

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Fairfield Greenwich Group
Securities Litigation

MDL No. 2088

**STANDARD CHARTERED DEFENDANTS' OPPOSITION TO REQUEST OF
HEADWAY INVESTMENT CORPORATION TO "SEVER" CERTAIN CLAIMS**

On June 19, 2009, Fairfield Greenwich Advisors LLC ("Fairfield") filed a Motion to Transfer and Coordinate Related Actions in the Southern District of New York Pursuant to 28 U.S.C. § 1407 (the "Motion to Transfer") requesting that the Judicial Panel on Multidistrict Litigation (the "JPML") transfer *Headway Investment Corporation v. American Express Bank, Ltd., et al.*, 09-cv-21395 (S.D. Fla.) to the Southern District of New York for coordinated or consolidated pretrial proceedings with *Anwar, et al. v. Fairfield Greenwich Limited, et al.*, 09-cv-00118 (S.D.N.Y.) — a putative class action pending before the Honorable Victor Marrero — and other actions filed against Fairfield and others in the wake of the revelation of the frauds committed by Bernard Madoff. Standard Chartered Bank and its affiliate, American Express Bank Ltd, named defendants in the *Headway* action, support that motion. Standard Chartered is already a named defendant in another action that has been coordinated with *Anwar: Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*, 09-cv-2410 (S.D.N.Y.). The *Bhatia* case, just like *Headway*, asserts claims against individuals and entities related to both Fairfield and Standard Chartered Bank. More such actions may be coming. To the extent that Standard

Chartered and its related entities, employees and former employees must appear and litigate in these individual actions, the cases should proceed in a single forum in a coordinated fashion.

On July 26, 2009, Headway Investment Corporation (“Headway”) filed an opposition to Fairfield’s Motion to Transfer. In its opposition, Headway agrees that the JPML should transfer its claims against Fairfield and its related entities, PricewaterhouseCoopers LLP (“PwC”) and Citco Financial Services (Europe) B.V. (“Citco”). Headway requests, however, that the JPML “sever” and decline to transfer the claims it has brought against the Standard Chartered defendants in the same action because the “epicenter” of those claims is in Miami, Florida and only “secondary questions of fact and law” exist in common between these and the claims in *Anwar*. (Opposition at 7, 10.)

Headway’s request should be denied. Neither the fact that certain evidence and witnesses may be located in Miami, nor that the *Headway* action includes claims that are not precisely identical to those raised in *Anwar* undermines the plain need for centralization here. There can be no dispute that Headway’s claims raise common issues of fact with the claims in *Anwar* and in *Bhatia*. Indeed, each of these actions will require discovery concerning, among other matters, the knowledge and conduct of defendants with respect to Madoff’s Ponzi scheme; the existence of various alleged “red flags” concerning that fraud; the due diligence conducted by defendants concerning Bernard L. Madoff Investment Securities LLC (“BLMIS”); and communications among defendants.

In short, these actions involve overlapping allegations, witnesses, and evidence. “Severing” the Standard Chartered claims from one of these actions will merely create a procedural mess and piecemeal litigation. The *Headway* action should be transferred (as a

whole) to be coordinated for pretrial purposes to serve the convenience of the parties and promote the just and efficient conduct of the actions.

BACKGROUND

Fairfield Greenwich Advisors LLC is an entity affiliated with the marketing name Fairfield Greenwich Group that offered hedge funds (the “Fairfield Funds”) invested with BLMIS. Following the revelation of Bernard Madoff’s massive Ponzi scheme, a slew of lawsuits were filed in federal court against Fairfield and related entities and individuals. Most of those lawsuits have been consolidated under a single consolidated class action complaint: *Anwar, et al. v. Fairfield Greenwich Limited, et al.* *Anwar* alleges, in pertinent part, that the Fairfield defendants breached fiduciary and professional responsibilities in connection with offering the Fairfield Funds by making false representations and failing to conduct adequate due diligence concerning Madoff’s operations despite the presence of numerous “red flags” concerning Madoff’s Ponzi scheme. (*Anwar* Compl., ¶ 202.)

