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May 29, 2015

By Hand

The Honorable Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, N.Y. 10007-1312

Anwar, et al. v. *Fairfield Greenwich Limited, et al.*,
No. 09-cv-118 (S.D.N.Y.) (V.M.) (F.M.)

Dear Judge Marrero:

Pursuant to Your Honor's direction during the telephone conference held on April 30, 2015, the Citco Defendants respectfully submit that the Court should dismiss all state-law claims asserted against them on the ground that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), as construed in *In re Kingate Management Ltd. Litigation*, 784 F.3d 128 (2d Cir. 2015), precludes those claims.

The plaintiff class consists of investors who purchased securities in four investment funds (the "Funds") created and managed by the Fairfield Greenwich Group ("Fairfield"). Class members allegedly purchased those securities in reliance on representations that the Funds would place all or almost all of their assets in accounts at Bernard L. Madoff Investment Securities LLC (the "Madoff Firm"). Class members also allegedly relied on representations that the Funds, acting through the Madoff Firm, would

invest their assets in accordance with the Madoff Firm's "split-strike conversion strategy." That strategy allegedly involved purchasing a basket of equity securities that correlated to the S&P 100 Index and hedging these purchases with put and call options. (Second Consolidated Am. Compl. ("SCAC") ¶¶ 169, 184.) As everyone now knows, no such strategy was ever executed. Instead, the Madoff Firm generated fictitious trades in these securities and false account statements as part of a massive Ponzi scheme. (*Id.* ¶ 167.)

After Madoff confessed his fraud, investors' shares in the Funds became practically worthless. Plaintiffs then filed this lawsuit against Fairfield, the auditors of the Funds, and other service providers of the Funds, including the Citco Defendants. Certain Citco Defendants acted as administrator and custodian for certain Funds at various times.[1] Plaintiffs assert claims under the federal securities laws and state-law claims for negligent misrepresentation, negligence, gross negligence, breach of fiduciary duty, third-party beneficiary breach of contract, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty against various Citco Defendants. Plaintiffs base all of these claims on their central allegation, stated prominently at the outset of their complaint, that the "loss of [class members'] assets in the Madoff Ponzi scheme is a direct and proximate result of Defendants' false representations and omissions and failure to fulfill their duties to Plaintiffs." (SCAC ¶ 3.)

After six years of litigation, Plaintiffs characterized their central theory to the Second Circuit in this way: the Citco Defendants supposedly "directly defrauded" class members by, among other actions, "repeatedly providing false Net Asset Values [("NAVs")] and representing to [class members] that [the Citco Defendants were] the custodian of (non-existent) assets[.]"[2] Plaintiffs also contend that the Citco Defendants were "composed of interrelated entities" and were "complicit" in each other's "fraud" and other "wrongdoing."[3]

These allegations are fatal to Plaintiffs' state-law claims under SLUSA. As the Second Circuit ruled in *Kingate*, SLUSA precludes state-law class-action claims that predicate liability on either (i) a defendant's alleged untrue statements or omissions, or (ii) a defendant's alleged complicity in alleged untrue statements or omissions, if, as here, the alleged untrue statements or omissions occur in connection with the purchase or sale of "covered" securities. 784 F.3d at 132.

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1 The Citco Defendants—collectively, "Citco"—are Citco Fund Services (Europe) B.V., Citco (Canada), Inc. (together, the "Citco Administrators"), Citco Global Custody N.V., Citco Bank Nederland N.V. Dublin Branch (with Citco Global Custody N.V., the "Citco Custodians"), Citco Fund Services (Bermuda) Ltd. ("CFSB"), and The Citco Group Ltd.

2 Pls.-Resp't's Opp'n to Mot. for Leave to File Reply Br. on Citco's Rule 23(f) Pet. 6, *Anwar* v. *Fairfield Greenwich Ltd.*, No. 15-792 (L) (2d Cir. Apr. 7, 2015), ECF No. 59 (hereinafter "PO").

3 Ex. 1 at 1; Ex. 2 at 5 n.1. Citations to "Ex. __" refer to the exhibits enclosed with this letter.

Procedural History

On motions to dismiss, the Citco Defendants (and other defendants) argued that SLUSA precludes Plaintiffs' state-law claims. This Court denied that aspect of the motions. The Court ruled that class members' purchases of shares in the Funds (themselves "uncovered" securities) did not satisfy SLUSA's requirement that a plaintiff allege false conduct "in connection with the purchase or sale of a covered security." *Anwar* v. *Fairfield Greenwich Ltd.* (*Anwar I*), 728 F. Supp. 2d 372, 398 (S.D.N.Y. 2010) (quoting 15 U.S.C. § 78bb(f)(1)(A)). In the Court's view at that time, class members had not invested in "covered securities," because they purchased only uncovered securities in a Fund with an expectation that the Fund would purchase covered securities as part of its investment strategy. *Id.* at 399. The Court further noted in *dicta* that, even if the "covered securities" requirement had been met, "only the fraud and negligent misrepresentation common law causes of action would be dismissed." *Id.* at 399 n.7

