UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: *All Standard Chartered Cases*	Master File No. 09-CV-118 (VM) (FM)

MEMORANDUM OF LAW IN SUPPORT OF THE STANDARD CHARTERED DEFENDANTS' MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, CERTIFICATION OF QUESTION FOR INTERLOCUTORY APPEAL

Sharon L. Nelles
Bradley P. Smith
Patrick B. Berarducci
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
nelless@sullcrom.com

Diane L. McGimsey
(Admitted *Pro Hac Vice*)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067

Attorneys for Defendants Standard Chartered plc, Standard Chartered Bank, Standard Chartered International (USA) Ltd. and Standard Chartered Bank International (Americas) Ltd.

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Defendants Standard Chartered plc, Standard Chartered Bank, Standard Chartered International (USA) Ltd. and Standard Chartered Bank International (Americas) Ltd. ("SCB" or the "Bank") respectfully request limited reconsideration of this Court's July 29, 2015 Order (the "Order") applying the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to claims in the 56 cases pending in this multi-district litigation ("MDL") against the Bank (the "SCB Cases"). In the alternative, the Bank respectfully requests that the Court certify a controlling question arising from the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

PRELIMINARY STATEMENT

On July 29, 2015, this Court granted in part and denied in part the motion brought by SCB to dismiss all claims in the SCB Cases pursuant to SLUSA. The Court addressed Standard Chartered plaintiffs' ("SCB plaintiffs") claims in two groups: *first*, the "Madoff Claims"; and *second*, the "Due Diligence Claims." (Order at 40.) In considering whether SCB plaintiffs' claims are precluded by SLUSA, the Court undertook to follow the principle set forth by the Second Circuit in *In re Kingate Management Ltd. Litigation*, 784 F.3d 128 (2d Cir. 2015), that SLUSA precludes claims predicated on conduct *by a defendant* that would qualify as false or misleading conduct under federal securities laws. (Order at 18.)

Applying this principle, the Court found that SLUSA precludes SCB plaintiffs' Madoff Claims but not the Due Diligence Claims. The Court determined that the Madoff Claims, which were based on the Bank's alleged "failure to disclose that a [Fairfield] Fund was a funnel to Madoff" (Order at 51), were precluded because the "essential allegations" were that "of omissions centered on the Funds' connections to B[L]MIS and Madoff" and thus "implicitly involve[] allegations of either complicity (as to the fraud claims) or some other false conduct (as to the negligent misrepresentation claims) by [the Bank]" (Order at 53). The Court did not dismiss the Due Diligence Claims, however, determining that those claims are *not* predicated on

false or misleading conduct because "[a]llegations of the underlying [Madoff] fraud are not essential" to those claims. (Order at 45-46, 51.)

SCB respectfully requests that the Court reconsider the Due Diligence portion of the Order. The proper inquiry is not whether Madoff's underlying fraud is essential to the Due Diligence Claims. Rather, the proper inquiry is whether the Due Diligence Claims are predicated on conduct *by the Bank* that is false or misleading under the federal securities laws, regardless of whether or how that conduct depends on Madoff's underlying fraud.

The Due Diligence Claims are premised on the core theory that the Bank lied to SCB plaintiffs when it made initial (and, in some cases, ongoing) recommendations that the Fairfield Funds were appropriate investments. The alleged "lie" here, whether made by direct representation or by omission, is that the Bank misrepresented itself to SCB plaintiffs as having conducted due diligence that was sufficient to support its recommendations of the Fairfield Funds. Indeed, this is the precise allegation that 23 SCB plaintiffs initially asserted against SCB as Section 10(b) claims under the Securities Exchange Act of 1934. Although SCB plaintiffs have now recast their claims, each depends on the same alleged conduct underlying the earlier Section 10(b) claims—namely, the Bank's provision of investment advice about the Fairfield Funds without conducting proper due diligence. The Second Circuit held long ago, in *Hanley* v. *SEC*, that providing investment advice without conducting adequate due diligence to support the advice is false and misleading conduct under the federal securities laws. 415 F.2d 589, 595-97 (2d Cir. 1969). As the court in *Hanley* explained, an investment professional who makes an investment recommendation *makes an implicit representation* "that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation," *id.* at 597; and if, as alleged here, such due diligence has not been carried out, the

recommendation is false and misleading, *id*. *Hanley* and its progeny compel the conclusion that SCB plaintiffs' Due Diligence Claims are based on false and misleading conduct under the federal securities laws, which in turn compels the conclusion that SLUSA precludes those claims. The Order overlooked this controlling Second Circuit precedent.