Standard Chartered Bank and its affiliates (including American Express Bank Ltd, which became a subsidiary of Standard Chartered Bank in February of 2008) are in the business of international banking. Some of Standard Chartered Bank’s private banking clients were invested in the Fairfield Funds, and some of those clients have filed lawsuits against Standard Chartered and Fairfield. The first filed of those actions is *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*¹ *Bhatia*, although it includes some distinct claims against Standard Chartered defendants, raises the same types of claims and allegations as *Anwar*. At the

¹ The Standard Chartered defendants named in *Bhatia* include Standard Chartered International (USA) Ltd. and Standard Chartered PLC.

request of Fairfield, and over the opposition of plaintiffs, the *Bhatia* case was transferred to Judge Marrero and consolidated for pretrial purposes with *Anwar*.²

Headway is a case just like *Bhatia*. *Headway* asserts claims against Fairfield and Standard Chartered entities and personnel arising out of their involvement with Madoff, alleging that those defendants breached their duties to private banking clients by failing to exercise proper due diligence and care when investing and overseeing client money in the Fairfield Funds.³ (See *Bhatia* Compl., ¶¶ 9, 36-58, 117-126; *Headway* Compl., ¶¶ 72-79, 107-14, 127-34, 151-55.) *Headway*, just like *Bhatia*, should be coordinated with *Anwar*.

ARGUMENT

I. The Standard for Centralization Under Section 1407 Is Plainly Met Here.

Transfer for centralization of actions under Section 1407 is proper where the actions involve “one or more common questions of fact” and centralization “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a). The Section 1407 standard is met where multiple actions share the same “factual backdrop.” *In re Bayou Hedge Funds Inv. Litig.*, 429 F. Supp. 2d 1374, 1376 (J.P.M.L. 2006). Although the JPML may “separate any claim . . . and remand . . . such claim[] before the remainder of the action is remanded,” 28 U.S.C. § 1407(a), the JPML should not separate claims where the cases “involve sufficient commonality of fact to warrant transfer of all

² See Letter from Peter E. Kazanoff to J. Michael McMahon, Clerk of Court, dated March 27, 2009, attached hereto as Exhibit A; Letter from Mark G. Cunha to the Honorable Victor Marrero, dated April 24, 2009, attached hereto as Exhibit B.

³ The Standard Chartered defendants named in *Headway* include Standard Chartered Bank, American Express Bank Ltd., Carlos Gadala-Maria, Raul N. Mas, Robert Friedman, Samuel Perruchoud, Rodolfo Pages, and John G. Dutkowski.

actions to a single district.” *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378, 1385 (J.P.M.L. 1974).⁴

Here, not only do *Anwar*, *Bhatia* and *Headway* indisputably share a common factual backdrop — the Ponzi scheme perpetrated by Bernard Madoff — but *Headway* makes specific allegations against both Standard Chartered defendants and Fairfield defendants that are essentially identical to those previously asserted in *Bhatia* and *Anwar*. *Headway* alleges that both the Standard Chartered defendants and Fairfield defendants failed in their respective due diligence duties and missed “red flags” indicating that BLMIS was a fraud. (*Comp. Headway Compl.*, ¶¶ 73-87 with *Bhatia Compl.*, ¶¶ 6-7 and *Anwar Compl.*, ¶ 202; see also Opposition at 12 (noting that *Headway*’s claims against Standard Chartered defendants “turn on . . . what due diligence was undertaken”).) In fact, plaintiffs in all three actions point to the same exact alleged “red flags.” (See Fairfield Memo of Law in Support of Mot. to Transfer at 7 (citing *Anwar Compl.*, ¶¶ 113, 115; *Headway Compl.*, ¶ 69).)

