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June 8, 2015

BY HAND

The Honorable Victor Marrero
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) (FM)

Dear Judge Marrero:

The *Anwar* Plaintiffs respectfully submit this letter memorandum regarding *In re Kingate Management Ltd. Litig.*, 784 F.3d 128 (2d Cir. 2015), in response to (i) the May 29, 2015 letter from Timothy Duffy ("PwC Letter") on behalf of the PricewaterhouseCoopers defendants ("PwC"); and (ii) the May 29, 2015 letter from Walter Rieman ("Citco Letter") on behalf of the Citco defendants ("Citco").

INTRODUCTION

Despite the plain language of *Kingate* to the contrary, PwC and Citco argue that every one of the remaining common law claims is precluded by SLUSA. The letters submitted by PwC and Citco, however, contain no discussion whatever of the Supreme Court's decision in *Chadbourne & Parke LLP v. Troice*, 134 S.Ct. 1058 (2014). PwC and Citco have failed to explain how their arguments square with the Supreme Court's directive that that SLUSA "defines 'covered security' narrowly," *id.* at 1064, and that SLUSA must not be construed too broadly so as to "interfere with state efforts to provide remedies for victims of **ordinary state-law frauds**." *Id.* at 1068 (emphasis added).

Defendants' letters likewise ignore the "elephant in the room" – that if their interpretation of *Kingate* were correct, there would have been no need for the Court of Appeals to do anything much more than dismiss plaintiffs' claims on the authority of *Herald II*. The Second Circuit's analytical framework establishing five distinct groups of claims for purposes of applying SLUSA would have been unnecessary. That analysis – and particularly its discussion of "Group 4" claims – would have been superfluous because the state law claims in *Kingate*, like those here, alleged that defendants misrepresented facts about their own actions and about the value of "uncovered" securities notwithstanding that the ultimate cause of plaintiffs' losses was Madoff's fraud involving SLUSA "covered" securities.

The claims against PwC and Citco here stand in stark contrast to the claims against the banks in *In re Herald*, 730 F.3d 112 (2d Cir. 2013), where "the plaintiffs' allegations with respect to BNY and JPMorgan relate directly to Madoff's purported transactions in covered securities." *Id.* at n.5. Unlike PwC and Citco, "the liability of JPMorgan and BNY is predicated not on these banks' relationship with plaintiffs or their investments in the feeder funds but on the banks' relationship with, and alleged assistance to, Madoff Securities' Ponzi scheme, which indisputably engaged in purported investments in covered securities on U.S. exchanges." *Id.* at 118-19.

The *Kingate* opinion specifically distinguished the preclusion of the common law claims in *Herald* that were based upon "complicity" with Madoff from duty-based claims such as those against Citco and PwC here, which *Kingate* held are not precluded. *Kingate* draws this "crucial[]" distinction: "Only Groups 1, 2, and 3 allege Defendants to have been, in varying degrees, **complicit** in [Madoff's fraudulent scheme]." *Kingate*, at 152 n.23 (emphasis added). The *Anwar* Plaintiffs, however, do not allege that PwC and Citco were complicit in Madoff's false statements about covered securities. Instead, these are Group 4 claims that PwC and Citco were negligent or breached other duties, which had the ultimate effect of "allowing Madoff's frauds to go undetected, causing Plaintiffs' loses." *Kingate*, at 151. As the Second Circuit said in *Kingate*, "[u]nder the Group 4 theories of liability, Defendants, like Plaintiffs, were victims of Madoff's fraud." *Kingate*, at 152. Proof of claims that arise from defendants' breach of contract and duty-based obligations to plaintiffs "would not require any showing of false conduct the part of Defendants." *Id.*

Kingate explicitly held that SLUSA does not bar allegations which "predicate liability on Defendants' breach of contractual, fiduciary, or tort-based duties owed to Plaintiffs, resulting in failure to detect the frauds of Madoff and BMIS." *Id.* at 135. The *Kingate* opinion is explicit that Madoff's role in the causative chain is insufficient to trigger SLUSA preclusion. *Id.* at 147 ("we understand this to mean that X is accused of having committed fraud, and not that he is charged with negligence or breach of contract in failing to detect someone else's fraud").