In addition, the Court appears to have overlooked the Second Circuit's decision in *Romano* v. *Kazacos*, 609 F.3d 512 (2d Cir. 2010). There, the Second Circuit addressed state law claims based on allegedly negligent investment advice that defendant, Morgan Stanley, "knew[] or should have known" was not accurate. *Id.* at 521. The Second Circuit held that SLUSA precluded these claims because such allegations are fundamentally "misrepresentations and omissions of material fact." *Id.* Likewise here, the Due Diligence Claims allege that the Bank knew (or should have known through the exercise of proper due diligence) that the Fairfield Funds were, contrary to the Bank's recommendations, not appropriate investments for SCB plaintiffs. Claims based on such alleged misrepresentations are precluded by SLUSA.

In the alternative, if it is the Court's determination that, *Hanley* and *Romano* notwithstanding, SCB plaintiffs' Due Diligence Claims do not depend on false conduct within the ambit of SLUSA preclusion and no reconsideration of the Order is warranted, the Bank respectfully requests that the Court certify the Order for interlocutory review pursuant to 28 U.S.C. § 1292(b). The Court's ruling that SLUSA does not preclude SCB plaintiffs' Due Diligence Claims is a controlling question of law as to which there is substantial ground for difference of opinion, as evidenced by the Second Circuit's holdings in *Hanley* and *Romano*. If the Second Circuit were to reverse the Court's ruling on this issue and hold that SLUSA precludes all of SCB plaintiffs' Due Diligence Claims, then the SCB Cases will come to an end. If, however, no immediate appeal is taken, the SCB Cases will, barring dismissal on summary

judgment, be returned to three federal judicial districts for trial. If final judgments are entered after these cases are returned, then appeals from these cases will be before three different courts of appeals, including the Second Circuit, requiring three separate circuits to review the exact same order, with potentially conflicting results. This is precisely the type of inefficient appellate process that interlocutory review is designed to prevent.

BACKGROUND

After deferring ruling on the application of SLUSA to the SCB Cases as the law developed in the Second Circuit, on July 29, 2015, the Court issued an extensive Order addressing SLUSA in the contexts of both the *Anwar* class action, which involves claims against the PricewaterhouseCoopers Defendants, and the SCB Cases.

In considering claims in the SCB Cases, the Court recognized that all of the SCB plaintiffs "allege[] that the [Bank] induced [them] to invest in the [Fairfield] Funds based on unsupported investment advice." (Order at 35.) The Court then turned to whether the Bank's alleged conduct in the SCB Cases is of the type that triggers SLUSA preclusion, describing the standard announced by *Kingate* as follows: "SLUSA precludes state law claims predicated on conduct *by the defendant* that is specified in SLUSA's operative provisions referencing the anti-falsity proscriptions of the 1933 and 1934 Acts." (Order at 18 (quoting *Kingate*, 784 F.3d at 146 (internal quotation marks omitted)).) The Court summarized this standard as an inquiry into "whether plaintiffs' state law class action claims assert conduct not compensable under the federal securities law, or whether such claims fundamentally constitute a species of federal securities class action litigation arising out of the same transaction, but artfully camouflaged as state law causes of action." (Order at 19.)

Applying this standard to claims in the SCB Cases, the Court looked to whether SCB plaintiffs' claims "involve[d] allegations of either complicity" by the Bank with the underlying Madoff fraud, whether the Bank's conduct "centered on the [Fairfield] Funds' connections to B[L]MIS and Madoff," or whether claims were "predicated . . . on the Madoff fraud more generally." (Order at 48, 53.) Under this Madoff-focused fraud test, the Court found that two types of so-called "Madoff Claims" were precluded: (1) fraud and negligent misrepresentation claims based on allegations that the Bank failed to disclose that the Fairfield Funds were a "funnel" to Madoff (Order at 52-53); and (2) breach of fiduciary duty claims based on allegations that the Bank failed to disclose adequately fees it received (Order at 48).

Continuing to use this Madoff-focused fraud test, the Court declined to apply SLUSA to SCB plaintiffs' Due Diligence Claims. In particular, as to SCB plaintiffs' "fiduciary duty" causes of action, the Court concluded that those claims are "not predicated on false conduct by the Standard Chartered Defendants" because the Bank's duties involve "an inquiry that is wholly distinct from the falsity wrongdoing underlying Madoff's fraud." (Order at 46.) As to the Due Diligence Claims asserted in gross negligence and negligence causes of action, the Court concluded that the Bank's duty to recommend investments only after conducting due diligence is a duty "owed by securities broker-dealers regardless of the underlying Madoff fraud," and allegations of Madoff's fraud "are not essential for plaintiffs to plead a sufficient negligence or gross negligence claim." (Order at 51.)

