Anwar et al v. Fairfield Greenwich Limited et al Doc. 1390

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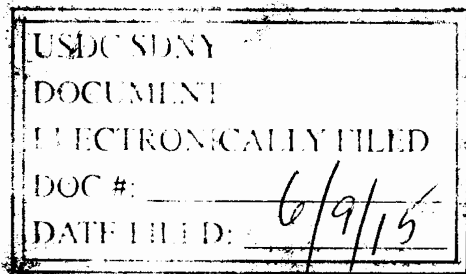

June 8, 2015

By Facsimile

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

Re: *Anwar* v. *Fairfield Greenwich Ltd.*, No. 09-CV-118 (VM) (FM) -- Standard Chartered Cases

Dear Judge Marrero:

We write on behalf of the Standard Chartered Defendants (the "Bank") in reply to the Standard Chartered Plaintiffs' May 29, 2015 letter regarding application of the *Kingate* decision to the Standard Chartered Cases ("SC Cases"). (Dkt. No. 1385.) As noted in the Bank's opening submission, all remaining claims in the SC Cases are predicated on allegations that the Bank made false and misleading recommendations that induced plaintiffs to try to invest in "covered securities" through the Fairfield Funds. As such, under *Kingate* and other Second Circuit precedent, those claims are squarely precluded by SLUSA. Plaintiffs argue nonetheless that their claims should not be dismissed because: (1) the SC Cases are not a "covered class action" under SLUSA; (2) SLUSA's "false conduct" requirement is not met with respect to the "Due Diligence Theory" claims; and (3) SLUSA's "in connection with" requirement is not met with respect to certain claims that plaintiffs contend may exist but fail to specify.

Each of plaintiffs' arguments fail and the SC Cases should be dismissed. *First*, the 57 SC Cases brought by 75 separate plaintiffs are a "group of lawsuits" that qualify as a "covered class action" under SLUSA's plain text. *See* 15 U.S.C. § 78bb(f)(5)(B)(ii). *Second*, plaintiffs' remaining claims all depend on alleged "false conduct" covered by SLUSA because each requires plaintiffs to show that the Bank engaged in the type of false or misleading conduct that is proscribed by the anti-falsity provisions of the federal securities laws. *Third*, all of the Bank's alleged "false conduct" was "in connection with" the purchase and sale of covered securities under SLUSA because here the "false conduct" at issue is allegedly false and misleading investment advice that induced plaintiffs to purchase the Fairfield Funds.

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A. The Standard Chartered Cases Are a Covered Class Action.

Plaintiffs argue that the SC Cases do not fall within SLUSA's definition of a "covered class action." This is wrong. As set forth in the Bank's October 31, 2014 submission, a "covered class action" includes "*any* group of lawsuits filed in or pending in the same court and involving common questions of law or fact" where "(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." 15 U.S.C. § 78bb(f)(5)(B)(ii) (emphasis added); *see also* Dkt. No. 1340 at 9. Every court in this District that has interpreted this provision in the context of an MDL proceeding has held that a group of separately filed individual cases that are coordinated or consolidated in an MDL for pretrial purposes constitutes a "covered class action." *E.g., Amorosa* v. *Ernst & Young LLP,* 672 F. Supp. 2d 493, 514-18 (S.D.N.Y. 2009), *aff'd sub nom., Amorosa* v. *AOL Time Warner Inc.*, 409 F. App'x 412 (2d Cir. 2011); *In re Meridian Funds Grp. Sec. & Employee Ret. Income Sec. Act (Erisa) Litig.*, 2015 WL 1258380, at *9 (S.D.N.Y. Mar. 13, 2015); *see also Instituto de Prevision Militar* v. *Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008). The SC Cases involve 75 plaintiffs whose 57 actions, including a putative class action, are consolidated with each other and with the *Anwar* class proceedings for pretrial purposes; they thus qualify as a "covered class action."[1]

