Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 124

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*,	::	
Plaintiffs,	::	
v.	::	
FAIRFIELD GREENWICH LIMITED, *et al.*,	::	MASTER FILE NO. 09-CV-0118 (VM)
Defendants.	::	
This Document Relates To: All Actions	::	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED COMPLAINT ON BEHALF OF DEFENDANTS RICHARD LANDSBERGER, CHARLES MURPHY, AND ANDREW SMITH (THE "OTHER FAIRFIELD DEFENDANTS")

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INTRODUCTION

Plaintiffs have not alleged any facts that suggest the Other Fairfield Defendants engaged in fraud, were responsible for the Madoff side of Fairfield's business, or controlled the content of the offering memoranda on which Plaintiffs' claims are based. Rather, Plaintiffs' entire case against the Other Fairfield Defendants, Messrs. Landsberger, Murphy, and Smith, hinges on their status as Fairfield executives. But this Court long ago abandoned the concept of status-based liability. For this reason, and for the reasons stated in the FG Defendants' reply memorandum of law ("FG Def. Reply Br.") and the Fee Defendant's reply memorandum of law ("Fee Def. Reply Br."), which are incorporated herein by reference, the claims against the Other Fairfield Defendants should be dismissed.

First, Plaintiffs lack standing to bring their claims. FG Def. Reply Br. at Point I.

Second, the claims are preempted by New York's Martin Act and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). FG Def. Reply Br. at Points II-III.

Third, the exculpatory provisions in the investment management agreements shield the Other Fairfield Defendants from liability. Fee Def. Reply Br. at Point I.

Fourth, Plaintiffs fail to plead facts from which the existence of a partnership would be proven. FG Def. Reply Br. at Point V.

Fifth, Plaintiffs' Section 20(a) claim is fatally flawed because Plaintiffs do not plead a primary securities fraud violation, fail to adequately allege control, and do not allege culpable participation. This argument is discussed in detail below.

Sixth, Plaintiffs' Opposition does not cure the defects in their negligent misrepresentation, breach of fiduciary duty, and gross negligence claims. FG Def. Reply Br. at Point VII.

Seventh, the Opposition does not explain away the legal defects in Plaintiffs' contract-related claims. Fee Def. Reply Br. at Points I-IV.

ARGUMENT

I. PLAINTIFFS' OPPOSITION UNDERSCORES THEIR FAILURE TO STATE A CLAIM UNDER SECTION 20(A) OF THE EXCHANGE ACT

As a threshold matter, Plaintiffs have not pled a primary securities fraud violation and therefore their § 20(a) claim against the Other Fairfield Defendants must be dismissed. *See* FG Def. Reply Br. at Point VI. Moreover, for the reasons set forth below, Plaintiffs fail to plead the elements of actual control and culpable participation by the Other Fairfield Defendants.

A. Plaintiffs Continue to Improperly "Presume" Control

Even if Plaintiffs had established a primary securities fraud violation – which they have not – their § 20(a) claim would fail because they have not pled facts from which a factfinder could conclude that any of the three Other Fairfield Defendants had "actual control over the transaction in question," which in this case involves the content of the offering memoranda distributed to Plaintiffs. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 487 (S.D.N.Y. 2005) (quotations omitted). Indeed, even the most indulgent reading of the handful of references to the Other Fairfield Defendants in the SCAC yields no facts from which one could conclude that they had control over the representations made in the PPMs.[1] That is why Plaintiffs improperly seek to "presume" control based on the Other Fairfield Defendants' alleged executive positions within Fairfield (SCAC at ¶ 377). But this Court has squarely held that plaintiffs are not entitled to such

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[1] Plaintiffs' limited allegations about the Other Fairfield Defendants are set forth on pages 4-5 of the Other Fairfield Defendants' Opening Brief. The Opposition's assertion that the Other Fairfield Defendants "had responsibilities regarding the distribution of offering materials and the purported due diligence with respect to the selection and monitoring of Madoff" (Pl. Br. at 40) essentially is a restatement of the same conclusory (and defective) allegations made in the SCAC. *See* SCAC ¶¶ 376-378.

a presumption, even on a motion to dismiss. *See, e.g.*, *Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 487 ("[C]ourts have held that officer or director status alone does not constitute control for the purposes of Section 20(a) liability."); *see also In re Livent*, *Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 436 (S.D.N.Y. 2001).

Plaintiffs' assertion that the SCAC's allegations of control are "at least as compelling as in *Alstom* and *Hemming*" is belied by the specific factual allegations in those cases. In *Alstom*, the § 20(a) claim proceeded only against the CEO and CFO, *not* the other individual defendants, and only after the court concluded that plaintiffs had stated a claim against those defendants under Rule 10b-5. *See Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 459, 494. The court explicitly disclaimed reliance on the defendants' executive positions in holding that control was adequately alleged. *Id.* at 494 ("[A] mere recitation of Bilger's title as CEO along with the committees upon which he sat is not sufficient . . . ."); *see id.* at 497 (Newey's title of CFO insufficient to plead control). It was the allegation that the CEO and CFO had signed reports and documents containing the alleged misstatements that was dispositive. *Id.* at 494 ("It comports with common sense to presume that a person who signs his name to a report has some measure of control over those who write the report.") (internal quotation marks and citation omitted). Similarly, in *Hemming v. Alfin Fragrances, Inc.*, the court held that "[a] person's status as an officer, director or shareholder, absent more, is not enough to trigger liability." *Hemming v. Alfin Fragrances, Inc.*, 690 F. Supp. 239, 245 (S.D.N.Y. 1988).

