PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

WRITER'S DIRECT DIAL NUMBER
212-373-3260

WRITER'S DIRECT FACSIMILE
212-492-0260

WRITER'S DIRECT E-MAIL ADDRESS
wrieman@paulweiss.com

UNIT 3601, OFFICE TOWER A, BEIJING FORTUNE PLAZA
NO. 7 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

MATTHEW W. ABBOTT
EDWARD T. ACKERMAN
ALLAN J. ARFFA
ROBERT A. ATKINS
DAVID J. BALL
JOHN F. BAUGHMAN
LYNN B. BAYARD
DANIEL J. BELLER
CRAIG A. BENSON
MITCHELL L. BERG
MARK S. BERGMAN
BRUCE BIRENBOIM
H. CHRISTOPHER BOEHNING
ANGELO BONVINO
JAMES L. BROCHIN
RICHARD J. BRONSTEIN
DAVID W. BROWN
SUSANNA M. BUERGEL
PATRICK S. CAMPBELL*
JESSICA S. CAREY
JEANETTE K. CHAN
YVONNE Y. F. CHAN
LEWIS R. CLAYTON
JAY COHEN
KELLEY A. CORNISH
CHRISTOPHER J. CUMMINGS
CHARLES E. DAVIDOW
THOMAS V. DE LA BASTIDE III
ARIEL J. DECKELBAUM
ALICE BELISLE EATON
ANDREW J. EHRLICH
GREGORY A. EZRING
LESLIE GORDON FAGEN
MARC FALCONE
ROSS A. FIELDSTON
ANDREW C. FINCH
BRAD J. FINKELSTEIN
BRIAN P. FINNEGAN
ROBERTO FINZI
PETER E. FISCH
ROBERT C. FLEDER
MARTIN FLUMENBAUM
ANDREW J. FOLEY
HARRIS B. FREIDUS
MANUEL S. FREY
ANDREW L. GAINES
KENNETH A. GALLO
MICHAEL E. GERTZMAN
ADAM M. GIVERTZ
SALVATORE GOGLIORMELLA
ROBERT D. GOLDBAUM
NEIL GOLDMAN
CATHERINE L. GOODALL
ERIC GOODISON
CHARLES H. GOOGE, JR.
ANDREW G. GORDON
UDI GROFMAN
NICHOLAS GROOMBRIDGE
BRUCE A. GUTENPLAN
GAINES GWATHMEY, III
ALAN S. HALPERIN
JUSTIN G. HAMILL
CLAUDIA HAMMERMAN
GERARD E. HARPER
BRIAN S. HERMANN
MICHELE HIRSHMAN
MICHAEL S. HONG
DAVID S. HUNTINGTON
AMRAN HUSSEIN
LORETTA A. IPPOLITO
BRIAN M. JANSON
JAREN JANGHORBANI
MEREDITH J. KANE
ROBERTA A. KAPLAN
BRAD S. KARP
PATRICK N. KARSNITZ
JOHN C. KENNEDY
BRIAN KIM
ALAN W. KORNBERG
DANIEL J. KRAMER
DAVID K. LAKHDHIR
STEPHEN P. LAMB*
JOHN E. LANGE
DANIEL J. LEFFELL
XIAOYU GREG LIU
JEFFREY D. MARELL
MARCO V. MASOTTI
EDWIN S. MAYNARD
DAVID W. MAYO
ELIZABETH R. McCOLM
MARK F. MENDELSOHN
WILLIAM B. MICHAEL
TOBY S. MYERSON
CATHERINE NYARADY
JANE B. O'BRIEN
ALEX YOUNG K. OH
BRAD R. OKUN
KELLEY D. PARKER
MARC E. PERLMUTTER
VALERIE E. RADWANER
CARL L. REISNER
LORIN L. REISNER
WALTER G. RICCIARDI
WALTER RIEMAN
RICHARD A. ROSEN
ANDREW N. ROSENBERG
JACQUELINE P. RUBIN
RAPHAEL M. RUSSO
ELIZABETH M. SACKSTEDER
JEFFREY D. SAFERSTEIN
JEFFREY B. SAMUELS
DALE M. SARRO
TERRY E. SCHIMEK
KENNETH M. SCHNEIDER
ROBERT B. SCHUMER
JOHN M. SCOTT
STEPHEN J. SHIMSHAK
DAVID R. SICULAR
MOSES SILVERMAN
STEVEN SIMKIN
JOSEPH J. SIMONS
AUDRA J. SOLOWAY
SCOTT M. SONTAG
TARUN M. STEWART
ERIC ALAN STONE
AIDAN SYNNOTT
ROBYN F. TARNOFSKY
MONICA K. THURMOND
DANIEL J. TOAL
LIZA M. VELAZQUEZ
MARIA T. VULLO
ALEXANDRA M. WALSH*
LAWRENCE G. WEE
THEODORE V. WELLS, JR.
BETH A. WILKINSON
STEVEN J. WILLIAMS
LAWRENCE I. WITDORCHIC
MARK B. WLAZLO
JULIA MASON WOOD
JENNIFER H. WU
JORDAN E. YARETT
KAYE N. YOSHINO
TONG YU
TRACEY A. ZACCONE
TAURIE M. ZEITZER
T. ROBERT ZOCHOWSKI, JR.