The Court, however, did not address whether any or all of the Due Diligence Claims are predicated on conduct *by the Bank*, independent of Madoff's fraud, that qualifies as false or misleading conduct under the anti-falsity provisions of the federal securities laws. The Court's analysis began and ended with the conclusion that the Bank's conduct was not

sufficiently dependent upon, or connected to, Madoff's underlying fraud. There was no analysis of whether, under *Hanley* and *Romano*, the Bank's investment recommendations themselves constituted false and misleading conduct under the federal securities laws.

Finally, separately, the Court noted that it had permitted plaintiffs in the *Saca* action (No. 11-CV-3480) to proceed to discovery with a breach of fiduciary duty claim alleging that the Bank failed to disclose all risks and material facts to those plaintiffs in recommending the Fairfield Funds. (Order at 44-46.) The Court did not separately address why this theory survived SLUSA scrutiny, but held that it was one of the "fiduciary duty" Due Diligence Claims that survived SLUSA preclusion because it was "not predicated on false conduct by the Standard Chartered Defendants." (Order at 45.) This appears to have been an unintended error under the Court's reasoning with respect to the Madoff Claims, because the *Saca* plaintiffs allege that the Bank failed to disclose the same fact as the Madoff Claims, namely, "that Fairfield was little more than a funnel to Madoff." (*Saca* Compl. ¶ 53, No. 11-CV-3480, Dkt. No. 1.)

ARGUMENT

I. Reconsideration of the Order Is Warranted Because Controlling Second Circuit Precedent Establishes That Plaintiffs' "Due Diligence Claims" Depend on Allegations of False and Misleading Conduct by the Bank.

Under Local Civil Rule 6.3, the Court may reconsider its prior order where "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader* v. *CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (affirming grant of reconsideration when moving party introduced "additional relevant case law and substantial legislative history"); Local Civil Rule 6.3 (reconsideration warranted on "matters or controlling decisions" that "the court has overlooked"). The Court also has broad discretion to reconsider an order "'to correct a clear error or prevent manifest injustice.'" *Anwar* v. *Fairfield Greenwich,*

Ltd., 745 F. Supp. 2d 379, 382 (S.D.N.Y. 2010) ("*SCB I*") (quoting *Virgin Atl. Airways, Ltd.* v. *Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

Here, the Court should reconsider its Order to address a key basis for applying SLUSA to the SCB Cases—namely, that under *Kingate*, *Hanley* and *Romano*, the Due Diligence Claims are predicated on the Bank making allegedly unsupported investment recommendations that the federal securities laws classify as false and misleading. Providing misleading investment advice is garden variety securities fraud under the "anti-falsity provisions" of the federal securities laws—*i.e.*, Sections 17(a) of the Securities Act of 1933 and 10(b) of the Securities Exchange Act of 1934. (Order at 11-12 (anti-falsity provisions aimed at "protect[ing] individual investors and the integrity of this country's financial markets from transactions induced by defendants' conduct in providing false, misleading, or incomplete information").)

A. The Court Misapplied *Kingate* by Considering Only the Madoff Fraud in Assessing Conduct.

To the extent that the Order construes *Kingate* to require that the Bank's wrongdoing be dependent on, or complicit with, Madoff's fraud for SLUSA to apply, the Bank respectfully submits that the Order is incorrect and should be reconsidered. *Kingate* holds that SLUSA's "false conduct" requirement is satisfied by two types of conduct relevant here: (1) allegations of a defendant's negligent or fraudulent "misrepresentations and misleading omissions . . . made in connection with the Funds' investments with Madoff in covered securities and with their oversight of these investments," 784 F.3d at 134-35,151; or (2) **any other allegations of "conduct by the defendant that would be actionable under the anti-falsity provisions" of Sections 17(a) or 10(b) either as a private claim or through an enforcement action by the U.S. Securities and Exchange Commission,** *id.* at 147, 149 (emphasis added). When either of these tests are satisfied, the "false conduct" requirement of SLUSA is met, and

neither category requires that the alleged wrongdoing be dependent upon the fraud of a third party like Madoff.