Plaintiffs seek to hold the Other Fairfield Defendants liable on precisely the grounds that were rejected in *Alstom* and *Hemming* – their executive positions at Fairfield. Moreover, Plaintiffs do not allege that the Other Fairfield Defendants signed any allegedly misleading

documents as in *Alstom*.[2] Indeed, Plaintiffs fail to identify any allegations in the SCAC which demonstrate the Other Fairfield Defendants' control over the content of the PPMs.

B. Culpable Participation Allegations Are Missing from the SCAC Entirely

The SCAC does not allege that the Other Fairfield Defendants were culpable participants in any alleged fraud. This omission is fatal because, despite the lack of consensus elsewhere on the issue, this Court clearly and consistently has held that culpable participation is a required element of a § 20(a) claim that plaintiffs must plead as part of their affirmative case. *See*, *e.g.*, *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 489; *see also In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d at 417.[3] And notwithstanding Plaintiffs' attempts to muddy the waters, this Court also has unequivocally held that recklessness is the minimum standard of culpability that must be pled, and that culpable participation must be alleged with particularity. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 447.

Recklessness – "an extreme departure from the standards of ordinary care" – cannot be inferred from the three emails cited in the SCAC to which the Other Fairfield Defendants were allegedly privy. *See* SCAC ¶¶ 208, 209, 228. These emails are all from late 2008, and reflect an effort to obtain more information in the wake of a deteriorating economy and a changing

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[2] The other control cases cited by Plaintiffs also are distinguishable. *See Cornwell v. Credit Suisse Group.*, No. 08-cv-3758(VM), 2010 WL 537593, at *6 (S.D.N.Y. Feb. 11, 2010) (plaintiffs alleged through "an array of 'Confidential Witnesses' that CSG executives reviewed specific reports" and participated in earnings calls), and the related decision, *Cornwell v. Credit Suisse Group*, 666 F. Supp. 2d 381, 392 (S.D.N.Y. 2009); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 672 F. Supp. 2d 596, 602 (S.D.N.Y. 2009) (defendant CEO and CFO signed statements filed with the SEC); *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897 (DLC), 2006 WL 3804619, at *2-3, *5-6 (S.D.N.Y. Dec. 28, 2006) (registration statement filed with SEC incorporating prospectus was signed by each defendant held to be in a controlling position, each of those defendants received information about losses, and two defendants participated in analyst calls).

[3] *See also Cornwell*, 2010 WL 537593, at *8; *Varghese*, 672 F. Supp. 2d at 611; *Aimis Art Corp. v. N. Trust Sec., Inc.*, 641 F. Supp. 2d 314, 319 (S.D.N.Y. 2009); *Bui v. Indus. Enters. of Am., Inc.*, 594 F. Supp. 2d 364, 371 (S.D.N.Y. 2009); *Tabor v. Bodisen Biotech, Inc.*, 579 F. Supp. 2d 438, 449-50 (S.D.N.Y. 2008); *In re Adler, Coleman Clearing Corp.*, 469 F. Supp. 2d 112, 127 (S.D.N.Y. 2007).

industry. For example, Landsberger's September 22, 2008 email requesting "clarity from BLM on how he sees the markets and liquidity from his counterparties on the options" and Vijayvergiya's September 24, 2008 email suggesting that they approach Madoff with "well thought out, reasoned questions that focus on filling the gaps in our knowledge" demonstrate an effort to learn more about counterparty risk in the immediate wake of the Lehman Brothers collapse. *See* SCAC ¶¶ 208-209; FG Def. Reply Br. at Point VI(A)(2). This is the antithesis of recklessness.[4]

Plaintiffs have failed, on every prong, to plead a § 20(a) claim against the Other Fairfield Defendants.

CONCLUSION

For all the foregoing reasons, the Other Fairfield Defendants' motion to dismiss should be granted in all respects.

Dated: New York, New York
May 21, 2010

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[4] Indeed, these allegations fall far short of the factual allegations in the culpable participation cases relied on by Plaintiffs. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 447, 505 (culpable participation pled against CEO and CFO who signed the company's SEC filings and two other officer defendants who had been suspended pending investigation into accounting improprieties and not reinstated); *Epstein v. Haas Sec. Corp.*, 731 F. Supp. 1166, 1176 (S.D.N.Y. 1990) ("committee [on which defendant sat] received internal analyses of certain of Haas' securities indicating that various stocks for which Haas made markets were overvalued and the likely subject of illegal manipulation").