Since this Court's ruling, the Supreme Court and Second Circuit have issued several significant decisions interpreting SLUSA. *Chabourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058 (2014); *Kingate*, 784 F.3d 128; *In re Herald, Primeo & Thema Sec. Litig.*, 730 F.3d 112 (2d Cir. 2013) (*Herald I*), *reh'g denied*, 753 F.3d 110 (2d Cir. 2014) (*Herald II*), *cert. denied*, 135 S. Ct. 1701 (2015). These decisions, we respectfully submit, establish that this Court's SLUSA ruling in *Anwar I* is no longer correct.

SLUSA, As Construed in *Kingate*, Precludes Plaintiffs' State-Law Claims Against the Citco Defendants

Four aspects of *Kingate* are critical to this case and demonstrate that all of Plaintiffs' state-law claims against the Citco Defendants are precluded.

First, *Kingate*, following *Herald I*, held that SLUSA's "covered securities" requirement is met where the members of a plaintiff class "purchased the uncovered shares of the offshore [so-called Madoff feeder] Funds, expecting that the Funds were investing the proceeds in S&P 100 stock." 784 F.3d at 142.

Second, *Kingate* held that SLUSA precludes claims "accusing the defendant of complicity in . . . false conduct that gives rise to liability." *Id.* at 147. A claim alleges "complicity" when it is "predicated on conduct by the defendant that is specified in SLUSA's operative provisions referencing the anti-falsity proscriptions of [the Securities Act of 1933 and the Securities Exchange Act of 1934]." *Id.* at 146 (emphasis deleted). "False conduct" includes, among other things, misrepresentations, untrue statements, and omissions.[4]

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[4] In *Kingate*, the Second Circuit defined "the terms 'falsity' and 'false conduct' . . . [to] encompass all the types of misleading or deceptive conduct identified in the relevant SLUSA provisions (including a misrepresentation or omission, an untrue statement, and the use or employment of any manipulative or deceptive device or contrivance)." 784 F.3d at 132 n.1.

Third, *Kingate* held that SLUSA preclusion does not depend on whether false conduct is a formal element of the allegedly precluded claim. Instead, if the other requisites for SLUSA preclusion are met, SLUSA precludes claims that are based on *allegations* of false conduct, including allegations of untrue statements or omissions. *See* 784 F.3d at 140. Under *Kingate*, a plaintiff may not try to obscure the relationship between the allegedly false conduct and the plaintiff's claims "by artfully characterizing a claim as dependent on a theory other than falsity when falsity nonetheless is essential to the claim, such as by characterizing a claim of falsity as a breach of the contractual duty of fair dealing." *Id.* This holding reaffirms prior Second Circuit jurisprudence holding that SLUSA precludes claims for breach of fiduciary duty, breach of contract, and negligence, among others, where the "realities underlying the claims" demonstrate that the claims are predicated on false conduct. *Herald I*, 730 F.3d at 119; *see also id.* at 119 n.7 (holding that SLUSA precludes claims for negligence and breach of fiduciary duty); *Romano* v. *Kazacos*, 609 F.3d 512, 523 (2d Cir. 2010) (holding that SLUSA precludes claims for negligence, breach of fiduciary duty, negligent misrepresentation, breach of contract, and unfair and deceptive trade practices).

Finally, *Kingate* held that a court must assess whether SLUSA precludes claims on a defendant-by-defendant and claim-by-claim basis. 784 F.3d at 143.

These principles compel the dismissal of each state-law claim brought against the Citco Defendants.[5] Class members' investments in the Funds qualify as transactions in "covered securities." Plaintiffs' claims predicate liability on the Citco Defendants' alleged untrue statements and/or omissions or the Citco Defendants' complicity in alleged untrue statements and/or omissions by Fairfield.

A. Class Members' Investments in the Funds Qualify as Transactions in "Covered Securities"

Under *Kingate* and *Herald II*, if class members purchase ownership interests in a fund with the expectation that the fund will invest in S&P 100 stocks, the class members' claims satisfy the "covered securities" requirement for SLUSA preclusion: "[P]laintiffs . . . purchased the uncovered shares of the offshore Funds, expecting that the Funds were investing the proceeds in S&P 100 stocks, which are covered securities. We therefore rule that the essential element of SLUSA preclusion that requires an allegation of falsity 'in connection with' a purchase or sale of a covered security is satisfied in this case." *Kingate*, 784 F.3d 142; *see also Herald II*, 753 F.3d at 119.