In the Order, the Court correctly concluded that the "Madoff Claims" fall squarely within *Kingate*'s standard because "[t]he failure to disclose that the Funds were a 'funnel' to BMIS implicitly involves allegations of either complicity [with the Madoff fraud] (as to the fraud claims) or some other false conduct (as to the negligent misrepresentation claims) by the Standard Chartered Defendants." (Order at 53.) The Court, however, erred when it considered only whether the Bank's alleged wrongdoing depended on Madoff's underlying fraud in assessing the Due Diligence Claims. The Court neglected to consider whether the Bank's own alleged conduct, irrespective of Madoff's underlying fraud, falls within *Kingate*'s categories of false conduct. It does.

In *Kingate*, the Second Circuit focused heavily on Madoff-related conduct because that was precisely the type of conduct at issue in that case. The defendants in *Kingate* were the creators, managers and service providers (such as auditors and custodians) of "feeder funds" that invested all or substantially all of their assets with Madoff. Thus, the *Kingate* defendants were similarly situated to defendants in the *Anwar* class action pending before this Court—Fairfield, PricewaterhouseCoopers and Citco. But neither *Anwar* nor *Kingate* includes defendants, such as the Bank, who provided investment advice to clients concerning Madoff feeder funds. And nothing in *Kingate* suggests, much less holds, that SLUSA's "false conduct" requirement can be met only where a defendant's alleged wrongdoing is as closely related to Madoff's fraud as the alleged wrongdoing in *Kingate*.

Applying *Kingate* here, the Due Diligence Claims clearly are predicated on conduct by the Bank that "would be actionable under the anti-falsity provisions" of

Sections 17(a) or 10(b) either as a private claim or through an enforcement action by the SEC. 784 F.3d at 147, 149. As discussed in detail below, it is well established in the Second Circuit that investment professionals who provide unsupported investment recommendations engage in conduct that is false and misleading under the anti-falsity provisions of the federal securities laws. *Hanley*, 415 F.2d at 595-97. Because no Due Diligence Claims can be sustained unless SCB plaintiffs can prove that the Bank gave unsupported investment recommendations, the Due Diligence Claims are predicated on conduct that satisfies SLUSA's false conduct requirement. This is so regardless of whether the recommended investment is Madoff or IBM.

Separately, the Bank's alleged conduct also involves "misrepresentations and misleading omissions . . . made in connection with the Funds' investments with Madoff in covered securities and with their oversight of these investments." *Kingate*, 784 F.3d at 134-35,151. The Bank's alleged recommendations misrepresented that the Bank had conducted adequate due diligence (or "oversight") of the Fairfield Funds. *Hanley*, 415 F.2d at 595-97. And those alleged misrepresentations were "in connection with" SCB plaintiffs' investments in Madoff's covered-security transactions. As the Second Circuit held in *Romano* v. *Kazacos*, also discussed in detail below in the context of SLUSA's "false conduct" requirement, misleading advice is "in connection with" subsequent investments in covered securities where the advice "induces" those investments. 609 F.3d at 521-23. The Order does not consider the *Romano* standard, but recognizes that all of SCB plaintiffs' claims "allege[] that the [Bank] induced [them] to invest in the [Fairfield] Funds based on unsupported investment advice." (Order at 35.) Thus, although the Bank's alleged conduct may not have depended on Madoff's underlying fraud, it was "in connection with" SCB plaintiffs' investments in covered securities and is therefore subject to SLUSA preclusion.

B. The Court Overlooked Controlling Precedent Establishing That Plaintiffs' "Due Diligence Claims" Rest on the Bank Providing False and Misleading Investment Recommendations.

The Order correctly recognizes that all of SCB plaintiffs' Due Diligence Claims are predicated on the Bank's *recommendations* to invest in the Fairfield Funds, not any independent duty that arises absent such investment advice. (*See* Order at 35 (the SCB Cases "all . . . involve common . . . alleg[ations] that the Standard Chartered Defendants induced Plaintiffs to invest in the Funds based on unsupported investment advice").) That investment recommendation is an essential component of SCB plaintiffs' Due Diligence Claims because **the duty to conduct due diligence arises only as a result of the Bank making a recommendation**. *Anwar* v. *Fairfield Greenwich, Ltd.*, 826 F. Supp. 2d 578, 591-92 (S.D.N.Y. 2011); *see also Ward* v. *Atl. Sec. Bank*, 777 So. 2d 1144, 1147 (Fla. Dist. Ct. App. 2001) (describing duties under Florida common law arising from provision of investment advice). Thus, the true gravamen of SCB plaintiffs' Due Diligence Claims is that the Bank's investment recommendations were false and misleading because, according to SCB plaintiffs, the Bank made an implicit or explicit false representation that it had done the necessary due diligence.

