THE BRODSKY LAW FIRM, PL

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June 8, 2015

BY FACSIMILE TRANSMISSION

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

Re: No. 09-cv-118 (VM)
Standard Chartered Cases

Dear Judge Marrero:

This letter brief responds to the SC Defendants' May 29, 2015 letter brief, docketed at DE 1384 (June 4, 2015).[1]

The SC Defendants argue that the SC Plaintiffs' Due Diligence Claims would be precluded by SLUSA. They persist in erroneously characterizing the Due Diligence Claims as being "dependent" on allegations of false conduct, which are "a predicate" to these claims. These are empty rhetorical flourishes. They ignore that the bank's duty not to engage in false conduct is separate and distinct from its duty to conduct proper "diligence" before recommending an investment.

In re Kingate Mgmt. Ltd. Litig., 784 F.3d 128, 153, 154 (2d Cir. 2015) requires the Court to engage in a careful allegation-level analysis, but the SC Defendants would lead the Court in the opposite direction: they paint with a broad brush and restate the allegations to their liking. The SC Defendants' approach is an unsuccessful attempt to force square pegs into round holes, an impossible task if

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[1] In determining the applicability of SLUSA to the SC Cases, the Court must first determine, in light of the language, history and purpose of SLUSA, whether the SC Cases are a "covered class action," and then, only if it determines that they are, must analyze each allegation made by each SC Plaintiff to decide which allegations would be precluded by SLUSA and which would not. The Court could save substantial judicial labor if it decides that the SC Cases are not a covered class action and declines to examine the different SC Complaints separately to determine exactly which allegations are precluded. It is within the Court's discretion whether to decline to rule on the second issue if it decides the "covered class action" issue in favor of the SC Plaintiffs. (To avoid repetition, statements made in this letter about the preclusion of claims by SLUSA are not a waiver of our position that the SC Cases are a covered class action.)

one stays true to the facts and the law.[2]

The "round hole" is *Kingate*'s holding, 784 F.3d at 132, that "state law claims that do not *depend* on false conduct are not within the scope of SLUSA, even if the complaint includes peripheral, inessential mentions of false conduct." (emphasis in original). The "square pegs" are claims that "do not depend on false conduct"—here, both what we have called "Due Diligence Claims" (the fundamental allegation that the SC Defendants failed to conduct a proper investigation before recommending an investment in Sentry) and "Non-Madoff Claims" (such as the claim that the SC Defendants failed to disclose the receipt of a substantial "fee"/kickback from Fairfield for every SC private client investing in Sentry). Only "Madoff Claims," *e.g.*, the SC Defendants' failure to disclose that Madoff's claimed results could not be replicated and did not stand up to analysis, would be precluded by SLUSA. See SC Plaintiffs' letter brief, May 29, 2015, docketed at DE 1385 (June 4, 2015), at 5, 7-8.

The SC Defendants list three "reasons" they say support their theory that the Due Diligence Claims would be precluded. None of these arguments holds water.[3]

The first argument is that a claim that an "investment professional" has recommended an investment without doing adequate due diligence "necessarily involves" false conduct. DE 1384, 2. For this proposition, the SC Defendants cite no Florida case or, for that matter, any case involving state law claims. Instead, they rely on *Hanly v. SEC*, 415 F.2d 589, 595-97 (2d Cir. 1969), a challenge by a broker suspended by the SEC in a statutory administrative proceeding. *Hanly* and its progeny have no application here. It applies the SEC's "shingle theory," under which, when a securities dealer deals with the public, it is said to have "hung out a

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[2] The SC Defendants inform the Court that "[i]n determining whether a state law claim depends on the type of conduct that triggers SLUSA, *Kingate* requires the Court to consider each 'claim's theory of the defendant's liability,' *rather than merely whether 'false conduct' is 'an essential element' of the claim. Id.* at 149, 153 n.25." DE 1384, at 2 (emphasis added). They have simply lifted a passage out of context and omitted the passage from which this sentence derives, thereby misstating the point the court was making. It was not, as the SC Defendants claim, to qualify *Kingate*'s "depends on" test, but rather to reiterate that, "under the standard we set forth above, SLUSA's application to a claim turns on the claim's theory of the defendant's liability, *the inclusion of allegations in a claim that are irrelevant to the claim's theory of the defendant's liability are irrelevant to SLUSA's application to the claim.*" *Id.* (omitted language italicized).