The same conclusion follows here. Class members purchased shares of the Funds and expected that the Funds would invest in S&P 100 stocks. (SCAC ¶¶ 169,

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[5] As stated in the parties' joint letter to the Court dated May 8, 2015, Plaintiffs concede that SLUSA precludes their claim for aiding and abetting fraud against all of the Citco Defendants. (*Anwar* Pl.s' Ltr. 1, May 7, 2015, ECF No. 1376.) That claim must therefore be dismissed.

184-85.) Indeed, the putative class in *Kingate* invested in the fraudulent scheme perpetrated by Bernard Madoff and his co-conspirators in exactly the same way as the class members in this action. Because the alleged false conduct related to investments in the *Kingate* funds occurred "in connection with the purchase or sale of a covered security," so too did the alleged false conduct underlying Plaintiffs' claims here. 784 F.3d at 132.

B. SLUSA Precludes Plaintiffs' Claims Against the Citco Administrators

The allegations in the SCAC make plain that all of Plaintiffs' state-law claims predicate liability on the Citco Defendants' allegedly false conduct. Plaintiffs have repeatedly and unequivocally confirmed that reality.

In particular, all of Plaintiffs' claims against the Citco Administrators predicate liability on the Citco Administrators' alleged untrue statements about the NAV of each Fund. Plaintiffs allege that "[t]he NAV, which was to be independently calculated and reported by Citco, *was fundamental to [class members'] initial investment decisions, decisions to invest additional funds, and decisions to maintain the investments over time*." (SCAC ¶ 335 (emphasis added).) According to Plaintiffs, the "Citco Administrators blindly and recklessly relied on information provided by Madoff and the Funds to calculate and disseminate the Funds' NAV, and to perform its other duties, even though that information was manifestly erroneous and should not have been relied on." (SCAC ¶ 338; *see also* Pls.' Mem. in Opp. to Mot. to Dismiss 11, Mar. 23, 2010, ECF No. 420.) Plaintiffs allege that class members sustained injuries because of the allegedly untrue NAV statements. (*E.g.*, SCAC ¶¶ 342, 484, 488 500, 504, 508, 513, 514, 534, 537, 539.)

Recently Plaintiffs have emphatically confirmed to the Second Circuit that their claims predicate the Citco Defendants' liability on alleged untrue statements concerning the Funds' NAVs:

> [T]he fundamental claims in this case . . . are that Citco *directly defrauded Plaintiffs and directly breached duties that it owed to [them] by, among other things, repeatedly providing false Net Asset Values and representing to [them] that it was custodian of (non-existent) assets*, all in violation of its own knowledge, *representations* and internal procedures, as well as industry norms. (PO at 6 (emphasis added).)

Because all of Plaintiffs' claims, including their state-law claims, against the Citco Defendants depend on accusations of false conduct, SLUSA precludes each of those state-law claims, "notwithstanding that the claim[s] assert[] liability on the part of the defendant under a state law theory that does not include false conduct as *an essential element*[.]" *Kingate*, 784 F.3d at 149. We address each of Plaintiffs' state-law claims below.

1. SLUSA Precludes Plaintiffs' Claims for Negligent Misrepresentation, Negligence, and Gross Negligence Against the Citco Administrators

Plaintiffs' negligence-based claims against the Citco Administrators are precluded because they premise liability on the Citco Administrators' allegedly untrue NAV statements and on other alleged false conduct. For instance, in explaining how they intend to prove reliance and causation with respect to these claims, Plaintiffs recently represented to this Court that: "If Citco had promulgated accurate NAVs (showing the Funds were essentially worthless) . . . no sane investor would have bought the Funds' shares. Moreover, Citco's NAVs determined the number of shares that were purchased in the initial investment. Accordingly, Plaintiffs' negligence-based claims will be determined on the basis of common evidence." (Pl.s' Supplemental Mem. in Supp. of Mot. for Class Cert 13, Aug. 1, 2014 (filed under seal) (emphasis deleted).) Plaintiffs thus concede that their negligence-based claims predicate liability on the Citco Administrators' "negligent misrepresentations or misleading omissions [with respect to the Funds' NAVs] in connection with transactions in covered securities." *Kingate*, 784 F.3d at 135 n.6. A claim-by-claim analysis underscores this conclusion:

First, SLUSA precludes Plaintiffs' claim for negligent misrepresentation. In the context of claims involving Madoff feeder funds, *Kingate* held that SLUSA precludes allegations predicating liability on "Defendants' negligent misrepresentations and misleading omissions in connection with the Funds' investments with Madoff and with oversight of Madoff's operations." *Id.* at 151. This is precisely the sort of false conduct on which Plaintiffs here base their claim negligent misrepresentation. For example, Plaintiffs allege:

- "The Citco Defendants induced Plaintiffs to make their initial investments in the Funds, to retain their investments in the Funds, and (where applicable) to make additional investments in the Funds by issuing false NAV and account balance statements for the Funds that they then disseminated to class members, or knew would be disseminated to class members." (SCAC ¶ 534.)