Kingate further makes plain that – contrary to defendants' arguments – not just any misrepresentation will trigger SLUSA. SLUSA preclusion only applies to claims that allege the defendant "committed false conduct conforming to SLUSA's specifications," *id.* at 149, that is, a misrepresentation or omission concerning **covered securities**. The Court did not say, as defendants would have it, that all claims involving misrepresentations or omissions are barred once the structure of the transaction (here, plaintiffs' investment in a "feeder fund") is sufficient to implicate SLUSA. Instead, the Group 1 or Group 2 allegations that are barred by SLUSA "predicate the named Defendants' liability on their own fraudulent misrepresentations and misleading omissions . . . made in connection with the Funds' investments with Madoff **in covered securities** and with their oversight of these investments." *Id.* at 134 (emphasis added). As shown in the *Anwar* plaintiffs' letter of May 29, 2015 ("*Anwar* Plaintiffs' Letter"), the claims against PwC and Citco are based on misstatements and omissions regarding defendants' own conduct implicating the value of **uncovered securities**. *See id.* at 9-10, 12-13.

Defendants repeat the mistake of the district court in *Kingate* which held that "because some allegations in the complaint involved material misstatements in connection with the purchase or sale of a covered security, the Complaint should be dismissed in its entirety." *Kingate*, at 142. The Second Circuit rejected this argument: "SLUSA requires courts to inquire whether the allegation is necessary to or extraneous to liability under the state law claims. If the allegation is extraneous to the complaint's theory of liability, it cannot be the basis for SLUSA preclusion." *Id.* at 142-43. Defendants ignore this distinction between allegations and claims, a distinction which means that claims are precluded only if they depend in their entirety on precluded allegations.[1] Thus, "state law claims that do not **depend** on false conduct involving covered securities are not within the scope of SLUSA, even if the complaint includes peripheral, inessential mentions of false conduct." *Id.* at 132 (emphasis in original).

ARGUMENT

I. Claims against PwC

A. Negligence (Count 13)

Count 13 asserts a negligence claim against PwC. The "essential" allegations of this claim do not require any misrepresentation. *See Anwar* Plaintiffs' Letter at 8-9. PwC does not dispute this. PwC contends, however, that "[b]ecause plaintiffs do not have privity with the PwC Defendants, their negligence claim must satisfy all the elements required by *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 553 (N.Y. 1985), including reliance on alleged false statements by the PwC Defendants." PwC Letter at 2. According to PwC, "[t]his puts their claims into Group 2," and thus precluded by SLUSA. *Id.* PwC is wrong for several reasons.

The *Credit Alliance* test does not require a representation, much less a misrepresentation. Rather, it focuses on the auditors' knowledge that known parties will be relying on the audit and linking conduct evincing the defendant's understanding of that reliance. In a recent case involving both negligence and negligent misrepresentation claims, the Second Circuit described *Credit Alliance* as requiring plaintiffs to show "that (1) the defendant had awareness that its work was to be used for a particular purpose; (2) there was reliance by a third party known to the defendant in furtherance of that purpose; and (3) there existed some conduct by the defendant linking it to that known third party evincing the defendant's understanding of the third party's reliance." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 405-06 (2d Cir. 2015) (quoting *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 59 (2d Cir.

[1] Footnote 6 of the *Kingate* opinion, which defendants misinterpret, relates to how allegations should be categorized – not to whether claims are precluded: "If the allegations that otherwise fit within the description of Group 3, 4 or 5, require proof that the Defendants committed such misrepresentations [*i.e.*, relating to a covered security], then **those allegations** belong in Group 1 or 2, rather than in Group 3, 4 or 5." *Kingate*, at n. 6 (emphasis added). The Court did not say that the presence of one such **allegation** suffices for the entire **claim** to be precluded.