As the Court will recall, 23 plaintiffs initially filed claims against SCB under Section 10(b) based on the theory that the Bank's recommendations were false and misleading in that the Bank misrepresented that (i) it had conducted due diligence on the Fairfield Funds and (ii) the Fairfield Funds were safe and appropriate investments. (SCB Oct. 31, 2014 Letter at 3-4; *SCB I*, 745 F. Supp. 2d at 369-71.) SCB plaintiffs' Due Diligence Claims rest on the same underlying conduct as the prior Section 10(b) claims, now recast as violations of Florida common law. Where common-law claims encompass conduct that qualifies as false or misleading under the federal securities laws, SLUSA preclusion applies even if the common-law claims would otherwise be viable under state law. *Kingate*, 784 F.3d at 135 & n.6; *see also*

Felton v. *Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 688-89, 693 (S.D.N.Y. 2006) (dismissing claims pursuant to SLUSA notwithstanding that the alleged wrongdoing might constitute a breach of "standardized contracts" under state law because "it is also a quintessential example of a fraudulent omission of a material fact under the federal securities laws"). The Due Diligence Claims do encompass, and are based upon, such conduct under the Second Circuit's holdings in *Hanley* and *Romano*:

1. *Hanley* Holds That Making Investment Recommendations Without Conducting Adequate Due Diligence Constitutes a Misrepresentation Under the Federal Securities Laws.

The Second Circuit held in *Hanley* v. *SEC* that investment professionals who provide investment recommendations without conducting adequate due diligence necessarily engage in false or misleading conduct that is proscribed by the anti-falsity provisions. 415 F.2d 589, 595-97 (2d Cir. 1969). This is so because, as the Second Circuit explained, "[b]y his recommendation [the investment advisor] implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation. Where the salesman lacks essential information about a security, he should disclose this as well as the risks which arise from his lack of information." *Id.* at 597. Thus, where an investment professional has not conducted adequate due diligence, the very act of making an investment recommendation constitutes a misrepresentation under the anti-falsity provisions of the federal securities laws. *Id.* (affirming penalties under Sections 17(a) and 10(b) against "securities salesmen" for failing to conduct adequate due diligence prior to making an investment recommendation).

Hanley is well settled and uncontroversial law. The long line of cases following *Hanley* do not question and, in fact, reaffirm that investment recommendations are necessarily false or misleading statements under the federal securities laws where the recommendations are not supported by adequate due diligence. *E.g.*, *South Cherry St., LLC* v. *Hennessee Grp. LLC*,

573 F.3d 98, 100-03, 108-14 (2d Cir. 2009) (addressing claims brought under Section 10(b) for failure to conduct adequate due diligence before recommending a hedge fund that turned out to be a Ponzi scheme); *SEC* v. *Shainberg*, 316 F. App'x 1, 3 (2d Cir. 2008) (affirming penalties under the Sections 17(a) and 10(b), explaining that "'[b]rokers and salesmen are under a duty to investigate,' and 'a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant'" (citing *Hanley*, 415 F.2d at 595-96)); *see also In re Capital Fin. Servs., Inc.*, 102 S.E.C. Docket 2435 (Dec. 16, 2011) (investment advisor violated Sections 17(a) and 10(b) by "fail[ing] to perform reasonable due diligence on numerous private placement offerings prior to recommending them to customers where the offerings turned out to be a classic Ponzi scheme and offering fraud"); *In re Wells Fargo Brokerage Servs. LLC, et al.*, Release No. 33-9349 at 9 (Aug. 14, 2012) ("A broker or salesperson who fails to investigate facts surrounding a security and who subsequently recommends that security to customers without having an adequate and reasonable basis for that recommendation may be in violation of the antifraud provisions of the federal securities laws, including Sections 17(a)(2) and 17(a)(3) of the Securities Act." (quoting *SEC* v. *Great Lakes Equities*, 1990 WL 260587, at *6 (E.D. Mich. Sept. 4, 1990))); *In re Donald J. Anthony, Jr., et al.*, Release No. 33-9571 at 8 (Apr. 3, 2014) (finding violations of Sections 17(a) and 10(b) for "recommend[ing] the Trust Offerings to . . . customers based on insufficient due diligence and fail[ing] to disclose to investors the risky nature of the Trust Offerings or the facts that should have led [the respondent] to that conclusion").

