THE BRODSKY LAW FIRM, PL

RICHARD E. BRODSKY, ATTORNEY AT LAW

May 29, 2015

BY FACSIMILE TRANSMISSION

Honorable Victor Marrero
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: ***Anwar, et al. v. Fairfield Greenwich Limited, et al., 09-cv-118 (VM) (THK) Standard Chartered Cases***

Dear Judge Marrero:

I am writing as the Liaison Counsel for, and on behalf of, the Standard Chartered Plaintiffs ("SC Plaintiffs"), in the Standard Chartered Cases (the "SC Cases").

By Order dated May 6, 2015, DE 1375, this Court directed the parties in the SC Cases to submit letter briefs regarding the "applicability" of *In re Kingate Mgmt. Ltd. Litig.* ("*Kingate*"), No. 11-1397-CV, 2015 WL 1839874 (2d Cir. Apr. 23, 2015), to the SC Cases. As directed in the May 6 Order, the SC Parties, by letter dated May 27, 2015, notified the Court concerning the issues to which their respective letter briefs would be addressed, as well as their respective positions concerning which allegations would be precluded by SLUSA if the Court were to conclude, contrary to our position, that the SC Cases are a covered class action.

A. Kingate Buttresses the SC Plaintiffs' Argument that the SC Cases Are Not a "Covered Class Action"

The claims in *Kingate* were brought as a class action, so *Kingate* does not deal with whether the case was a covered class action. Nevertheless, *Kingate* lends substantial support to our position that the SC Cases are *not* a covered class action.

The SC Defendants argue the contrary position, citing one of the definitions of "covered class action," 15 U.S.C. §§ 77p(f)(5)(B)(II),

200 S. BISCAYNE BOULEVARD, STE. 1930 • MIAMI, FLORIDA 33131
WWW.THEBRODSKYLAWFIRM.COM
786-220-3328 • RBRODSKY@THEBRODSKYLAWFIRM.COM

78bb(f)(5)(b)(ii).[1] We have previously controverted the SC Defendants' argument in numerous letters to the Court, most recently, and comprehensively, in our letter brief dated November 17, 2014, DE 1349, 14-20 (filed Jan. 7, 2015). *Kingate* unquestionably buttresses our position.

First, *Kingate* expressly recognizes that the text of SLUSA is "ambiguous" in several respects, 2015 WL 1839874, *passim*. While we have argued that the text of SLUSA alone establishes that the SC Cases are not a covered class action, we have also shown, that, if the Court concludes that the "covered class action" provision relied on by the SC Defendants is ambiguous, the legislative history and overall purpose of SLUSA strongly favor the conclusion that the SC Cases are not a covered class action. *E.g.*, DE 1349, 17-19. The *Kingate* court's recognition of multiple instances of ambiguity in SLUSA supports that conclusion.

Second, *Kingate* contains the following language:

> Although the issue is not presented to us, we question whether a motion to dismiss pursuant to SLUSA is best considered under Rule 12(b)(6), as a motion to dismiss for failure to state a claim, or under Rule 12(b)(1) (and/or 12(h)(3)), as a motion to dismiss for lack of subject-matter jurisdiction. A dismissal under SLUSA simply means that the lawsuit "may [not] be maintained" *as a covered class action.* 15 U.S.C. §§ 77p(b)), 78 bb(f)1). It does not adjudicate against any plaintiff the right to recover on the claim. *A dismissal under SLUSA would not be with prejudice, barring a plaintiff from filing a new, non-covered action asserting the same claims against the same defendants.*

Kingate, 2015 WL 1839874, at *3 n.9 (emphasis added). If a claim found to be precluded by SLUSA may be re-pleaded as a "new, non-covered action asserting the same claims against the same defendants," the only logical basis for such a holding would be the limitation of SLUSA to cases that actually *can* be repleaded as "non-covered" actions "asserting the same claims." However, if the Court were to find that the SC Cases are a covered class action, this would not be an available option for the SC Plaintiffs. Each of the Plaintiffs already *has* filed a separate action: the cases were filed by 9

[1] Both sections of SLUSA, as codified, define "covered class action" to include "any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—(I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose."

different lawyers over a 4-year period, and many were filed before there were more than 50 SC Plaintiffs. None of the SC Plaintiffs could do anything different from what has already been done to "fil[e] a new, non-covered action asserting the same claims against the same defendants." *Kingate*'s footnote 9, therefore, helps illustrate why a construction of "covered class action" to include the SC Cases would extend that definition far beyond what SLUSA was designed to reach—plaintiffs' lawyers' *coordinated* stage-managing of multiple plaintiffs' claims to evade the pleading requirements of the Private Securities Litigation Reform Act. It strengthens the conclusion that stretching the definition of covered class action to reach the facts of this case is unwarranted by a facial analysis of the statute, a review of his legislative history and purpose, or resort to any case or other authority.