2012)). In fact, this Court did not mention misrepresentations or "false conduct" in "explicitly find[ing] that Plaintiffs can show sufficient common evidence to demonstrate that the transmission of PwC's audit opinions to the Funds' investors was the 'end and aim of the transaction.'" *See Anwar v. Fairfield Greenwich Ltd.*, 2015 WL 935454, at *7-8 (S.D.N.Y. Mar. 3, 2015).[2]

Moreover, even if a misrepresentation by PwC were essential to the negligence claim, there is no allegation that PwC made any misrepresentation with respect to a covered security. As *Kingate* found, a claim alleging negligence by an auditor similar to allegations here against PwC is not barred by SLUSA. In the Second Circuit's example, "[t]he auditor examines the accounts of the plaintiffs' securities transactions, does so negligently, and finds everything in order." *Kingate*, 784 F.3d at 148. The Court of Appeals held the claim did not involve the type of conduct barred by SLUSA: "It is true that the negligence claim includes an allegation of fraud in connection with transactions in covered securities and that the alleged fraud by the broker is an essential predicate of the plaintiffs' claims against the defendant auditor. However, the auditor is not alleged to have committed any of the conduct specified in SLUSA." *Id.*

Furthermore, the *Credit Alliance* test is a standing requirement that delineates who can bring a claim against service providers such as auditors. Standing is not an "element" of a negligence claim. *See Anwar II*, 728 F. Supp. 2d 372, 432 (S.D.N.Y. 2010) (quoting *Di Benedetto v. Pan Am World Serv., Inc.*, 359 F.3d 627, 630 (2d Cir. 2004) (elements of negligence are (1) "a cognizable duty of care; (2) that the defendant breached that duty; and (3) that the plaintiff suffered damage as a proximate result of that breach")).

The negligence claim against PwC is a traditional state law claim, of the kind to which *Troice* found SLUSA should not apply. 134 S.Ct. at 1068. *Kingate* followed *Troice* in holding that while claims based on misrepresentations about Madoff's investments in covered securities and oversight over such investments are barred, claims predicated on "negligence or breach of contract in failing to detect" Madoff's fraud are not. *Kingate*, 784 F.3d at 147.

B. Negligent Misrepresentation (Count 14)

PwC contends that Count 14 alleging negligent misrepresentation "also falls into Group 2." PwC Letter at 5. PwC argues that in addition to *Credit Alliance*, "plaintiffs' particular allegations" in Count 14 are that the PwC induced investors to hold their positions and make subsequent investments by falsely representing "'that (i) [PwC] had conducted [its] audits in accordance with GAAS or ISA and (ii) the Funds' financial statements 'present[ed] fairly, in all

[2] PwC gains no support from *Cromer Finance Ltd v Berger,* 137 F. Supp. 2d 452 (S.D.N.Y. 2001), where the district court simply analyzed the *Credit Alliance* factors, but did not hold or suggest that a negligence claim required proof of a misrepresentation. Nor does Thomas Mackey's law review note (PwC Letter at 2-3 n.2) support PwC, as the student author relied on a dissenting opinion to criticize a California Supreme Court decision under California law.

material respects, the financial positions of [the Funds],'" PwC Letter at 5 (quoting SCAC ¶ 440).

As discussed, the *Credit Alliance* test does not trigger SLUSA preclusion. The *Kingate* opinion emphasizes that the Group 1 and Group 2 allegations are precluded because they are based on the named defendants' own misrepresentations or omissions relating to "covered securities." *Kingate*, at 151. Accordingly, not all claims involving misrepresentations by a defendant implicate SLUSA. Here, PwC is alleged to have made misrepresentations about (i) its own conduct, *i.e.*, that PwC had conducted its audits in accordance with the relevant standards, and (ii) uncovered securities, *i.e.*, that the Funds' financial statements were accurate. These allegations are akin to the example in *Kingate* which makes clear that a claim against an auditor for giving a "clean" audit opinion, *i.e.*, "find[ing] everything in order," *Kingate*, 784 F.3d at 148, after negligently failing to detect a fraud involving covered securities, is "outside the concerns of the federal securities laws, the PSLRA, and SLUSA." *Id.*

PwC's one-page audit reports made no mention of covered securities, of course, nor any other assets of the funds. Even the attached fund financial statements show only the funds' year-end holdings. Those holdings never included any common stocks or options, but were invariably limited U.S. Treasury bills, which are not covered securities.