Moreover, not only will the Standard Chartered defendants be subject to the same discovery from plaintiffs in *Bhatia* and *Headway*, the Standard Chartered defendants will require discovery from the Fairfield defendants in both cases. The role of the Fairfield defendants is

⁴ *Headway* argues that the JPML should “sever” claims against the Standard Chartered defendants pursuant to Rule 21 of the Federal Rules of Civil Procedure because other defendants in *Headway* are not “necessary or indispensable to the claims against” the Standard Chartered defendants. (Opposition at 6 n.4.) Rule 21, however, is not relevant here. Rather, the JPML must consider whether the *Headway* action should be transferred for centralization pursuant to Section 1407. See generally *In re Brand-Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1377 (J.P.M.L. 2003) (discussing the differences between separating and severing claims). Severing *Headway*’s claims against the Standard Chartered defendants from its other claims would simply convert *Headway* to two actions — one against the Fairfield defendants, PwC and Citco, and the other against the Standard Chartered defendants — each of which would require discovery and other pretrial proceedings relating to the same common factual issues.

central to the Standard Chartered defendants' defenses in *Headway* (and in *Bhatia*). As set forth above, plaintiffs in *Anwar*, *Bhatia* and *Headway* variously allege that the Fairfield defendants made false representations and/or committed negligence in connection with offering the Fairfield Funds. Should these cases proceed, plaintiffs' allegations against Fairfield will support the Standard Chartered defendants' defenses.

At bottom, Headway's claims against the Standard Chartered defendants cannot be simply "severed" from the actions proceeding in the Southern District of New York: "the parties in these actions will have to depose many identical parties and witnesses, and examine many of the same documents, in order to prepare these actions for trial." *In re Capital Underwriters, Inc. Sec. Litig.*, 464 F. Supp. 955, 959 (J.P.M.L. 1979). Such discovery should be conducted in a coordinated fashion, overseen by a single court, in order to prevent duplication and avoid the possibility of conflicting pretrial rulings. *Id.* (citing *In re Investors Funding Corp. of New York Secs. Litig.*, 437 F. Supp. 1199, 1200-02 (J.P.M.L. 1977)). Transfer of these claims for pretrial purposes will serve the convenience of the parties and promote the just and efficient conduct of the actions.

II. Headway's Arguments Against Centralization Are Without Merit.

Headway argues that its claims against the Standard Chartered defendants should be separated from its other claims because they involve "ultimate questions of fact" that differ from the other actions pending before Judge Marrero. (*See* Opposition at 11, 12.) Headway's arguments were squarely addressed, and rejected, in *In re Bayou Hedge Funds Inv. Litig.*, 429 F. Supp. 2d 1374 (J.P.M.L. 2006). In *In re Bayou*, the JPML ordered pretrial centralization of four actions that alleged various claims relating to a group of hedge funds that operated as a Ponzi scheme. At least one plaintiff in *Bayou*, who sued its investment advisor for failing to conduct adequate due diligence on the fraudulent funds, argued against transfer and centralization of that

action because “the resolution of its action will depend on facts not present in the other actions, like the specific advice given to [plaintiff] by the [advisor] defendants regarding [plaintiff]’s investment in the [fraudulent] hedge funds,” 429 F. Supp. 2d at 1376. Transfer was nevertheless proper because the “factual backdrop” to each action was the alleged improprieties regarding the Ponzi scheme. *Id.*

Similarly, in *In re Capital Underwriters, Inc. Sec. Litig.*, 464 F. Supp. 955, 959 (J.P.M.L. 1979) — nine actions involving alleged fraudulent conduct in the sale of limited partnership interests in real estate projects — plaintiffs opposed centralization on the ground “that the claims in each action center on the purchase of interests in one or more of eleven different limited partnerships by different plaintiffs from a variety of different defendants at different times over a four to five year period”; that “the factual basis for [their] claims arise primarily out of oral solicitations, not a common written document or documents applicable to all purchasers”; and that, “[u]nder these circumstances, . . . each plaintiff must present individual proof of the manner in which each investment decision was made, as well as proof of how the conduct of each defendant caused the damages allegedly sustained.” 464 F. Supp. at 958. Like *Bayou*, in *Capital Underwriters*, transfer for centralization was proper because each of the limited partnerships “was merely one aspect of a Ponzi Scheme” and “questions relating to the . . . existence of this scheme [would] be a focus of discovery and other pretrial proceedings in each of these actions.” *Id.* at 959.⁵