Hanley and its progeny are directly applicable to all SCB plaintiffs' Due Diligence Claims. It does not matter that SCB plaintiffs have pleaded Due Diligence Claims under state law based on duties and alleged wrongdoing that may not, on their face, characterize

the Bank's conduct as false or misleading. None of SCB plaintiffs can plead such claims without alleging that the Bank (1) recommended the Fairfield Funds and (2) failed to conduct adequate due diligence to support those recommendations. *Anwar*, 826 F. Supp. 2d at 591-92 ("It . . . defies logic to assume that SCBI breached its fiduciary duty or was grossly negligent in recommending Fairfield Sentry without conducting due diligence when the Lous have not even alleged that SCBI recommended the securities or advised them in the first place."). That combination of conduct gives rise to an implicit misrepresentation under the federal securities laws and thus triggers SLUSA preclusion.

2. *Romano* Holds That Making an Investment Recommendation That Is Known or Should Be Known To Be Inaccurate Is False Conduct That Triggers SLUSA Preclusion.

In *Romano*, the Second Circuit's most recent application of SLUSA to claims predicated on misleading investment advice, plaintiffs brought various state common law claims to recover investment losses based on allegations that Morgan Stanley's unsupported and misleading advice that plaintiffs "had sufficient savings to retire early and comfortably" had induced plaintiffs to retire early and invest in covered securities. 609 F.3d 512, 515, 522-23 (2d Cir. 2010). Plaintiffs alleged that Morgan Stanley was negligent in providing this advice and "knew or should have known" that the advice was "false, incorrect, or misleading." *Id.* at 521. The Second Circuit held that such allegations are "misrepresentations and omissions of material fact" subject to SLUSA preclusion. *Id.*

The same reasoning applies here. SCB plaintiffs' claims all hinge on allegations that the Bank recommended the Fairfield Funds to each of them as appropriate investments, when in fact the Bank knew or should have known through the exercise of proper due diligence that "the number of unanswered questions about the nature of BLMIS's operations" made the Fairfield Funds unsuitable for recommendation to anyone. (Sept. 29, 2014 Tr. at 33:14-18; *see*

also, e.g., *Maridom* Am. Compl. ¶ 27; *Headway* Compl. ¶¶ 38, 77; *Skyworth Products* Compl. ¶ 4, *Gerico, Inc.* Compl. ¶¶ 17-18; Pls' Nov. 17, 2014 Letter at 4, 12 (Dkt. No. 1349).) Thus, just as in *Romano*, SCB plaintiffs' claims rely on allegations that the Bank made investment recommendations it "knew or should have known" were "false, incorrect, or misleading," which qualifies as false conduct that triggers SLUSA preclusion. *Romano*, 609 F.3d at 521.

Of course, in *Romano*, Morgan Stanley's recommendation did not lead plaintiffs there to invest in a Ponzi scheme. And that is exactly the point. The conduct that precludes the Due Diligence Claims is untethered from Madoff's fraud; it is, as alleged, false and misleading in its own right, whether or not the sub-manager of the recommended investment engaged in his own fraud.

C. The Court Overlooked That the Unique Due Diligence Claim in the *Saca* Action Is Expressly and Exclusively Based on an Alleged Omission by the Bank.

Separate and apart from the Due Diligence Claims generally, the Court concluded that express allegations in the pending *Saca* action that the Bank failed to disclose all risks and material facts in recommending the Fairfield Funds did not depend on allegations of the Bank's false conduct. (Order at 44, 45-46.) But the omissions alleged by the *Saca* plaintiffs are that the Bank failed (i) to disclose "that Fairfield was little more than a funnel to Madoff" and (ii) "to update Plaintiffs about the true nature of Plaintiffs' Fairfield investments." (*Saca* Compl. ¶ 53, No. 11-CV-3480, Dkt. No. 1.) Those allegations clearly are predicated on alleged false conduct by the Bank that depends on Madoff's underlying fraud, and, even under the Court's reasoning in the Order, should be precluded by SLUSA just like the Madoff Claims.[1]

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[1] The *Saca* plaintiffs also allege several misrepresentations, such as "leading Plaintiffs to believe that AEBI and SCBI had conducted adequate due diligence on Fairfield such that AEBI and SCBI possessed a reasonable basis in fact to recommend to Plaintiffs that Plaintiffs invest in

Allowing these claims to survive SLUSA scrutiny appears to have been an unintended oversight in the Order. To the extent that is not the case, however, then the Order overlooks controlling precedent that the federal securities laws proscribe a defendant's failure to disclose all material risks and facts in recommending an investment where a defendant owed a duty to speak or when failing to do so would be misleading. *See SEC* v. *Dorozhko*, 574 F.3d 42, 49 (2d Cir. 2009) (explaining that under Supreme Court precedent 10(b) applies to "nondisclosure in breach of a fiduciary duty" and violation of "an affirmative obligation in commercial dealings not to mislead" (citing *United States* v. *O'Hagan*, 521 U.S. 642, 653 (1997); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 n.18 (1988))). Indeed, *Kingate* holds that alleged misrepresentations and omissions—whether made negligently or fraudulently—are the type of conduct proscribed by the anti-falsity provisions and thus constitute "false conduct" to trigger SLUSA. 784 F.3d at 134-35, 151. Accordingly, the *Saca* plaintiffs' claims are predicated on false conduct and should be precluded by SLUSA.