Finally, PwC is not alleged to have aided and abetted or participated in Madoff's fraud involving covered securities. *See id.* at 152 n.23. "Only Groups 1, 2, and 3 allege Defendants to have been, in varying degrees, complicit in the falsity." *Id.* Instead, PwC negligently misrepresented that it was "provid[ing] . . . auditing . . . services to the Funds, thus allowing Madoff's frauds to go undetected, causing Plaintiffs' losses." *Id.* at 151.

II. Claims against Citco

None of the state law claims against Citco, except aiding and abetting the Fairfield Defendants' fraud (Count 25), is precluded under *Kingate*. Claims for breach of contract, breach of fiduciary duty, gross negligence and negligence "predicate liability on Defendants' breach of contractual, fiduciary, and or tort-based duties to Plaintiffs to provide competent management, consulting, auditing or administrative services to the Funds, thus, allowing Madoff's frauds to go undetected, causing Plaintiffs' losses." *Id.* at 151. *Kingate* held that these claims are not precluded because they do not require a showing of false conduct by the defendant of the sort specified by SLUSA, *i.e.*, involving covered securities. The state law claims against Citco here similarly are not precluded as they do not depend upon misrepresentations by Citco concerning covered securities, or complicity in such a scheme.

A. Third-Party Breach of Contract (Count 20)

Citco argues that the breach of contract claim, an exemplar of what the *Kingate* court said is not precluded, is barred because it involves allegations that the Citco Administrators "among other omissions, grossly fail[ed] to discharge its responsibility to accurately calculate the Fund's NAV," Citco Letter at 10, because the administration agreement required the Citco

Administrators to render specific performance directly to class members, and because allegedly the Citco's Administrators' untruthful conduct caused plaintiffs' investment decisions. *See id.*

These arguments do not come close to transforming a cause of action for breach of contract into a precluded claim. The "omissions" referred to by Citco are clearly presented as "omissions" in fulfilling its duties under the contract. SCAC ¶ 484. The fact that the administration agreement requires performance directly to class members only means that there is an enforceable third-party contract claim. And, as noted, *Kingate* rejected Citco's causation-based argument in finding no preclusion even though plaintiffs' injuries would not have occurred but for Madoff's fraudulent acts. *Kingate*, at 147.

None of the elements of a breach of contract claim require proof of a misrepresentation or omission implicating SLUSA. This claim is predicated on failure of Citco to perform its contractual duties, which included "'reconciliation of cash and other balances at brokers'; 'reconciliation of bank accounts'; . . .'independent reconciliation of the Fund's portfolio holdings'; . . .'Preparation of monthly financial statements, in conformity with the International Accounting Standards,' including 'Statement of Assets and Liabilities,' 'Statement of Operations,' 'Statement of Changes in Net Assets,' 'Statement of Cash Flows,' and 'Portfolio listings'; [and] 'Preparation of books and records (including specific schedules and analysis) to facilitate external audit, and liaising with the Fund's auditors in their review and preparation of the annual financial statements,'" among other things. SCAC ¶ 476; *see also* Ex. 3 to Citco's Letter at 20 (interrogatory response identifying contract provisions allegedly breached). None of these duties involves complicity in Madoff's fraud involving covered securities.

B. Breach of Fiduciary Duty (Count 21)

Citco as administrator is alleged to have breached fiduciary duties for numerous reasons. *See, e.g,* SCAC ¶¶ 476, 488-89, 492-95. Citco focuses on one of those breaches: its failure to calculate NAVs accurately and communicating false fund valuations to plaintiffs. Citco Letter at 9. But miscalculation is not false conduct, and as shown above, misstatements about the Fairfield Funds' financial condition do not necessarily implicate SLUSA because they involve uncovered securities. The fact that the Citco Administrators were responsible for communicating with investors does not preclude a standard state law claim for breach of fiduciary duty. Indeed, breach of fiduciary duty claims were expressly identified in *Kingate* as an example of claims that are not precluded. *Kingate*, at 151 (discussing "Group 4" claims)[3]

[3] *Romano v. Kazacos*, 609 F.3d 512, 523 (2d Cir. 2010) (Citco Letter at 4), is inapposite. That case dealt with whether an 18-month time lag between defendants' alleged misrepresentations and plaintiffs' purchases of covered securities rendered the misrepresentations not "in connection with" such transactions. The court did not discuss the elements of breach of fiduciary duty, and obviously did not apply the *Kingate* framework to such claims.