*NOT ADMITTED TO THE NEW YORK BAR

June 8, 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.) (VM) (FM)

Dear Judge Marrero:

As the Citco Defendants showed in their May 29 letter, SLUSA precludes Plaintiffs' state-law claims for two fundamental reasons.[1] First, class members' purchases of shares in the Funds are transactions in "covered securities." Second, all of Plaintiffs' state-law claims depend on (a) alleged untrue statements and/or omissions by the Citco Defendants, and/or (b) the Citco Defendants' alleged complicity in alleged untrue statements and/or omissions by Fairfield. (*See* Citco Ltr. 4.)

In an attempt to avoid SLUSA preclusion, Plaintiffs make three main arguments. First, Plaintiffs suggest that the "in connection with" language in SLUSA

[1] Capitalized terms have the meanings given to them in the Citco Defendants' letter brief dated May 29, 2015 ("Citco Ltr."). "Pls.' Ltr." refers to Plaintiffs' letter brief dated May 29, 2015.

should be narrowly construed to exclude from SLUSA preclusion claims that supposedly do not allege complicity in the Madoff Firm's fraud. Second, Plaintiffs argue that certain of their state-law claims are not precluded because false conduct is not a formal element of those claims. Third, Plaintiffs argue that their claim for negligent misrepresentation is not precluded because the Citco Defendants' alleged untrue statements and/or omissions supposedly do not concern transactions in "covered securities" within the meaning of SLUSA.

None of these arguments is correct.

A. Plaintiffs' State-Law Claims Allege Misrepresentations and/or Omissions that Satisfy SLUSA's "in Connection with" Test

Plaintiffs appear to argue that SLUSA does not preclude their state-law claims because those claims supposedly do not allege misrepresentations and/or omissions "in connection with" a transaction in covered securities. To support that argument, Plaintiffs suggest that *Herald* and *Kingate* are distinguishable because the liability of the defendants in those cases as to the precluded claims was supposedly premised on their alleged complicity in the Madoff Firm's underlying fraud. According to Plaintiffs, the Citco Defendants' liability, in contrast, is premised only on their own false conduct. (*See* Pls.' Ltr. 4, 8, 13.) This argument is unavailing.[2]

The Supreme Court has held that the "in connection with the purchase or sale" requirement of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 is met if false conduct "coincide[s]" with a purchase or sale of securities. *SEC* v. *Zandford*, 535 U.S. 813, 822 (2002); *see also Superintendent of Ins.* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971). Because the "in connection with" language in SLUSA has the same meaning, *see Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-87 (2006), the "coincide" test applies to SLUSA, *see, e.g.*, *Romano* v. *Kazacos*, 609 F.3d 512, 521 (2d Cir. 2010). That test "is broad in scope." *Id.*

