was consolidated into *Anwar* for all pre-trial purposes and Defendants were required to respond only to the *Anwar* consolidated complaint rather than to individual complaints like Headway's. This Court established a consolidation mechanism to efficiently manage what would otherwise be an unwieldy litigation and appointed co-lead plaintiffs' counsel to make assessments as to which claims should be pursued. *See* Consolidation Order at ¶ 14. Headway cannot assert at this juncture new claims against the Fairfield Defendants by amending a complaint to which the Fairfield Defendants are not to respond under the applicable court orders. Headway's back-door attempt to assert and preserve for trial new claims through a pleading that is not operative as to the Fairfield Defendants must be rejected in its entirety.

Given the improper posture of Headway's request to amend, we will not unnecessarily burden the Court with arguments as to the merits of the proposed amendments but request an opportunity to do so should the Court issue any order overriding or otherwise amending the existing CMO in a manner that would render such arguments relevant. In any event, Headway's time to amend without leave of court has long expired[8] and, in seeking leave to amend, Headway

[8] Headway asserts that, under Federal Rule of Civil Procedure 15(a)(1), it is entitled to amend its complaint as to the Fairfield Defendants "as a matter of right," without seeking leave of the court, since the Fairfield

has provided absolutely no basis for its proposed amendments and no justification for its unreasonable delay beyond vague references to "knowledge gained from discovery."

CONCLUSION

For the foregoing reasons, Headway's motion for leave to amend its complaint as to the Fairfield Defendants must be denied with prejudice.

Dated: April 2, 2012
New York, NY

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Defendants have not answered its complaint. *See* Headway MOL at n.4. Headway appears to rely on the obsolete, pre-2009 version of Rule 15(a)(1), which permitted a party to amend its pleading once as a matter of course "before being served with a responsive pleading." *See* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FED. PRAC. & PROC. § 1481 (3d ed.). However, the current Federal Rule of Civil Procedure 15(a)(1), effective since December 1, 2009, sets a specific date restriction and only permits a party to amend its pleading once as a matter of course "within 21 days after serving it." FED. R. CIV. P. 15(a)(1). Not surprisingly, Headway also relies on a 2008 case—*Williams v. Savage*, 569 F. Supp. 2d 99 (D.D.C. 2008)— that applies the obsolete Rule 15(a)(1). *See* Headway MOL at n.4.

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