In its capacity as custodian, Citco argues the fiduciary duty claim is barred because the alleged misconduct "includes allegations that the Citco Custodians misrepresented the activities they had undertaken." Citco Letter at 11. This claim does not require any "false conduct" as defined in *Kingate* by the Citco Custodians with respect to covered securities. Rather, it involves misstatements about Citco's performance of its own duties. It is comparable to the example described in *Kingate* where the defendant custodian "negligently failed" to discover that a contractor it engaged "to perform services related to the custody" had been convicted of securities fraud. *See Kingate*, 784 F.3d at 148. Here, the Citco Custodians allowed Madoff to serve as sub-custodian responsible for safekeeping billions of dollars worth of supposed assets without any monitoring or due diligence and failed even to have him execute a sub-custodian agreement laying out his obligations.[4] That is not a precluded claim.

The elements of breach of fiduciary duty claims against both the Citco Administrators and Custodians can be satisfied without any "essential" allegations concerning misrepresentations. *See, e.g.*, *Johnson v. Nextel Comm'ns, Inc.*, 660 F.3d 131, 138 (2d Cir. 2011) ("The elements of a claim for breach of a fiduciary obligation are: (i) the existence of a fiduciary duty; (ii) a knowing breach of that duty; and (iii) damages resulting therefrom.").

Contrary to Citco's assertion, there is no requirement under New York law that a plaintiff establish reliance on a misstatement or omission to show causation. As the Second Circuit held in *LNC Invs., Inc. v. First Fidelity Bank*, "no controlling authority . . . suggest[s] that reliance is required to establish causation in a breach of fiduciary duty or a breach of contract case." 173 F.3d at 461 (Sotomayor, J.). There, the Court of Appeals addressed whether a trustee had acted prudently to safeguard trust assets – an issue analogous to the fiduciary duty claims here – and held: "This duty of prudence was not qualified, either in the Trust Indenture or in the common law, by the concept of reliance." *Id.* at 462. "Reliance is not necessary to show causation on these duty-based claims." Plaintiffs' Supp. Memo in Support of Motion for Class Certification, dated August 1, 2014, at Class Cert Motion, at 21. "If Citco or PwC had performed their duties properly, they would have sought to obtain independent evidence of the Funds' assets. If unable to do so (as in fact was the case), Citco and PwC should have withheld their financial reports or qualified them based on the lack sufficient evidence of the Funds' assets. If either Citco or PwC contacted independent third parties, they would have learned that the Funds had virtually no assets. Under either scenario, the Class members would not have incurred losses." *Id.* In

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[4] Citco selectively refers to the *Anwar* Plaintiffs' responses to interrogatories, but disregards that these responses contend that the Citco Custodians "breached fiduciary duties to Plaintiffs by failing to reconcile from sources independent of Madoff the Funds' purported cash balances; failing to reconcile from sources independent of Madoff the Funds' portfolio holdings; failing to confirm the existence of the Funds' assets from sources independent of Madoff; failing to insist on an audit of BLMIS/Madoff by a qualified accounting firm; failing to adequately investigate the significant concerns of its internal auditors; . . . ; failing to monitor BLMIS/Madoff in any meaningful way; failing to enter into contracts with BLMIS/Madoff." Ex. 1 to Citco's Letter at 10-11.

addition, if Citco had raised its grave internal concerns regarding Madoff to the Fairfield Defendants and Madoff refused to allow inquiries to truly independent parties to confirm the existence of the assets, Fairfield would not have continued to send plaintiffs' money to Madoff.

