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June 8, 2015

VIA FAX

Hon. Victor Marrero
District Judge, United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: ***Anwar, et al. v. Fairfield Greenwich Limited, et al.***
Master File No. 09-CV-00118 (VM) (THK)

Dear Judge Marrero:

The *Anwar* plaintiffs admit that their purchase of shares of the Fairfield funds, the assets of which were purportedly invested in covered securities, satisfies SLUSA's "covered securities" requirement. In addition, they have no answer to the fact that both of their claims depend on alleged misrepresentations by the PwC Defendants in connection with their purchase of those covered securities.

I. SLUSA Precludes Plaintiffs' Negligence Claim.

Plaintiffs claim that *Kingate* "makes clear that negligence by auditors in failing to detect a fraud involving covered securities is a textbook Group 4 claim" not barred by SLUSA. (*Id.* at 8.) They argue that the PwC Defendants' liability arises from the breach of "duties owed directly to Plaintiffs as investors in the Fairfield Funds," and that their negligence claim "'would not require any showing of false conduct on the part of [PwC].'" (*Id.* at 8-9.)

Plaintiffs' assertion that they have "no need to plead or prove any misstatement at all" (Letter at 9.), is, as outlined in the PwC Defendants' initial letter, contrary to the allegations in plaintiffs' own complaint and the position they have consistently taken in this Court and in the Court of Appeals: that their negligence claim against the PwC Defendants is premised on the alleged falsity of the PwC Defendants' audit opinions.

Plaintiffs' assertion is also contrary to *Credit Alliance*, which governs their negligence claim. Under *Credit Alliance*, Plaintiffs' negligence claim "depends" on their ability to prove a misstatement. As Plaintiffs acknowledged in opposing PwC Defendants' motion to dismiss, New York permits a plaintiff who is not in privity with an accountant to bring a negligence claim only if the plaintiff can satisfy the requirements of *Credit Alliance*. One such requirement is that

the plaintiff relied on an "inaccurate" or misleading audit report. The requirement of a misleading report triggers the false conduct element of *Kingate*: "When the success of a class action claim depends on a showing that the defendant committed false conduct conforming to SLUSA's specifications, the claim will be subject to SLUSA, notwithstanding that the claim asserts 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. Although negligence is a state law theory that does not include false conduct as an essential element, for plaintiffs who are in privity with the defendant accountant, here, the success of the *Anwar* plaintiffs' class and individual actions all depend on showing that the PwC Defendants engaged in false conduct conforming to the *Credit Alliance* requirements, including issuing an "inaccurate" or misleading audit report. Accordingly, plaintiffs' *Credit Alliance* negligence claim "depends" on establishing a misleading statement. Their letter cites no support for any conclusion to the contrary.

The *Anwar* plaintiffs cannot rely on the illustration in *Kingate*, because that illustration does not involve a *Credit Alliance* negligence claim. To the contrary, in the illustration, the plaintiff is in contractual privity with the auditor it is suing. A negligence claim by an auditor's client is not subject to *Credit Alliance*, and does not necessarily require a showing that the auditor engaged in false conduct. In contrast, the *Anwar* plaintiffs are not in privity with the PwC Defendants, must satisfy *Credit Alliance*, and must plead and prove reliance on a false statement by the PwC Defendants, which puts their claim in Group 2.

Plaintiffs cannot avoid this result by arguing that in order to trigger SLUSA preclusion, the relevant misstatements must be "about a SLUSA-covered security." (Letter at 9; *see also id.* at 2 (arguing that misrepresentation or omission must be "concerning" a covered security).) Nothing in SLUSA, *Kingate*, or any other Supreme Court or Second Circuit case requires that the misstatement "concern" or be "about" a SLUSA-covered security. Rather, the requirement is that the misstatement be made "in connection with" a covered security, and the alleged false statements by the PwC Defendants here were unquestionably made "in connection with" purported investments in covered securities. As explained in *Kingate*, in the Madoff context, "in connection with" includes "negligent misrepresentations and misleading omissions in connection with the Funds' investments with Madoff." *Kingate*, 784 F.3d at 151.

Plaintiffs allege that the PwC Defendants' misstatements include that "the Funds' financial statements presented fairly, in all material respects the financial condition of the Funds." (Letter at 10.) And plaintiffs allege that this statement was false precisely because the Funds financial statements misrepresented "the multi-billion dollar valuations of the Funds' investments," *i.e.*, the value of the listed "covered securities." (SCAC ¶ 305.) Simply put: The *Anwar* plaintiffs allege that the PwC Defendants' representations in their audit reports that the

financial statements were properly stated were false precisely because the financial statements showed the Funds owned "covered securities" that did not, in fact, exist. Under *Kingate*, that is a claim of false conduct "in connection with" a covered security, and therefore such a claim is precluded by SLUSA.

II. SLUSA Precludes Plaintiffs' Negligent Misrepresentation Claim.

Plaintiffs assert that the "misstatements by PwC said nothing about Madoff or his purported trading in covered securities. Nor do the misrepresentations in PwC's one-page audit letters make any mention of Madoff or covered securities." (Letter at 10.) But *Kingate* does not require explicit reference to covered securities. It is enough that the *Anwar* plaintiffs expressly allege that the PwC Defendants' audit reports misrepresented both the audit work concerning the covered securities and the accuracy of the Funds' financial statements, which reflected ownership of the covered securities:

- "PwC was required to plain and conduct audits that verified the existence of the Funds' investments." (SCAC ¶ 297.)
- "PwC did not test the trades supposedly made by BMIS or confirm the actual existence of securities in BMIS accounts. If PwC had made any such efforts, it would have discovered the securities did not exist." (SCAC ¶ 310.)
- "Had PwC performed appropriate audits (as it represented it had), it would have learned that the securities transactions purportedly conducted by Madoff did not occur and the assets of the Funds did not exist." (SCAC ¶ 313.)
- "[The PwC Defendants'] audit reports ***misrepresented*** that [they] had conducted the audits in compliance with GAAS and ISA and ***misrepresented*** that the Funds' financial statements set out the true financial condition of the Funds." (SCAC ¶ 316 (emphasis added).)

If alleging these misrepresentations does not put plaintiffs' claim into Group 2, it is hard to imagine what would.[1]

Conclusion

Both of plaintiffs' remaining claims against the PwC Defendants are precluded by SLUSA and should be dismissed.

Respectfully,

Timothy A. Duffy, P.C. /gls

Timothy A. Duffy, P.C.

cc: Counsel of Record (via email)

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

SO ORDERED.

6-8-15
DATE

VICTOR MARRERO, U.S.D.J.

[1] The *Anwar* plaintiffs are also mistaken in their suggestion that *Kingate* requires an "allegation that PwC was complicit in Madoff's fraud involving covered securities." (Letter at 10.) Nothing in *Kingate* suggests that complicity in the underlying fraud is required for SLUSA preclusion. Indeed, the Second Circuit ordered the *Kingate* District Court to dismiss negligent misrepresentation claims that, by their very nature, do not involve complicity in any underlying fraud. *See Kingate*, 784 F.2d at 151.