II. The Order Satisfies the Criteria for Certification of an Interlocutory Appeal Under 28 U.S.C. § 1292(b).

In the event the Court declines to reconsider its Order as it relates to the SCB Cases, the Bank respectfully requests that the Court certify for interlocutory appeal pursuant to § 1292(b) the question of whether SLUSA precludes all of SCB plaintiffs' remaining Due Diligence Claims. A district court may certify an order for interlocutory appeal if: (1) there is a controlling question of law; (2) there is substantial ground for difference of opinion on the controlling question; and (3) an immediate appeal may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); 1 MOORE'S FEDERAL PRACTICE § 203.31 (3d

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Fairfield because, according to AEBi and SCBI, Fairfield was [a] sound investment." (*Saca* Compl. ¶ 53, No. 11-CV-3480, Dkt. No. 1.)

ed. 2012). All three criteria are met here. Moreover, this case typifies the "'exceptional circumstances [that] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978)), *aff'd*, 459 U.S. 1190 (1983). Such exceptional circumstances are present here because allowing an immediate appeal would "avoid protracted and expensive litigation." *Id.*; *U.S. Rubber Co.* v. *Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Once "the statutory criteria are met," there is a "duty of the district court and of [the Court of Appeals] . . . to allow an immediate appeal to be taken." *Ahrenholz* v. *Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000).

A. Application of SLUSA to Plaintiffs' Remaining "Due Diligence Claims" Is a Controlling Question of Law.

A legal question is "controlling" if reversal of the district court's decision would: (1) result in dismissal or termination of the action; (2) could significantly affect the conduct of the litigation; or (3) where the answer to the certified question has "precedential value for a large number of cases." *Capitol Records, Inc.* v. *MP3tunes, LLC*, 2012 WL 242827, at *1 (S.D.N.Y. Jan. 9, 2012) (emphasis added); *see also Kinghoffer* v. *S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *SEC* v. *Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000). Here, a reversal of the Court's Order with respect to SCB plaintiffs' remaining Due Diligence Claims would terminate the litigation in all 56 SCB Cases. Thus, "[u]nlike other complex consolidated cases, in which a reversal of an order might result in only a partial dismissal of the overall litigation, a reversal [of the Court's Order] will result in dismissal of the entire [SCB] litigation, and thus there is no risk that the Court of Appeals will be burdened with subsequent appeals." *In re Lloyd's Am. Trust Fund Litig.*, 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997) ("*In re Lloyd's*"). A ruling from the Second Circuit also could have broad precedential value in other

securities cases where SLUSA is at issue due to the Second Circuit's preeminence in the field of securities law. *See Morrison* v. *Nat'l Aust. Bank Ltd.*, 561 U.S. 247, 260 (2010) (explaining that other court had deferred to the Second Circuit because of its "preeminence in the field of securities law" (quoting *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (1987)).

B. There Are Substantial Grounds for Difference of Opinion on the Scope of SLUSA with Respect to Claims Arising from Allegedly Unsupported Investment Advice.

Substantial ground for difference of opinion on a controlling question exists where "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *In re Lloyd's*, 1997 WL 458739, at *5; *see also Klinghoffer*, 921 F.2d at 25 (substantial ground for difference of opinion where "the issues are difficult and of first impression"). The presence of controlling and conflicting authority provide substantial grounds for a difference of opinion with respect the question here. The Court's ruling that SCB plaintiffs' Due Diligence Claims do not depend on false conduct under SLUSA where the Bank's conduct was not dependent upon a secondary underlying fraud conflicts with the Second Circuit's holdings in *Kingate*, *Hanley* and *Romano* and other courts in this Circuit. These conflicting precedents are sufficient to demonstrate a substantial ground for difference of opinion justifying interlocutory review. *In re Lloyd's*, 1997 WL 458739, at *5.