The next issues are whether—assuming, *arguendo*, that the SC Cases could properly be deemed a covered class action—SLUSA would preclude any of the allegations in the SC Cases. Our discussion will be in two parts. First, we will briefly discuss the *Kingate* opinion. Second, we will discuss the application of *Kingate* to the SC Plaintiffs' various complaints.

B. The *Kingate* Opinion

We adopt the portion of what we understand will be Part II ("SLUSA and How It Has Been Applied") of the *Anwar* Plaintiffs' letter brief to the Court. Nevertheless, we wish to add an additional point necessary to an understanding of how *Kingate* applies to the SC Cases.

As the *Anwar* Plaintiffs note, *Kingate* divided the claims in that case into five categories (Group 1, etc.). *See Kingate*, at *3. The court's division of claims into Groups 1 through 5 explicitly refers only to the claims pleaded in *Kingate* and does not purport to be a listing of all conceivable claims against non-Madoff-affiliated parties arising in a Madoff-feeder case. (For simplicity's sake, in this letter brief we use "Madoff" to refer both to Bernard L. Madoff and to Bernard L. Madoff Investment Securities, LLC.) At the same time, the precise contours of each enumerated *Kingate* "Group" claim should not be read so literally as to suggest that the *Kingate* taxology should not be applied to claims not actually brought in *Kingate* but that, nonetheless, fall within the description of a *Kingate* "Group." At the very least, the categorization of

Kingate claims by "Group" provides a useful yardstick by which to measure the application of *Kingate* (and SLUSA) to the allegations here.

C. Application of *Kingate* to SC Plaintiffs' Allegations

1. Introduction

Because the allegations in the SC Cases are different from the pending allegations in *Anwar*, we are unable to adopt the *Anwar* Plaintiffs' discussion of how *Kingate* applies to the allegations in *Anwar*. *See* joint letter from SC Parties, May 27, 2015.

A discussion of the allegations presented in the different SC Cases must necessarily deal, at least in part, with generalities. We start with this caveat because, if the Court decides that the SC Cases are a covered class action, it will necessarily have to examine, separately, each allegation[2] made in each complaint to determine whether or not it is precluded by SLUSA.[3] The very multiplicity and variability of these separate allegations have made it impractical to attempt to summarize them in this letter brief. Therefore, should the Court determine that the SC Cases are a covered class action, we respectfully suggest that it direct each SC Plaintiffs' counsel to provide the Court with his or her position on which allegations in his or her SC Case(s)

---

[2] *Kingate* affirmed earlier Circuit decisions holding that SLUSA does not preclude all claims just because a portion of the complaint is precluded. Rather, Kingate held that it is up "to the district court to determine, on full briefing, which *allegations* of the Complaint fall into which of the categories we have described (recognizing that the numbered counts of the Complaint in some cases include multiple allegations and that all the allegations of a single 'count' are not necessarily of the same type or group). The court emphasized this point by concluding that "should the district court determine that some of Plaintiffs' claims (or *portions* thereof) fall within the terms of SLUSA's preclusion and others do not, we direct the district court to dismiss the precluded claims and proceed with respect to the other claims." *Kingate*, at *19-20 (emphases added).

[3] The fact that the various SC Complaints are not identical—claim-by-claim or allegation-by-allegation—is an inevitable result of the fact that the complaints were drafted at different times by 9 different law firms, each acting on its own and without coordination, and while each complaint filed by any one firm bears strong similarities to the other complaints filed by that firm, complaints filed by different law firms allege facts differently and contain different claims. Even claims that are analogous to one another contain different allegations and emphases.

would be precluded and which would not be precluded, to which categorization we would expect to allow the SC Defendants to respond.