Contrary to plaintiffs' contentions, *Kingate* does not support their argument that SLUSA's "covered class action" provision is ambiguous, let alone that the statute could be read to exclude the SC Cases. (Pls. Ltr. at 2.) *Kingate* does not address any ambiguity with respect to the "covered class action" provision at all. Rather, in *Kingate*, the Second Circuit considered SLUSA's use of the word "alleging" to be ambiguous in the context of the statute's "in connection with" provision. 784 F.3d 128, 143 (2d Cir. 2015). Finding one provision of SLUSA ambiguous does not render an entirely different provision of the statute ambiguous. The Second Circuit has identified no ambiguity in SLUSA's definition of "group of lawsuits," it has been consistently applied without controversy, and there is no need to resort to legislative history to interpret the clear provision.

Kingate also does not hold, as plaintiffs assert, that for a claim to be precluded by SLUSA, there must be a way for a plaintiff to replead it as a non-covered action. (Pls. Ltr. at 2.) Plaintiffs rely entirely on dicta found in a footnote where the *Kingate* Court questioned an issue "not presented"—namely, whether a defendant seeking to dismiss a putative class action under SLUSA should move under Rule 12(b)(1) of the Federal Rules of Civil Procedure rather than Rule 12(b)(6). 784 F.3d at 135 n.9. The *Kingate* Court observed that a plaintiff in a putative class action could replead in a "non-covered action"—*i.e.*, one that is *neither* a putative class action *nor* a "group of lawsuits" on behalf of more than 50 persons. *Id.*[2] In doing so, the Court

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[1] Among the SC Cases is a putative class action styled *Caso* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-9196, which this Court stayed after compelling the named plaintiff to individual arbitration in May 2012 (Dkt. Nos. 882, 1151). The *Caso* action alone constitutes a covered class action under 15 U.S.C. § 78bb(f)(5)(B)(i).

[2] It is not difficult to imagine the circumstance that the *Kingate* Court was contemplating: A class action lawsuit is dismissed under SLUSA and a named plaintiff seeks to press claims on an individual basis. Such an action might still be viable. If 50 or more members of the class,

did not suggest—much less hold—that, contrary to SLUSA's explicit provisions, a "group of lawsuits" brought on behalf of 50 or more persons in a consolidated MDL proceeding can be exempt from SLUSA.

B. Plaintiffs' Due Diligence Theory Claims Are Premised on False Conduct by the Bank and Thus Precluded by SLUSA.

Plaintiffs next argue that their Due Diligence Theory claims are not precluded by SLUSA because they are premised on a "common law duty SC owed to the SC Plaintiffs" that "is not dependent on an allegation of false conduct" and does not require a showing of complicity in Madoff's fraud. (Pls. Ltr. at 6-7.) Plaintiffs' argument is both legally and factually incorrect.

Under *Kingate*, a state law claim need not include false conduct as an essential element to trigger SLUSA preclusion. 784 F.3d at 149. What is required is that plaintiffs' claims be predicated on conduct by the defendant that is proscribed by the anti-falsity provisions of the federal securities laws. *Id.* at 146, 149. The law is well-settled in the Second Circuit that claims such as plaintiffs' Due Diligence Theory claims rest on conduct covered by those anti-falsity provisions—*i.e.*, making investment recommendations without conducting adequate due diligence. *Hanly* v. *SEC*, 415 F.2d 589, 595-97 (2d Cir. 1969) (holding that investment professionals who recommend investments without conducting adequate due diligence necessarily make misrepresentations that implicate anti-falsity provisions). Indeed, as set forth in the Bank's May 29, 2015 letter, for more than 40 years, the SEC and private litigants have routinely brought enforcement actions and private claims under the anti-falsity provisions where investment professionals recommend investments without conducting adequate due diligence. (SCB Ltr. at 3-4.) Under *Kingate*, that is the end of the inquiry and SLUSA applies.