[3] The SC Defendants deal only with the Due Diligence Claims (recognizing that we had previously informed the SC Defendants that we agreed that the Madoff Claims would be precluded). No express reference had previously been made to the Non-Madoff Claims. See Parties' joint letter, May 27, 2015, docketed at DE 1381 (May 27, 2015), at 2.

shingle" and impliedly represented that it will deal with the public fairly.[4] This construct of implied representations of fairness has been aptly described as employing a "legal fiction". Arnold S. Jacobs, Theories governing broker-dealers' responsibilities, 5D Disclosure and Remedies under the Sec. Laws, § 18.3 (available on WestlawNext) ("The approach is a fiction—you imply a representation (which the broker has no intention of making) and then impose liability when it is breached."). The SEC may very well have concluded it needed to engage in this legal fiction to bring broker-dealer misconduct not based on false conduct within the reach of its powers to enforce statutes and rules it enforces that are based on false conduct.[5] Whatever its importance to the SEC in policing broker-dealers, the shingle theory has no applicability to banks (and therefore the claim that it applies to "investment professionals" other than stockbrokers is specious), and has not been recognized or applied in the common law. It is strictly limited to securities fraud cases. *In re Refco Sec. Litig.*, 759 F.Supp.2d 301, 320 (S.D.N.Y 2010) (shingle theory not part of New York common law; collecting cases). There is simply no basis under Florida law to import this legal fiction into the Due Diligence Claims.[6]

The SC Defendants' second argument is similar to the first. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S.Ct. 1318 (2015) (holding prospectus' disclosure of opinions not honestly believed or without disclosure of conflicting facts known to speaker invokes '33 Act section 11 liability) in no way leads to the conclusion that the Due Diligence Claims perforce "depend on" implied misrepresentations. The Due Diligence Claims are based on the violation of a duty

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[4] For a review of the shingle theory, see Arnold S. Jacobs, Theories governing broker-dealers' responsibilities, 5D Disclosure and Remedies under the Sec. Laws, § 18.3 (available on WestlawNext).

[5] A similar need gave rise to the theory that "insider trading" violates the securities laws' anti-fraud provisions. *See In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961) (failure of insider to disclose facts unknown to market before trading thereon).

[6] In South Cherry LLC v. Hennessee Grp. LLC, 573 F.3d 98 (2d Cir. 2010), affirming the dismissal of a breach of contract claim and a rule 10b-5 claim, the claims included separate and affirmative misrepresentations, not merely implied representations. Likewise, the cited SEC administrative proceedings against broker-dealers are inapplicable because they are essentially grounded in the shingle theory and, in any event, are "without admitting or denying" settlements involving no adjudication and therefore providing no precedential value even in the context of an SEC proceeding. Another case cited by the SC Defendants, Romano v. Kozacos, 609 F.3d 512 (2d Cir. 2010), is also inapposite. It merely holds that fraudulent misrepresentations about the benefits of cashing out a pension and investing the proceeds in covered securities satisfy the "in connection with" requirement of SLUSA. Under *Kingate*, that issue is mooted here. Significantly, *Kingate* extensively analyzes the meaning of the word "alleging" as used in SLUSA, but *Romano* does not deal with that issue at all.

not to recommend an investment without making a careful investigation of risks and attending to those risks. This is the theory that has been pleaded and has been upheld in the various SC Cases. *E.g.*, *Anwar v. Fairfield Greenwich Ltd.*, 745 F. Supp. 2d 360, 375, 376 (S.D.N.Y. 2010) ("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.*") (emphasis added). Florida law contains no rule or rubric that converts such a claim into one dependent on the existence of implied misrepresentations.

The third argument advanced by the SC Defendants consists of various allegations made by SC Plaintiffs alleging misrepresentations and omissions. The SC Defendants say, without basis and without support, that these allegations are a "predicate" to the Due Diligence Claims, but this is, of course, inaccurate both textually and as a matter of law. The SC Defendants ignore that there are several duties that a fiduciary such as the bank owes to its clients: the quoted allegations stem from the duty of full disclosure, which is a separate duty from the duty violated when a recommendation is made without a proper investigation. *E.g.*, *Ward v. Atlantic Sec. Bank*, 777 So.2d 1144, 1177 (Fla. Dist. Ct. App. 2001) (listing fiduciary duties of bank to customer, including "studying" before recommending an investment, disclosure of risks and non-misrepresentation of any material fact); *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 520 (Fla. Dist. Ct. App. 1994) ("A fiduciary owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts."). The SC Defendants would have the disclosure duties swallow the rule and do away with all other duties arising from a fiduciary relationship. This, again, is not the law of Florida.

Respectfully, for the reasons stated in this letter brief and our prior letter briefs dated November 17, 2014 and May 29, 2015, the Court should rule that the SC Cases are not a "covered class action," and if the Court reaches the issues of preclusion, it should rule that the Due Diligence Claims and Non-Madoff Claims would not be precluded. As previously suggested, if the Court so rules, it should solicit from each of the SC Plaintiffs and from the Defendants their analyses of precisely which allegations would be precluded and which would not.

Sincerely yours,

THE BRODSKY LAW FIRM, PL

Richard E. Brodsky
Liaison Counsel for SC Plaintiffs

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.

6-9-15
DATE

VICTOR MARRERO, U.S.D.J.

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