2. **Description of SC Plaintiffs' Allegations Against SC**

The SC Plaintiffs' allegations against SC are fairly and logically divided into three separate categories:

a. *Claims that SC failed to do a proper investigation of Sentry and Madoff before recommending to its private clients that they invest in Sentry.* This type of claim will be referred to as a "Due Diligence Claim." All of the SC Plaintiffs have made this type of claim. Some label these claims as negligence claims, some as breach of fiduciary duty claims, and some as both. As discussed below, these claims would not be precluded by SLUSA even if, *arguendo*, the SC Cases were deemed a covered class action.

b. *Claims that depend on the allegation that SC itself misrepresented or omitted material facts in connection with Sentry's investments with Madoff in covered securities.* Examples of such claims are SC's failure to disclose that no one else on Wall Street was able to replicate BMIS' purported results, and that the trading in covered securities and options, as constructed, could not support such results. This type of claim will be referred to as a "Madoff Claim." Not all of the SC Plaintiffs have made such a claim. As discussed below, these claims would be precluded if, *arguendo*, the SC Cases were deemed a covered class action.

c. *Claims that SC either negligently or willfully misrepresented material facts where the claims do not depend on the allegation that SC itself misrepresented or omitted material facts in connection with Sentry's investments with Madoff in covered securities.* This type of claim will be referred to as a "Non-Madoff Claim." An example of such a claim is SC's failure to disclose that it received, annually, 0.5% (50 bp) from Fairfield for each dollar that each client put into Sentry (which investments ranged as high as $600,000,000 at any one time, yielding SC as much as $3,000,000 a year). *See Gordon v. Chase Home Fin., LLC*, No. 8:11-CV-2001-T-33EAJ, 2012 WL 750608, at *1 (M.D. Fla. Mar. 7, 2012) (denying motion to dismiss breach of fiduciary duty claim arising from lender/mortgage servicer's requiring mortgagors to purchase excess flood insurance and affiliate's receiving kickback from insurer). As discussed below, these claims would not be precluded even if, *arguendo*, the SC Cases were deemed a covered class

action.[4]

3. Only Some SC Allegations Would Be Precluded Were the SC Cases Deemed a Covered Class Action.

The first set of claims (Due Diligence Claims) are plainly analogous to a *Kingate* Group 4 claim[5] and would not be precluded by SLUSA even if, *arguendo*, the SC Cases were a covered class action.

First, such claims arise either from a common law duty SC owed to the SC Plaintiffs—a duty arising from either SC's fiduciary relationship with its private banking clients—or from a non-fiduciary standard of due care. *See, e.g.*, Amended Complaint, *Maridom v. Standard Chartered Bank International (Americas) Limited*, No. 10-cv-920-VM, DE 8, at 13 ¶ 40 ("Whether SCBI's duty of care is expressed in terms of a fiduciary duty or simply a duty of ordinary due care, SCBI failed to meet its duty as it related to its recommendations to Plaintiffs invest in [Sentry.").

Second, no SC Plaintiff alleges that SC was in complicity with or was aiding and abetting BMIS.

Third, SC "is not alleged to have committed any of the conduct specified in SLUSA," *Kingate*, at *15, and, in any event, false conduct is not

---

[4] At least one Plaintiff, Barbachano, has advanced such a claim. *See* Amended Complaint, *Joaquina Teresa Barbachano Herrero v. Standard Chartered Bank International (Americas) Limited and Standard Chartered PLC*, No. 1:11-cv-03553-VM, *passim*. Others were denied leave to amend to include such allegations but were permitted to seek to offer supportive evidence at trial. Anwar v. Fairfield Greenwich Ltd., No. 09-cv-0118-VM, 2012 WL 1415621, *4 (S.D.N.Y. Apr. 13, 2012). It is expected that all SC Plaintiffs will seek to offer evidence at trial concerning this claim.