Plaintiffs cannot evade SLUSA by arguing that the Bank owed a duty to conduct due diligence that arose solely from "either [the Bank's] fiduciary relationship with its private banking clients—or from a non-fiduciary standard of due care."[3] (Pls. Ltr. at 6.) Regardless of how the Bank's duty to conduct due diligence arose, to prevail on their Due Diligence Theory claims, plaintiffs still must show that they were injured because the Bank recommended the Fairfield Funds to them without conducting due diligence. That conduct falls within the anti-falsity provisions and thus triggers SLUSA preclusion under *Kingate*.[4]

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however, sought to press those same claims, and the actions were consolidated, the actions would be a covered class action subject to dismissal under SLUSA.

[3] In addition, *Kingate* does not hold that SLUSA applies only where a defendant was complicit in Madoff's fraud. (Pls. Ltr. at 6.) The operative inquiry is, unremarkably, whether plaintiffs' claims are "predicated on conduct of *the defendant*" of the type proscribed by the anti-falsity provisions. *Kingate*, 784 F.3d at 149 (emphasis in original). Plaintiffs' Due Diligence Theory claims rest on such conduct.

[4] Moreover, the only duty to conduct due diligence before making investment recommendations recognized under Florida law is identical to the duty that arises under the anti-falsity provisions in the same circumstances. In *Leib* v. *Merrill Lynch, Pierce, Fenner & Smith,*

In short, plaintiffs cannot escape that the Due Diligence Theory claims depend on plaintiffs showing conduct by the Bank that is the type proscribed by the anti-falsity provisions of the federal securities laws—namely, recommending an investment without conducting adequate due diligence—and thus involve "false conduct" under SLUSA.[5]

C. All of Plaintiffs' Claims That the Bank Made Misrepresentations or Omissions When Recommending the Fairfield Funds Are "in Connection with" Plaintiffs' Investments in Covered Securities.

Plaintiffs concede that SLUSA precludes alleged misrepresentation and omission claims concerning "material facts in connection with Sentry's investments with Madoff in covered securities," but argue that SLUSA does not preclude claims based on the Bank's alleged misrepresentations and omissions that were not "in connection with" the Fairfield Funds' investments in covered securities. (Pls. Ltr. at 5-8.) There are no such claims pending here. Plaintiffs provide a single "example" of a purportedly allowable claim, namely, a claim that the Bank allegedly "did not disclose that it received remuneration from Fairfield whenever an SC[B] private banking client [acted on the Bank's advice and] invested in Sentry." (*Id.* at 5-6, 8.) But only one plaintiff asserted such a claim, and this Court already considered its merits and dismissed it. *Anwar* v. *Fairfield Greenwich Ltd.*, 286 F.R.D. 258, 260 (S.D.N.Y. 2012).

In any event, even if there were pending claims that the Bank misrepresented or failed to disclose its fees or any other fact when recommending the Fairfield Funds, such claims easily would satisfy SLUSA's "in connection with" requirement. The Supreme Court has "espoused a broad interpretation" of this requirement that reaches any alleged false conduct that "coincides" with a covered security transaction. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 84-85 (2006). The Second Circuit's decision in *Romano* v. *Kazacos* illustrates the breadth of the "coincides" test where, as here, a broker or advisor provides advice that leads to an investment in covered securities. (SCB Oct. 31, 2014 Ltr. at 13-16.) In *Romano*, plaintiffs brought various state common law claims to recover lost wages after they decided to retire based on allegedly negligent advice from Morgan Stanley & Co. that plaintiffs "had sufficient savings to retire early and comfortably." 609 F.3d 512, 515, 522-23 (2d Cir. 2010). To avoid SLUSA, plaintiffs argued that Morgan Stanley's advice "did not mention or recommend specific investment vehicles or asset allocation strategies," and emphasized that, although plaintiffs eventually invested in covered securities after they retired, those investments

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Inc., the court explained that the anti-falsity provisions impose a "duty to recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis." 461 F. Supp. 951, 953 (E.D. Mich. 1978). Plaintiffs' Due Diligence Theory claims survived motions to dismiss because the Bank owed the *same* duty under Florida law. *Anwar* v. *Fairfield Greenwich*, Ltd., 745 F. Supp. 2d 360, 376 (S.D.N.Y. 2010).