Under SLUSA, then, a claim is precluded if it depends on an untrue statement or omission that coincides with the purchase or sale of a covered security. And under *Herald* and *Kingate*, class members' purchases and sales of shares in the Funds *were* purchases and sales of covered securities for purposes of SLUSA. *See In re Kingate*

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[2] Plaintiffs also attempt to distinguish *Herald* on the ground that the court did not rule that the state-law claims asserted against Madoff feeder fund service providers were precluded under SLUSA. (Pls.' Ltr. 4-5.) They argue that it is "[o]f particular significance" that *Herald* instead dismissed those claims on *forum non conveniens* grounds. (*Id.*) That ruling has no significance at all. It is appropriate, and routine, for a court to rule on a *forum non conveniens* motion before addressing, if at all, other issues, including SLUSA preclusion. *See, e.g.*, *LaSala* v. *Bank of Cyprus Pub. Co. Ltd.*, 510 F. Supp. 2d 246, 253-54, 267 (S.D.N.Y. 2007). The *Herald* court's decision to dismiss state-law claims on *forum non conveniens* grounds cannot reasonably be construed as an indication of the court's view as to whether those claims would also be precluded by SLUSA.

Mgmt. Ltd. Litig., 784 F.3d 128, 142 (2d Cir. 2015); *In re Herald*, 753 F.3d 110, 113 (2d Cir. 2014). That is so because class members' purchases or sales of shares in the Funds were considered "attempted investments in covered securities, albeit through feeder funds." *Kingate*, 784 F.3d at 142 (quoting *Herald II*, 753 F.3d at 113). In consequence, SLUSA precludes state-law claims in this case if they depend on alleged false conduct that coincides with the purchase or sale of shares in the Funds.

As in *Herald* and *Kingate*, that is precisely the case here. Plaintiffs' state-law claims all depend on allegations that coincide with class members' purchases and sales of shares in the Funds, and with the Funds' attempted investments in covered securities. Plaintiffs' state-law claims against the Citco Administrators allege misrepresentations and/or omissions concerning the Funds' NAVs. According to Plaintiffs, the Funds' NAVs are essentially a statement of the value of the Funds' holdings in covered securities. Similarly, Plaintiffs' state-law claims against the Citco Custodians allege misrepresentations and/or omissions concerning the Citco Custodians' custody of covered securities and, like the defendants in *Herald*, their relationship with the Madoff firm. Any untrue statement or omission made to induce any investor to purchase or sell Fund shares is thus an untrue statement or omission made in connection with the purchase or sale of covered securities for purposes of SLUSA. *Romano*, 609 F.3d at 522 (noting "in connection with" requirement satisfied where act complained of induced the purchase or sale of the security at issue).[3]

Contrary to Plaintiffs' suggestion, it does not matter that the Citco Defendants' liability is supposedly premised on their own false conduct, as opposed to complicity with the Madoff Firm's underlying liability.[4] All that matters is whether the claims against the Citco Defendants depend on false conduct that "coincides" with transactions in covered securities. They clearly do. For that reason, Plaintiffs' state-law claims easily satisfy SLUSA's capacious "in connection with" test.

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[3] Under *Romano*, a misrepresentation or omission is also made in connection with the purchase or sale of covered securities if the misrepresentation or omission "'necessarily allege[s],' 'necessarily involve[s],' or 'rest[s] on' the purchase or sale of [covered] securities." 609 F.3d at 522 (quoting *Dabit* v. *Merrill Lynch, Fenner & Smith, Inc.*, 395 F.3d 25, 48, 50 (2d Cir. 2005)).