[5] SC did not render services to Sentry, as did the remaining defendants in *Anwar*, and while none of the SC Plaintiffs alleges that SC is liable for not having discovered that Madoff was running a Ponzi scheme, but rather, they allege that SC violated its fiduciary duty to investigate Sentry/BMIS, detect potential risks, and not recommend an investment in Sentry if those risks could not be "mitigated" (resolved). These are immaterial differences from *Kingate's* Group 4, which in all material respects is analogous to the SC Plaintiffs' claims that SC did inadequate due diligence in recommending an investment in *Sentry*.

an essential element of a Due Diligence Claim. While some of the SC Cases allege that SC breached a fiduciary duty to the plaintiffs by misrepresentations or omissions of material fact, a Due Diligence Claim (a separate specie of a breach of fiduciary claim) is not dependent on an allegation of false conduct. The Court has, from the outset, acknowledged the components of this claim. Thus, in deciding SC's motion to dismiss the first four of the SC Cases (*Headway*, *Valladolid*, *Maridom*, and *Lopez*), the Court held:

> All Plaintiffs allege breach of fiduciary claims. Under Florida law, '[t]he elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages.' *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla.2002).
>
> ***
>
> Here, Plaintiffs sufficiently state causes of action for breach of fiduciary duty. *All Plaintiffs allege that Standard Chartered's recommendation that they invest in the Fairfield Funds without conducting proper diligence was a breach of fiduciary duty.*

Anwar v. Fairfield Greenwich Ltd., 745 F. Supp. 2d 360, 375, 376 (S.D.N.Y. 2010) (emphasis added). *See also Anwar v. Fairfield Greenwich Ltd.*, 826 F. Supp. 2d 578, 590-91(S.D.N.Y. 2011) (denying motion to dismiss Due Diligence claims advanced by later SC Plaintiffs Almiron and Carrillo); *Anwar v. Fairfield Greenwich Ltd.*, 891 F. Supp. 2d 548, 555 (S.D.N.Y. 2012) (After SC concedes Due Diligence claims filed by later SC Plaintiffs Gerico, Saca, Barbachano, Mailand, Escobar, Baymall, Blockbend, and Eastfork, denying motion to dismiss breach of fiduciary duty claim based on duty to monitor).

The second set of claims (Madoff claims) would be precluded if, *arguendo*, the SC Cases were deemed a covered class action. They are analogous to *Kingate*'s Group 1or 2 claims (depending on whether they are based on willful or negligent conduct) because they are predicated on SC's own misrepresentations and omissions in connection with Sentry's investments with Madoff in covered securities.

The third set of claims (Non-Madoff Claims) would not be precluded, even if, *arguendo*, the SC Cases were deemed a covered class action. They do not seek to impose liability on SC for misrepresentations or omissions in connection with Sentry's investments with Madoff in covered securities. For

example, the claim that SC did not disclose that it received remuneration from Fairfield whenever an SC private banking client invested in Sentry does not depend on, and is analytically unrelated to, Madoff's fraud. Indeed, they deal with SC's own conduct independent of any fraud by Madoff. This claim would lie however Sentry invested its funds—*i.e.*, whether it invested in real estate or gave it to BMIS supposedly to invest in covered securities. It is not analogous to a Group 1, Group 2 or Group 3 (aiding and abetting) claim under *Kingate*. It is analogous to a Group 4 claim.

D. Conclusion

Kingate strengthens our argument that the SC Cases are not a covered class action. Therefore, we respectfully request that the Court consider this letter brief and the prior letter briefs on the subject and conclude that the SC Cases are not a covered class action.

Assuming, *arguendo*, that the Court concludes that these cases are a covered class action, we request that the Court rule that only a very limited subset of the allegations made in the SC cases—what we call "Madoff Claims"—would be precluded. In that eventuality, we respectfully suggest that the Court direct each SC Plaintiffs' counsel to provide the Court with his or her position on which allegations in his or her SC Case(s) would be precluded and which would not be precluded, to which showing we would expect to allow the SC Defendants to respond.

Finally, assuming that the Court concludes either that SLUSA does not apply at all or, if it does, that it does not preclude all claims, we respectfully request the Court's prompt determination of the SC Defendants' request for leave to move for summary judgment, which has been fully briefed and has been awaiting the *Kingate* decision.

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Standard Chartered Plaintiffs.

SO ORDERED.

6-4-15
DATE VICTOR MARRERO, U.S.D.J.

Sincerely yours,

THE BRODSKY LAW FIRM, PL

Richard E. Brodsky

cc: Attorneys for SC Plaintiffs and SC Defendants
Attorneys for *Anwar* Plaintiffs and remaining *Anwar* Defendants