- "Plaintiffs justifiably relied, to their detriment, on the Citco Defendants' false statements and omissions, in ignorance of their falsity, by making their initial investments in the Funds, retaining their investments in the Funds, and (where applicable) making additional investments in the Funds. Plaintiffs have suffered substantial damages as a result of the wrongs alleged herein." (SCAC ¶ 539.)

These allegations are no different from those that *Kingate* held are precluded.[6]

[6] In fact, these allegations are restated almost verbatim to support Plaintiffs' claims under the federal securities laws against the Citco Administrators. (*Compare* SCAC ¶¶ 523-26 *with* ¶¶ 534-39). In that

Second, Plaintiffs' claims for negligence and gross negligence similarly predicate liability on the Citco Administrators' false conduct. (*E.g.*, SCAC ¶ 337 ("Citco failed to take reasonable steps, industry-standard to calculate the Funds' NAV . . . or relay accurate information to investors"); *id.* ¶ 338 ("Rather, Citco blindly and recklessly relied on information provided by Madoff and the Funds to calculate and disseminate the Funds' NAV, and to perform its other duties, even though that information was manifestly erroneous and should not have been relied on.").) Plaintiffs further allege that, "[i]f Citco had not breached its duties as set forth above," class members would not have invested in the Funds, would not have retained their existing investments, and would therefore not have sustained their alleged damages. (*See id.* ¶ 340.) To prove these allegations, Plaintiffs would need to show that the Citco Administrators engaged in false conduct by, among other things, disseminating untrue NAV statements to class members and making untrue statements about Citco's services. (*See, e.g.*, *id.* ¶¶ 336-340.) According to Plaintiffs, the Citco Administrators disseminated these untrue NAV statements because they had ignored "red flags" concerning the Madoff Firm and the Funds, and had relied on untrue information from the Madoff Firm and the Funds, notwithstanding the Citco Administrators' supposedly untrue statements that they "provid[ed] fully independent services . . . to safeguard the interests of investors." (*Id.* ¶ 325.) Because SLUSA precludes claims based on allegations that the defendant engaged in false conduct in connection with an investment decision, and Plaintiffs directly allege such false conduct by the Citco Administrators, SLUSA precludes Plaintiffs' claims for negligence and gross negligence against the Citco Administrators. *See Kingate*, 784 F.3d at 134 n.6.

Third, Plaintiffs' theory of injury presupposes that the Citco Administrators made untrue statements in connection with class members' investment decisions in covered securities. That is so because Plaintiffs allege that class members were injured by their decisions to buy or retain shares in the Funds. (*E.g.*, SCAC ¶ 340.) Class members' investment decisions, in turn, were supposedly based on the Citco Administrators' alleged untrue statements (such as the NAVs) or on what Plaintiffs characterize as the Citco Administrators' non-disclosure of information (such as the Citco Administrators' alleged failure adequately to disclose that they did not verify information supplied by the Madoff Firm). Accordingly, the Citco Administrators' alleged untrue statements and omissions are an essential part of the alleged causal link between the Citco Administrators' supposed breaches of duty and the class members' supposed injuries and damages. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 n.6 (2d Cir. 2013); *Laub* v. *Faessel*, 745 N.Y.S.2d 534, 536 (App. Div. 2002); *see also Braddock* v. *Braddock*, 871 N.Y.S.2d 68, 84 (App. Div. 2009) (Lippman, J., dissenting).

In fact, if Plaintiffs' allegations of misrepresentation-based breaches were excised from the SCAC, Plaintiffs would not be able to pursue their remaining duty-

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context, Plaintiffs employ these allegations to allege the misrepresentations and omissions that are elements of their federal claims.

based state-law claims because those claims would then unquestionably be derivative in nature. That is so because, absent allegations that class members made investment decisions based on alleged untrue statements or omissions, the supposed breaches underlying these claims would merely allege mismanagement of the Funds. *See, e.g.*, *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1038 (Del. 2004); *cf. Anwar I*, 728 F. Supp. 2d at 401 n.9 (ruling that Plaintiffs' claims are "direct" because "[t]he principal wrong asserted by Plaintiffs here is essentially nondisclosure of or failure to learn facts which should have been disclosed based on duties that were independently owed to Plaintiffs.").

Finally, Plaintiffs' theory of duty underlying all of their negligence-based claims presupposes that the Citco Administrators made untrue statements or omissions. In ruling that Plaintiffs had adequately pleaded the existence of a duty to support their negligence-based claims against the Citco Administrators, this Court considered whether Plaintiffs' allegations satisfied the requirements of *Credit Alliance Corp.* v. *Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985). *See Anwar I*, 728 F. Supp. 2d at 432.