Finally, Count 21 alleges that Citco breached fiduciary duties by, among other things, not performing the duties of an administrator in independently reconciling the Fund's holdings, *see* SCAC ¶ 327, and by not performing duties as a custodian in holding the securities of the fund or ensuring that the securities were in the custody of a sub-custodian. *See Anwar II*, at 441 (citing SCAC ¶ 330). Citco again disregards the *Anwar* Plaintiffs' interrogatory responses which contend that the Citco Administrators breached their fiduciary duties by "failing to reconcile from sources independent of Madoff the Funds' purported cash balances; failing to reconcile from sources independent of Madoff the Funds' portfolio holdings; failing to confirm the existence of the assets from sources independent of Madoff; failing to insist on an audit by a qualified accounting firm; failing to adequately investigate the significant concerns of its internal auditors." Ex. 3 to Citco's Letter at 12-13. These claims can be established without proof of any misstatements by Citco. *See Kingate*, at 142-43, 146-48.

C. Gross Negligence (Count 22) and Negligence (Count 23)

For the same reasons as the breach of fiduciary duty claims, plaintiffs' claims for negligence and gross negligence against the Citco Administrators and the Citco Group are not barred by SLUSA. Citco does not contend, nor could it, that misrepresentations or omissions are essential elements of a negligence claim. Instead, similar to PwC, Citco argues that a "necessary implication" of the Court's ruling that the Funds' investors can satisfy the *Credit Alliance* test as to Citco "is that Plaintiffs' negligence-based claims depend on alleged untrue statements about covered securities transactions." Citco Letter at 8. As explained above, *Credit Alliance* does not imply this at all and does not trigger SLUSA preclusion.

The Second Circuit identified duty-based and tort-based claims as falling within Group 4, and as set forth in plaintiffs' initial letter, these claims against the Citco Administrators are no exception. *Anwar* Plaintiffs' Letter at 12. In interrogatory responses, Plaintiffs contended that these claims can be established based on the same breaches of duty-based obligations discussed in the breach of fiduciary duty section above. *See, e.g.*, Ex. 3 to Citco's Letter at 18-20. Finally, the Citco Group is not alleged to have made any misstatements; its liability is predicated on its failure to properly supervise the Citco Administrators and to properly follow up on concerns raised by Citco's internal audit department.

D. Aiding and Abetting Fairfield's Breach of Fiduciary Duty (Count 24)

Like the contract- and duty-based claims discussed above, the claims for aiding and abetting the Fairfield Defendants' breaches of fiduciary duty do not require any false conduct as defined in *Kingate*. These claims are akin to the custodian example in the *Kingate* decision. The Fairfield Defendants hired Madoff to serve as the investment manager, broker, and sub-custodian without conducting proper due diligence into his operations. No misstatements are "essential"

and the claim can be established based the Fairfield Defendants' breaches of duty which do not implicate SLUSA and Citco's awareness of and assistance to those breaches.

E. Negligent Misrepresentation (Count 28)

The false NAVs issued by the Citco Administrators and omissions regarding their failure to follow Citco's own and industry-standard procedures are not the type of misrepresentations that fall into Group 1 or 2 under *Kingate*. *See Anwar* Plaintiffs' Letter at 12-13. The false NAVs involve the value of uncovered securities – which, unlike the covered securities purportedly traded by Madoff and lied about by the Fairfield Defendants – are not traded on any U.S. national exchange.

Citco's Letter argues that the false NAVs issued by the Citco Administrators "are the same statements underlying Plaintiffs' claims under the federal securities laws." Citco Letter at 10. This argument, however, ignores that the definition of a "security" under the 1933 and 1934 Acts is far broader than SLUSA's definition of a "covered security." As the Supreme Court recognized in *Troice*, "[t]he term 'security' under § 10(b) covers a wide range of financial products beyond those traded on national exchanges." *Troice*, at 1069-70. Thus, while shares in the Fairfield funds are indisputably not SLUSA "covered securities," they are no less indisputably "securities" under §10(b). There is consequently no inconsistency between allowing plaintiffs' federal securities claims to proceed alongside state law claims that involve the same facts. And as *Troice* held, "the **only** issuers, investment advisers, or accountants that today's decision will continue to subject to state-law liability are those who don't sell or participate in selling securities traded on U.S. national exchanges." *Troice*, at 1069 (emphasis in original).[5]