⁵ The single authority cited by Headway in support of its request that its claims against the Standard Chartered defendants be severed, *In re Penn Central Sec. Litig.*, 325 F. Supp. 309 (J.P.M.L. 1971), is inapposite. The separation of claims in *Penn Central* was based on the “unique nature of commercial paper,” which convinced the JPML “that the claims for relief by holders of unsecured commercial paper were distinguishable from other conventional claims for relief by holders of conventional securities.” *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378, 1385 n.13 (J.P.M.L. 1974).

Headway also argues against centralization on the ground that its claims against the Standard Chartered defendants relate in part to individual bank employees who sit in different locations than those in *Bhatia*. Where, as here, the same alleged fraud or wrongdoing permeates multiple actions, however, centralization is appropriate regardless of whether the actions involve separate and individualized facts. *In re Bayou Hedge Funds Inv. Litig.*, 429 F. Supp. 2d at 1376; *In re Capital Underwriters, Inc. Sec. Litig.*, 464 F. Supp. at 959; see also *In re H & R Block, Inc.*, 444 F. Supp. 2d 1339, 1340-41 (J.P.M.L. 2006) (granting motion for coordinated or consolidation pretrial proceedings for twelve actions alleging that different advisors breached fiduciary duties owed to their tax clients in connection with the marketing and sale of express IRAs); *In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359, 1361 (J.P.M.L. 2004) (centralizing numerous actions alleging improper trading activities against different mutual fund-related defendants because “[r]esolution of overlapping issues, concerning similar conduct in the mutual fund industry, will be streamlined”). The transferee court can “allow[] pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues,” *In re Reserve Fund Sec. & Derivative Litig.*, 598 F. Supp. 2d 1370, 1371 (J.P.M.L. 2009), and, in its discretion, remand Headway’s claims against Standard Chartered defendants to the transferor court if the pretrial proceedings for those claims are completed in advance of other actions. *In re Bank of Am. Corp.*, 598 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2009).

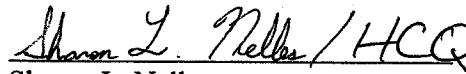
Finally, Headway argues that its claims against the Standard Chartered defendants should be separated because none of the Standard Chartered defendants are currently named in the *Anwar* Consolidated Amended Complaint. (Opposition at 14-15.) This is correct but misses the point: The Standard Chartered defendants are named in *Bhatia*, which already has been

coordinated with *Anwar* because of the overlapping issues and discovery between those cases.⁶ Furthermore, Headway's argument is undercut by its own complaint, which asserts that the Standard Chartered defendants' alleged failure to conduct adequate due diligence with respect to the Fairfield Funds — an issue central to both *Headway* and *Bhatia* — was not a failure specific to Headway or Miami. (See *Headway* Compl., ¶ 6 (the “head of the Global Investment Services Group” and “chief investment officer for American Express Bank . . . was responsible for the approval of all products offered to its clients and oversaw the due diligence process”).)

* * *

For the reasons set forth above and those stated in Fairfield's Motion to Transfer, the Standard Chartered defendants respectfully request that the JPML deny Headway's request to sever its claims against the Standard Chartered defendants, and that the JPML transfer all of the claims in *Headway* to the Southern District of New York.

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⁶ Moreover, counsel for *Anwar* plaintiffs have recently stated that they “reserve the right to bring class claims against the Standard Chartered Defendants.” See Letter from Robert C. Finkel to William M. O'Connor, dated July 13, 2009, attached hereto as Exhibit C.