The *Credit Alliance* test recognizes that service providers, such as a fund administrator, generally owe a duty *only* to their clients (here, the Funds), and not to non-clients, such as the class members here. That is because "a duty of care may arise only where the parties are in contractual privity or have a relationship so close as to approach that of privity." *Id.* (internal quotation marks omitted). To show that a defendant "owes a duty to give . . . accurate information" to a plaintiff when the parties are not in contractual privity, a plaintiff must show "that there is (1) an awareness by the maker of the statement that is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Id.* (internal quotation marks omitted).

This Court ruled that "Plaintiffs allege a relationship between investors and the Administrators that gives rise to a duty of care under the *Credit Alliance* standard." *Id.* at 435. A necessary implication of this ruling is that Plaintiffs' negligence-based claims depend on alleged untrue statements about covered securities transactions. In particular, this Court ruled that Plaintiffs satisfied the "known party" prong of the *Credit Alliance* test because they allege that "potential investors . . . were known parties to the Administrators, and that the Administrators intended those investors to rely on the NAV and account balance statements to invest in the Funds." *Id.* at 434. This ruling demonstrates that Plaintiffs' negligence-based claims predicate liability on the Citco Administrators' issuance of allegedly untrue NAV statements and class members' alleged investment decisions based on those statements. So, too, does this Court's ruling that Plaintiffs sufficiently alleged "linking conduct." "[I]t is reasonable to infer from Plaintiffs' allegations that the Administrators were aware that Plaintiffs would—and did—rely on their statements of the Funds' NAV that were sent to investors, thus satisfying the linking requirement." *Id.* at 435.

2. SLUSA Precludes Plaintiffs' Claim for Breach of Fiduciary Duty Against the Citco Administrators

SLUSA precludes Plaintiffs' claim for breach of fiduciary duty because that claim, like Plaintiffs' negligence-based claims, predicates liability on the Citco Administrators' allegedly untrue statements concerning the Funds' NAV and/or other false conduct. For example, Plaintiffs allege that the Citco Administrators breached "their fiduciary duties to Plaintiffs, by . . . failing to discharge properly their responsibilities as Administrators and Sub-Administrators, *including in calculating the Funds' NAV and communicating fictitious Fund valuations to Plaintiffs*." (SCAC ¶ 495 (emphasis added).) This allegation unmistakably predicates liability on the Citco Administrators' alleged "misrepresentations and misleading omissions in connection with the Funds' investments with Madoff and oversight of Madoff's operations." *Kingate*, 784 F.3d at 151. These allegations are thus "of the type" that should be dismissed under SLUSA. *Id.*; *see also Romano*, 609 F.3d at 521-24 (holding that SLUSA precludes breach of fiduciary duty claim alleging "uniform misrepresentations" made to plaintiffs).

Further, Plaintiffs' theory of the Citco Administrators' supposed *fiduciary* duty, like Plaintiffs' theory of duty under *Credit Alliance*, presupposes false conduct connected to class members' investment decisions. According to this Court's ruling sustaining Plaintiffs' claim for breach of fiduciary duty against a motion to dismiss, the following key allegations supported Plaintiffs' theory that the Citco Administrators owed a fiduciary duty to Plaintiffs: the NAV was "fundamental to [class members'] investment decisions"; the Citco Administrators were "responsible for communicating with investors"; and the Citco Administrators "sent investment confirmations to [class members]." *Anwar I*, 728 F. Supp. 2d at 441-42. Plaintiffs' theory of duty and breach thus depends directly on Plaintiffs' allegations of false communications from the Citco Administrators to class members.

In fact, Plaintiffs have contended that the Citco Administrators breached their supposed fiduciary duties "*by making false and misleading statements and omissions*," which class members allegedly relied on "when deciding to invest initially or subsequently in the Funds. . . [and] when deciding to retain their investments in the Funds[.]" (Ex. 3 at 12, 10-11 (emphasis added); *see also id.* at 13 (contending that the "principal" evidence supporting their breach of fiduciary duty claim is based on the same evidence supporting their federal securities claim).) Claims brought based on such evidence are exactly what SLUSA precludes. *See Merrill Lynch, Pierce, Fenner & Smith* v. *Dabit*, 547 U.S. 71, 85 (2006); *Kingate*, 784 F.3d at 151; *Herald I*, 730 F.3d at 119; *Romano*, 609 F.3d at 524.

Finally, as with the negligence-based claims, Plaintiffs' theory of injury for their breach of fiduciary duty claim presupposes that the Citco Administrators made untrue statements or omissions in connection with class members' investment decisions in covered securities. (*See supra* p. 7; *see also* SCAC ¶¶ 495, 498.)