III. Where Proving the Essential Elements of a Claim Does Not Require Proof of Matters Precluded by SLUSA, the Claim Is Not Barred

The Second Circuit expressly held that a claim is not precluded by SLUSA merely because it contains allegations that might otherwise lead to preclusion, in addition to other allegations that are not precluded. *See Kingate*, at 142-43. Under *Kingate*, each allegation must be analyzed separately. *Id.* "SLUSA requires courts to inquire whether the allegation is necessary to or extraneous to liability under the state law claims. If the allegation is extraneous to the complaint's theory of liability, it cannot be the basis for SLUSA preclusion." *Id. Kingate* requires preclusion of claims where the "essential" allegations include that a defendant made a false statement or material omission in connection with covered securities or was complicit in Madoff's fraud. *Id.* at 151. However, a claim is not precluded where its essential elements can

[5] "We concede that this means a bank, chartered in Antigua and whose sole product is a fixed-rate debt instrument not traded on a U.S. exchange, will not be able to claim the benefit of preclusion under [SLUSA]. But it is difficult to see why the federal securities laws would be—or should be—concerned with shielding such entities from lawsuits." *Troice*, at 1069.

be established without showing such a showing; in that case the precluded matters are treated, in the Second Circuit's lexicon, as "extraneous." *Id.* at 142-43. Thus, even if certain allegations within one of plaintiffs' claims or causes of action were to be deemed precluded, the claim can proceed if it can be established on the basis of other allegations that are not precluded. That is the case with all of plaintiffs' claims in *Anwar*.

CONCLUSION

Citco and PwC falsely told investors for 14 years that there were billions of dollars of assets in the Fairfield funds when in fact there were virtually none. Citco's arguments largely boil down to reciting where plaintiffs have alleged that Citco misrepresented the Fairfield funds' NAVs. PwC likewise attempts to identify misstatements supposedly embedded in plaintiffs' claims. The SCAC references defendants' failures, whether negligently or in breach of other duties, to obtain independent evidence to support their false valuations. It is true that plaintiffs have alleged these and related misrepresentations and omissions in connection with multiple claims. But to summarize, there are at least three reasons why defendants are wrong in arguing these allegations create SLUSA preclusion.

First, most of plaintiffs' state law claims do not require any allegations of misrepresentations. Those that do involve misrepresentations as to the value of Fairfield fund shares, which are uncovered securities, and not misrepresentations regarding covered securities. Only the latter are representations concerning "conduct by the defendant that is specified in SLUSA's operative provisions." *Kingate*, at 146.

Second, defendants ignore that miscalculating the NAV (and defendants' many other misdeeds) constitute breaches of contract, of fiduciary duty, and of duties to exercise reasonable care, all of which are state law causes of action that *Kingate* made clear are not subject to SLUSA preclusion. "Interpreting SLUSA to apply more broadly to state law claims that are altogether outside the prohibitions of the federal securities laws, and could not be subject to the PSLRA, would . . . construe ambiguous provisions of SLUSA in a highly improbable manner – as prohibiting state law claims involving matters that were not Congress's concern in passing SLUSA . . . ." *Id.* at 146. The illustrations given by the Court of Appeals include the very types of claims not directly involving covered securities, such as accounting negligence and custodial failures, that plaintiffs have pleaded.

Third, if a certain allegation is covered by SLUSA, then it is only that allegation that is precluded and the remainder of the claim survives because its essential elements may be proven by other non-precluded allegations. Defendants' arguments ignore all of plaintiffs' other allegations giving rise to state law claims that do not involve any type of misrepresentation or omission, let alone one concerning covered securities.

For these reasons, and others discussed above and in the *Anwar* Plaintiffs' Letter, SLUSA does not bar any of plaintiffs' remaining claims against PwC and Citco, except Count 25.

Respectfully yours,

David A. Barrett

cc: All counsel in *Anwar* and *Standard Chartered* cases (by e-mail)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Anwar Plaintiffs. The Court considers the SLUSA issue herein now fully briefed and will not accept any further submission from any party to this action related thereto.

SO ORDERED.

6-9-15

DATE

VICTOR MARRERO. U.S.D.J.