C. An Immediate Appeal Would Materially Advance the Termination of the SCB Cases and Promote Judicial Efficiency.

An immediate appeal would also advance the resolution of the SCB Cases and promote judicial efficiency in resolving this action. This is true whenever an appeal "promises to . . . shorten the time required for trial" and also "advance[s] the ultimate termination" of the litigation. *Klein* v. *Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, 536 (S.D.N.Y. 2005). "The institutional efficiency of the federal court system is among the chief concerns underlying

§ 1292(b). Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called 'big' cases," such as the SCB Cases. *In re Lloyd's*, 1997 WL 458739, at *5 (citations omitted); *see also, Dev. Specialists, Inc.* v. *Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929, at *3 (S.D.N.Y. July 18, 2012) (interlocutory appeals are "most appropriate" in cases "where [they] will save the parties (and the court) from unnecessary, expensive, and protracted litigation"). "[C]ertification may be particularly appropriate in complex litigation involving multiple coordinated actions." *Fed. Housing Fin. Agency* v. *UBS Ams.*, 858 F. Supp. 2d 306, 338 (S.D.N.Y. June 19, 2012), *aff'd*, 712 F.3d 136 (2d Cir. 2013).

With this in mind, interlocutory appeal is particularly appropriate. *First*, the parties, this Court and other transferor courts are likely to expend significant time and resources before any final judgment is rendered in the SCB Cases. The Court has yet to rule on SCB plaintiffs' pending request to preclude the Bank from moving for summary judgment in 11 of the SCB Cases, and plaintiff-specific discovery has yet to take place in 45 other actions with 64 named SCB plaintiffs. If SCB plaintiffs' remaining claims are not ultimately dismissed on summary judgment or otherwise terminated, the JPML may remand for trial 54 of the 56 SCB Cases to the Southern District of Florida and one case to the Central District of California. *See* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . ."). One individual action would remain before this Court for trial. In other words, if the SCB Cases proceed, "substantial resources may be expended in vain both by the parties and this Court if [this Court's] initial conclusion proves incorrect." *In re Dynex Capital, Inc. Sec. Litig.*, 2006 WL 1517580, at *3 (S.D.N.Y. June 2,

2006); *see also Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 621 (1975) ("[A]n interlocutory appeal may be appropriate if reversal of an order would eliminate the possibility of multiple trials of common issues.").

Second, if no immediate appeal is taken, any future appeal from a final judgment is not likely to occur on a consolidated basis in one appeal to the Second Circuit, but rather in multiple appeals to the Second, Ninth and Eleventh Circuits. Multiple appeals would not only create the prospect of conflicting rulings, but also promote judicial inefficiency. The prospect of multiple appeals is a result that interlocutory review under Sections 1291 and 1292 is meant to prevent. *Cf. Martens* v. *Smith Barney, Inc.*, 238 F. Supp. 2d 596, 600 (S.D.N.Y. 2002) ("The efficiency of both the district court and the appellate court are to be considered, and the benefit to the district court of avoiding unnecessary trial time must be weighed against the inefficiency of having the relevant Court of Appeals hear multiple appeals in the same case.").

Third, immediate review by the Second Circuit would be consistent with SLUSA's primary purpose "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [Private Securities Litigation Reform Act of 1995]," including the requirement that SCB plaintiffs meet heightened pleading standards *before* they may proceed to trial. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006) (internal quotation marks omitted). Indeed, SLUSA's purpose would be vitiated if the Bank were forced to face further pretrial proceedings or trials on claims that a court of appeals later holds were precluded all along. As this Court recognized, when SLUSA applies, SCB plaintiffs may "pursue only one source of relief: the remedies and procedures available through the federal securities laws." (Order at 14.) No SCB plaintiff has successfully pleaded such a claim. Accordingly, the Court's Order with respect to the SCB Cases presents

precisely the type of "exceptional circumstances" that Section 1292(b) was meant to address. *Klinghoffer*, 921 F.2d at 25 ("[E]xceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." (internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the Court reconsider the Order and dismiss all the pending claims in the SCB Cases. In the alternative, SCB requests that the Court certify the Order for interlocutory review of whether SLUSA precludes all of SCB plaintiffs' remaining claims.

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New York, New York

/s/ Sharon L. Nelles

Sharon L. Nelles
Bradley P. Smith
Patrick B. Berarducci
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
nelless@sullcrom.com

Diane L. McGimsey
(Admitted *Pro Hac Vice*)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067

Attorneys for Defendants Standard Chartered plc, Standard Chartered Bank, Standard Chartered International (USA) Ltd. and Standard Chartered Bank International (Americas) Ltd.