3. SLUSA Precludes Plaintiffs' Claim for Third-Party Beneficiary Breach of Contract Against the Citco Administrators

Plaintiffs' claim for third-party beneficiary breach of contract also predicates the Citco Administrators' liability on allegations of false conduct. For instance, Plaintiffs allege that "Citco breached the Administration Agreements with the Funds, by, *among other omissions*, grossly failing to discharge its responsibility to calculate accurately the Funds' NAVs." (SCAC ¶ 484 (emphasis added).) Plaintiffs further allege that class members are the beneficiaries of these agreements because the agreements "recogniz[e] Citco's obligation to keep Fund shareholders informed of the status and performance of their investments." (*Id.* ¶ 475.) According to Plaintiffs, that information was "fundamental" to class members' investment decisions. (*Id.* ¶ 335.) Plaintiffs thus allege that class members were injured as a result of allegedly untrue statements concerning the Funds' NAV. Those allegedly untrue statements are the same statements underlying Plaintiffs' claims under the federal securities laws. (*See also* Ex. 3 at 20-21 (citing examples of the same conduct supporting their federal securities claim as "facts" establishing breaches of the Administration Agreements). "Because both the misconduct complained of, and the harm incurred, rests on and arises from securities transactions, SLUSA applies." *Romano*, 609 F.3d at 524.

Further, Plaintiffs' theory as to why class members are beneficiaries of the administration agreements between the Citco Administrators and the Funds presupposes an untrue statement or omission directed to class members in connection with their investment decisions. As this Court previously explained in denying the motion to dismiss this claim, "the Administration Agreements require the Citco Defendants to render certain specific performance directly to [class members]." *Anwar I*, 728 F. Supp. 2d at 430. That alleged performance included "publishing the Net Asset Value per Share (of each class if appropriate)[.]" (SCAC ¶ 477.) Put another way, this claim alleges that the Citco Administrators were supposed to provide class members with accurate NAV statements, but did not do so. This claim therefore concerns the type of misconduct that falls "within SLUSA's specifications of conduct prohibited by the anti-falsity provisions of the 1933 and 1934 Acts." *Kingate*, 784 F.3d at 151.

Finally, much like their other duty-based claims, Plaintiffs' theory of injury on their contract claim presupposes an untrue statement or omission made to them in connection with their investment decisions. Plaintiffs allege that class members would have refrained from investing in the Funds or redeemed their investment in the Funds if they had known the truth about the Citco Administrators' alleged misconduct. According to Plaintiffs, class members' injury is a "direct and proximate result of Defendants' false representations and omissions and failure to fulfill their duties to [class members]." (SCAC ¶ 3.) Plaintiffs can establish such an injury, if at all, only by proving that the Citco Administrators' untruthful conduct caused their investment decisions.

C. SLUSA Precludes the State-Law Claims Against the Citco Group

Plaintiffs' state-law claims against the Citco Group—negligence, gross negligence, and negligent misrepresentation—are precluded for the same reasons that Plaintiffs' state-law claims against the Citco Administrators are precluded.[7] All of Plaintiffs' state-law negligence-based claims against the Citco Group are based on allegations that the Citco Group "controlled the Administrators." *Anwar I*, 728 F. Supp. 2d at 436; *see also* SCAC ¶ 540. The Securities Exchange Act of 1934 expressly provides for control-person liability, *see* 28 U.S.C. § 78t, and Plaintiffs assert a federal claim under that provision against the Citco Group based on the Citco Administrators' alleged misconduct. (SCAC ¶¶ 527-30.) The claims against the Citco Group thus allege "conduct *of the defendant* specified in SLUSA's operative provisions," and are precluded under SLUSA. *Kingate*, 784 F.3d at 149.

D. SLUSA Precludes Plaintiffs' Claim for Breach of Fiduciary Duty Against the Citco Custodians

To quote Plaintiffs themselves, "Plaintiffs have made clear" that "the theory of their case" is that all Citco Defendants, including the Citco Custodians, "*were complicit in Citco's fraud*, breach of duties, and *other wrongdoing*." (Ex. 4 at 1-2 (emphasis added).) This alleged misconduct includes allegations that the Citco Custodians misrepresented the activities they had undertaken by, among other things, "representing to [class members] that [they were the] custodian of (non-existent) assets" (PO at 6) and by "fail[ing] to relay accurate information to [class members]" about the Funds and the Madoff Firm in connection with class members' investment decisions. (SCAC ¶ 337.) *Kingate* speaks unequivocally about the consequences of such allegations: "claims accusing the defendant of *complicity in the false conduct* that gives rise to liability *are* subject to SLUSA's prohibition." 784 F.3d at 132 (first emphasis added).