[5] Plaintiffs do not dispute that the Bank's "false conduct" was "in connection with" their investments in covered securities. Nor could they. The Bank's recommendations allegedly induced plaintiffs to invest in the Fairfield Funds (Section C, *infra*), and one of plaintiffs' core contentions is that proper due diligence would have revealed Madoff's reported trading in covered securities was too good to be true (Pls. Sept. 12, 2014 Ltr. at 4-5).

took place up to 18 months after the challenged advice. *Id.* at 516, 524. The Second Circuit rejected plaintiffs' arguments and held that Morgan Stanley's alleged wrongdoing was "in connection with" plaintiffs' investments in covered securities because it "somehow induced" those investments, and because plaintiffs' claims "turn[ed] on injuries caused by acting on misleading investment advice." *Id.* at 521-24.

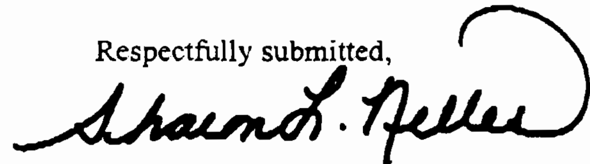
In the SC Cases, the connection between investments in covered securities and any misrepresentations or omissions that the Bank may have made in its investment recommendations is far more direct than it was in *Romano*. Plaintiffs' case is that the Bank's recommendations directly caused and induced plaintiffs to invest in covered securities through the Fairfield Funds. (SCB Oct. 31, 2014 Ltr., Ex. A (chart of allegations).) And with respect to plaintiffs' non-disclosure of fees theory in particular, courts routinely dismiss similar claims under SLUSA. *See, e.g.*, *Behlen* v. *Merrill Lynch*, 311 F.3d 1087, 1094-95 (11th Cir. 2002) (applying SLUSA to state-law claims alleging defendant sold investments to receive excess fees and commissions); *Spencer* v. *Wachovia Bank, N.A.*, 2006 WL 3408043, at *2-*5 (S.D. Fla. May 10, 2006) (applying SLUSA to dismiss breach of fiduciary duty claim where defendant collected undisclosed fees).[6]

For all the foregoing reasons and those set out in the Bank's May 29 Letter and prior submissions concerning SLUSA, the Court should dismiss the SC Cases in their entirety and with prejudice.[7]

SO ORDERED. 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 Bank Defendants.

DATE 6-9-15 VICTOR MARRERO U.S.D.J.

Respectfully submitted,



Sharon L. Nelles

cc: Standard Chartered Plaintiffs' Steering Committee (by E-mail)

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[6] Plaintiffs are not aided by the *Anwar* plaintiffs' argument that "SLUSA must be interpreted narrowly." (*Anwar* Pls. May 29 Ltr. at 3.) As the *Anwar* plaintiffs acknowledge, *Chadbourne & Parke LLP* v. *Troice* held only that SLUSA "defines 'covered security' narrowly." (*Id.* at 4.) *Chadbourne* did not disturb the Supreme Court's holding in *Dabit* that courts should use a "broad interpretation" of the "in connection with" requirement. 134 S. Ct. 1058, 1066 (2014). *Kingate* confirms that investments in Madoff feeder funds like the Fairfield Funds constitute investments in covered securities, and thus the only question is whether the Bank's alleged wrongdoing was "in connection with" those investments. *Chadbourne* does not narrow the Second Circuit's holding in *Romano* concerning the application of SLUSA's "in connection with" requirement to claims based on allegedly misleading investment advice like those at issue in the SC Cases.

[7] There is no need for further submissions about the individual allegations each plaintiff in the SC Cases has made, as plaintiffs propose. Plaintiffs have long recognized, and do again in their latest submission, that all of their claims fall within the Due Diligence or Omission Theories. Plaintiffs had ample opportunity to identify any other plausible theories of liability. They failed to do so, and the time to assert new claims is long past.