[4] Underscoring this point, Plaintiffs concede that their claim for aiding and abetting fraud against the Citco Defendants must be dismissed as precluded under SLUSA. (Pls.' Ltr. 13.) That claim, however, predicates liability on the Citco Defendants' alleged complicity *in Fairfield's false conduct*—not Madoff's. Plaintiffs do not explain why alleged complicity in Fairfield's false conduct is sufficient to preclude their aiding and abetting fraud claim while, in their view, *Herald* supposedly requires complicity in Madoff's fraud for SLUSA preclusion to apply.

B. Plaintiffs' State-Law Claims All Premise Liability on the Citco Defendants' Alleged False Conduct

Plaintiffs argue that SLUSA does not preclude their state-law claims (excluding their claim for negligent misrepresentation) because (i) false conduct supposedly is not a formal element of those claims, and (ii) "there is no need to prove that Citco made any false statements and, therefore, the claim[s] fall[] into [*Kingate*'s] Group 4." (Pls.' Ltr. 11 (discussing third-party beneficiary breach of contract claim).)[5] This argument misapprehends the law and ignores Plaintiffs' own allegations.

First, as the Citco Defendants explained in their May 29 letter, "*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." (Citco Ltr. 4 (citing *Kingate*, 784 F.3d at 140).) *Kingate* explained that "plaintiffs should not be permitted to escape SLUSA 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." 784 F.3d at 140 (collecting cases). *Herald I* also recognized, in reliance on prior Second Circuit precedent and other case law, that an analysis of preclusion under SLUSA requires a court to focus on "both the pleadings and the realities underlying the claims." *In re Herald*, 730 F.3d 112, 119 (2d Cir. 2013).

These precedents foreclose Plaintiffs' attempt to avoid SLUSA preclusion merely by reciting the formal elements of certain of their state-law claims and insisting that those claims do "not require any false representation." (Pls.' Ltr. 12.) As the Citco Defendants showed in their May 29 letter, "the realities underlying" each of Plaintiffs' state-law claims, including the claims for third-party beneficiary breach of contract, gross negligence, negligence and aiding and abetting fiduciary duty, are that those claims all predicate liability on the Citco Defendants' alleged false conduct.

Second, Plaintiffs may not avoid SLUSA preclusion by arguing that their state-law claims fall within *Kingate*'s "Group 4" claims simply because those claims rest in part on allegations that the Citco Defendants did not fulfill their contractual or common-law duties. *Kingate* did not rule that all claims predicating a defendant's liability on breaches of contractual, fiduciary, and/or tort-based duties are necessarily protected from SLUSA preclusion. To the contrary, *Kingate* made clear that the relevant question for SLUSA purposes is whether the claim predicates liability on "false conduct by the [d]efendant[] of the sort specified in SLUSA." 784 F.3d at 152 (emphasis

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[5] Plaintiffs make the same argument about their claims for gross negligence, negligence, and aiding and abetting breach of fiduciary duty. (*See* Citco Ltr. 12.)

omitted). As the Citco Defendants have shown, Plaintiffs' state-law claims all predicate their liability on precisely such conduct.[6]

C. Plaintiffs' Claim for Negligent Misrepresentation Is Based on Alleged Misrepresentations that Coincided with Transactions in "Covered Securities"

Plaintiffs argue that SLUSA does not preclude their claim for negligent misrepresentation because "[t]he false statements that Citco made about the Funds' NAVs are representations made by Citco about the value of the Funds, which are indisputably not covered securities." (Pls.' Ltr. 12.) *Herald* and *Kingate* foreclose this argument.[7]

Kingate held that "that the essential element of SLUSA that requires falsity 'in connection with' a purchase or sale of a covered security is satisfied in this case" because class members, "like the *Herald* plaintiffs, 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." *Kingate*, 784 F.3d at 142. *Kingate* thus ruled that SLUSA precluded the claim for negligent misrepresentation asserted in that case because, like Plaintiffs' claim for negligent misrepresentation here, it predicated 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.