The SCAC contains numerous allegations of false conduct by the Citco Custodians. For example, Plaintiffs allege that "Citco breached its fiduciary duties by: . . . *misrepresenting* that BMIS was a qualified sub-custodian and *misrepresenting* the care Citco Bank had taken with respect to selection and supervision of BMIS." (SCAC ¶ 353(p)(iv) (emphasis added).) Plaintiffs also allege that the Citco Custodians "*actively and fraudulently concealed* their failure to perform any material due diligence on or monitoring of the operations of BMIS and Madoff, and *affirmatively misrepresented* that they were performing constant and intensive due diligence on every aspect of the implementation of the split strike conversion strategy when in fact they were performing virtually no such due diligence." (*Id.* ¶ 349 (emphasis added).)

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[7] Plaintiffs' claim against all Citco Defendants for aiding and abetting breach of fiduciary duty is discussed further below.

Similarly, in their brief addressing class certification, Plaintiffs argued that the presumption of reliance established in *Affiliated Ute Citizens* v. *Utah*, 406 U.S. 128 (1972), applied to all of their claims based on supposed material omissions by the Citco Defendants. This Court applied the *Affiliated Ute* presumption to Plaintiffs' claims under the federal securities laws based on what the Court perceived to be a series of alleged "*material omissions*" that Plaintiffs attributed primarily to the Citco Custodians. The information that the Citco Custodians allegedly omitted to disclose included the following: "[Citco's] internal auditors had grave doubts about the veracity of the Funds' financial information and whether the Funds' assets existed"; "[Citco's] attempts to verify that the Funds' assets existed failed due to Madoff's lack of cooperation in meetings with Citco"; and "[Citco] was doing nothing to supervise Madoff as Citco's sub-custodian." *Anwar* v. *Fairfield Greenwich Ltd.*, 2015 WL 935454, at *13 (S.D.N.Y. Mar. 3, 2015). In short, Plaintiffs allege that Citco "withheld . . . material information from . . . investors." *Id.* These allegations make plain that "falsity is essential to the claim" asserted against the Citco Custodians. *Kingate*, 784 F.3d at 140.

Moreover, as with Plaintiffs' other state-law claims against the Citco Defendants, Plaintiffs' theory of injury for their breach of fiduciary duty claim presupposes that the Citco Custodians made an untrue statement or omission in connection with class members' investment decisions in covered securities. (*See supra* pp. 7, 9.) That is because the factual predicate for all of Plaintiffs' claims is that the Citco Custodians supposedly made untrue statements or omissions about the activities in which they were engaged on behalf of the Funds or about "numerous red flags surrounding Madoff's operations[.]" (SCAC ¶ 338.) Plaintiffs expressly advance their claim against the Citco Custodians on a theory that class members "would not have invested in the Funds, or retained their investments in the Funds" if they had known the truth about the alleged false conduct. (*Id.* ¶ 340; *see also id.* ¶¶ 496-98.) "These allegations are more than sufficient to satisfy SLUSA's requirement that the complaint allege a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." *Herald I*, 730 F.3d at 119 (internal quotation marks omitted).

E. SLUSA Precludes Plaintiffs' Claims for Aiding and Abetting Breach of Fiduciary Duty Against the Citco Administrators, the Citco Custodians, CFSB, and the Citco Group

Under *Kingate*, allegations that a defendant aided and abetted untruthful conduct by others clearly allege "complicity in false conduct that gives rise to liability" and thus "are subject to SLUSA's prohibition." 784 F.3d at 132 (emphasis deleted); *see also id.* at 151. Here, Plaintiffs allege that the Citco Administrators, the Citco Custodians, CFSB, and the Citco Group all aided and abetted breaches of fiduciary duty committed by Fairfield. Fairfield's supposed breaches of duty consisted of extensive false conduct, including misrepresentations and omissions regarding the Funds'

investments and Fairfield's oversight of the Funds' investments. (SCAC ¶¶ 181-216.) *Kingate* expressly held that "SLUSA precludes [such] allegations." 784 F.3d at 151.

It is obvious from the face of Plaintiffs' complaint that the alleged misconduct forming the basis for Fairfield's alleged breaches of fiduciary duty consists of conduct prohibited by the anti-falsity provisions of the federal securities laws. The section of the complaint addressing this claim is the same section of the complaint addressing Plaintiffs' fraud claims. That section consists of twenty pages of alleged misrepresentations and omissions that Fairfield made (or failed to make) to class members. (SCAC ¶¶ 181-216.) For instance, Plaintiffs allege:

> [T]he Fairfield Defendants *misrepresented* to [class members] that their assets were being invested using a split-strike conversion strategy, and that assets in the Funds were earning substantial, consistent returns over time. The Fairfield Defendants *further misrepresented* that they and their financial services providers and auditors were conducting extensive due diligence and monitoring of Madoff's operations, which served as the Funds' investment advisor, as well as their broker, execution agent, and sub-custodian or custodian, and that they had full transparency to all of Madoff's operations. The Fairfield Defendants *failed to disclose* to [class members] *the material facts* that in reality no one had conducted [any of these activities]. (*Id.* ¶ 182 (emphasis added).)

There can be no serious dispute that these allegations qualify for SLUSA preclusion in light of *Kingate*, especially since they are the same set of allegations used to support Plaintiffs' claims for fraud under the federal securities laws and under state law. *See* 784 F.3d at 151.[8]

More than that, Plaintiffs' own representations establish that their claim for aiding and abetting breach of fiduciary duty against the Citco Defendants depends on a showing of "false conduct conforming to SLUSA's specifications." *Id.* at 148. In answers to contention interrogatories, Plaintiffs verified that they contend that Fairfield breached fiduciary duties to Plaintiffs "because the representations that [Fairfield] made

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[8] These are also the exact same allegations that Plaintiffs identify as supporting their aiding and abetting fraud claim against the Citco Defendants, which Plaintiffs now concede is precluded by SLUSA. (*E.g.*, SCAC ¶¶ 341-42; Exs. Ex.1 at 16; Ex. 2 at 16-17; Ex. 3 at 16-17; Ex. 5 at 16-17; Ex. 7 at 11 (responding to the Citco Defendants' contention interrogatories asking to identify the misrepresentations supporting Plaintiffs' claim for aiding and abetting fraud claim by incorporating by reference the alleged the misrepresentations identified in response to the Citco Defendants' contention interrogatories about Plaintiffs' claim for aiding and abetting breach of fiduciary duty claim).) Because there is no difference in the type of alleged misconduct supporting each aiding and abetting claim, dismissal of the claim for aiding and abetting fraud warrants dismissal of the claim for aiding and abetting breach of fiduciary duty.

to investors were *false and misleading*, including those statements set forth in the Funds' offering materials, and [other] *misrepresentations*." (Ex. 2 at 13 (emphasis added); *see also* Ex. 1 at 13 ("Fairfield . . . breached fiduciary duties to Plaintiffs *because of the misrepresentations and omissions* that it made to investors, including those statements set forth in the Funds' offering materials." (emphasis added)); Ex. 3 at 14 (same); Ex. 5 at 14 (same); Ex. 7 at 8 (same); Ex. 6 at 8 ("Fairfield breached fiduciary duties to Plaintiffs . . . because of misrepresentations it made to investors, including those statements set forth in the Funds' offering materials[.]").) And in describing how the Citco Defendants allegedly assisted Fairfield's breach of fiduciary duty, Plaintiffs allege that the Citco Defendants: (1) "reviewed, revised, and approved the PPMs, and signed off on them knowing that they contained *materially false and misleading statements and omissions*"; (2) "also knew that the PPMs . . . gave the impression that Citco was performing services in a manner that was *materially misleading, yet Citco did nothing to correct these misrepresentations and omissions*, instead participating in them"; and (3) "knew that *Fairfield continued to misstate its transparency to Madoff and its ability to monitor his operations*." (Ex. 2 at 14-15 (emphasis added); *see also* Ex. 1 at 14-15; Ex. 3 at 15-16; Ex. 5 at 15; Ex. 6 at 9-10; Ex. 7 at 9-10.)

Finally, "it is obvious that [the Citco Defendants'] liability, under [the aiding and abetting claim], is premised on their participation in, knowledge of, or, at a minimum, cognizable disregard of [Fairfield's] securities fraud." *Herald I*, 730 F.3d at 119 n.7. For the Citco Administrators, Plaintiffs contend that they aided and abetted "Fairfield's breaches by continuing to serve as administrator . . . , including processing subscriptions and redemptions, calculating the NAV, publishing NAV statements, and processing the transfer of funds from [class members] to Fairfield and Madoff, . . . [without which] Fairfield's breaches could not have continued." (Ex. 5 at 14-15; Ex. 3 at 15.) For the Citco Custodians, Plaintiffs make similar contentions. (Ex. 1 at 14; Ex. 2 at 14-15.) So, too, for CFSB and the Citco Group. (Ex. 6 at 9-11; Ex. 7 at 9.) These allegations of misconduct are used nearly verbatim in support of Plaintiffs' contentions supporting their claims for aiding and abetting fraud. (Ex. 1 at 16; Ex. 2 at 16-17; Ex. 3 at 16-17; Ex. 5 at 16-17; Ex. 7 at 11.) Accordingly, SLUSA precludes the claim.

Conclusion

For the foregoing reasons, and those set forth in the letters filed concurrently by the PwC defendants (and the Standard Chartered defendants), all of Plaintiffs' state-law claims against the Citco Defendants are precluded by SLUSA and therefore should be dismissed.

Respectfully submitted,

Walter Rieman

Walter Rieman

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by The Citco Defendants.

SO ORDERED.

6-4-15
DATE

VICTOR MARRERO, U.S.D.J.

Enclosures

cc: All counsel in *Anwar* (by e-mail)