Under *Herald* and *Kingate*, then, class members' investments in the Funds here are transactions in "covered securities" for purposes of SLUSA. And for reasons already stated, the Citco Defendants' alleged untrue statements and/or omissions, including statements respecting the Funds' NAVs, manifestly coincided with class members' purchases and sales of shares in the Funds.

Plaintiffs nonetheless attempt to distinguish *Kingate* and *Herald* by arguing that their negligent misrepresentation claim against the Citco Administrators is

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[6] Plaintiffs also argue that *Kingate*'s first of three "illustrative examples" is "on all fours with the claims" in this case and supports their view that SLUSA does not preclude their state-law claims—although they do not specify which ones. (Pls.' Ltr. 7.) In that example, *Kingate* reasoned that SLUSA would not preclude a negligence claim by clients of a stockbroker against the broker's auditor based on the auditor's failure to detect the broker's fraud because the auditor would not be "alleged to have committed any of the conduct specified in SLUSA." 784 F.3d at 148. This example does not apply here. As the Citco Defendants explained in their May 29 letter, Plaintiffs' state-law claims necessarily depend on alleged misrepresentations and/or omissions by the Citco Defendants in connection with covered securities transactions. Unlike the auditor in the *Kingate* example, the Citco Defendants are thus alleged to have engaged in conduct specified in SLUSA.

[7] Plaintiffs appear to limit this argument to their negligent misrepresentation claim, but to the extent it is meant to apply to any other of Plaintiffs' state-law claims, it would fail for the same reasons.

different from the negligent misrepresentation claims asserted in those cases. They argue that their negligent misrepresentation claim "alleges that Citco is liable for its own misconduct in issuing false NAVs and omitting information about Citco's own conduct," while the *Herald* and *Kingate* negligent misrepresentation claims supposedly premised the defendants' liability on their alleged complicity in Madoff's fraud. (Pls.' Ltr. 13.)

Kingate dooms this argument. The *Kingate* plaintiffs alleged that the Madoff feeder fund administrator defendant had a contractual duty to calculate the fund's NAV accurately; that the NAV was critical to class members' investment decisions; and that the administrator did not fulfill its duties by failing, among other things, to accurately calculate the NAV, to independently confirm pricing information provided by Madoff, and to reconcile trading information provided by Madoff. (Amended Consol. Class Action Compl. ¶¶ 187-88, 200-01, 372, *In re Kingate Mgmt. Litig.*, 09-cv-05386 (May 18, 2010 S.D.N.Y.), ECF No. 53.) *Kingate* held that these allegations were sufficient to warrant SLUSA preclusion. 784 F.3d at 151. As the Citco Defendants explained in their May 29 letter, these allegations are virtually identical to the allegations underlying Plaintiffs' negligent misrepresentation claims against the Citco Administrators. (Citco Ltr. 6; *see also* SCAC ¶¶ 531-40.) *Kingate* therefore requires dismissal of Plaintiffs' claim for negligent misrepresentation as precluded under SLUSA.

Further, as noted above, the "in connection with" test is satisfied where any untrue statement or omission made is alleged *to induce* any investor to purchase or sell Fund shares. (*Supra* p. 3.) Class members must allege such an untrue statement or omission in support of their claim for negligent misrepresentation: if the alleged misrepresentations at issue did not induce the class members' investment decisions, class members cannot demonstrate reliance, proximate causation, or damages.

Conclusion

For the foregoing reasons, and those set forth in the Citco Defendants' May 29 letter and the letters submitted by the PwC defendants and the Standard Chartered defendants, SLUSA precludes all of Plaintiffs' state-law claims against the Citco Defendants. Those claims should therefore be dismissed.

Respectfully submitted,

Walter Rieman

Walter Rieman

cc: All counsel in *Anwar* (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 Citco defendants. The Court considers the SLUSA issue herein now fully **SO ORDERED.** briefed and will not accept any further submission from any party to this action related thereto.

6-9-15
DATE

VICTOR MARRERO, U.S.D.J.