UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, et al., Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, et al., Defendants. This Document Relates to: *Bhatia* v. *Standard Chartered International (USA) Ltd.*, No. 09-CV-2410; *Tradewaves Ltd.* v. *Standard Chartered International (USA) Ltd.*, No. 09-CV-9423; *Headway Investment Corp.* v. *American Express Bank Ltd.*, No. 09-CV-08500; *Lopez* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-00919; *Maridom Ltd.* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-00920; and *Valladolid* v. *American Express Bank Ltd.*, No. 10-CV-00918.	Master File No. 09-CV-118 (VM)

MEMORANDUM OF LAW OF THE STANDARD CHARTERED DEFENDANTS IN SUPPORT OF THEIR SUPPLEMENTAL MOTION TO DISMISS ON THE NEWLY-ARISEN GROUND THAT PLAINTIFFS' COMMON-LAW CLAIMS ARE PREEMPTED BY SLUSA

Sharon L. Nelles (SN-3144)
Bradley P. Smith (BS-1383)
Patrick B. Berarducci (PB-2222)
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 Bank International (Americas) Ltd., Standard Chartered International (USA) Ltd., Standard Chartered Bank and Standard Chartered PLC

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Standard Chartered Bank, Standard Chartered International (USA) Ltd., Standard Chartered Bank International (Americas) Ltd., and Standard Chartered PLC (collectively, "Standard Chartered" or "the Bank") respectfully submit this memorandum of law in support of their supplemental motion to dismiss plaintiffs' state common-law claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

On the ground that plaintiffs' state common-law claims are preempted by the Securities Litigation Uniform Standards Act ("SLUSA"), this supplemental motion requests dismissal of those claims in *Headway Investment Corp.* v. *American Express Bank,* No. 09-CV-08500 ("*Headway*") (Counts I, IV and VIII), *Lopez* v. *Standard Chartered International (Americas) Ltd.*, No. 10-CV-00919 ("*Lopez*") (Counts IV, V, VI and VII), *Maridom Ltd.* v. *Standard Chartered International (Americas) Ltd.*, No. 10-CV-00920 ("*Maridom*") (Counts I, II and III), and *Valladolid* v. *American Express Bank Ltd.*, No. 10-CV-00918 ("*Valladolid*") (Counts I, II and III) (collectively, the "Florida Cases"); and *Bhatia* v. *Standard Chartered International (USA) Ltd.*, No. 09-CV-2410 ("*Bhatia*") (Counts IV, V, VI, VII and VIII), and *Tradewaves Ltd.* v. *Standard Chartered International (USA) Ltd.,* No. 09-CV-9423 ("*Tradewaves*") (Counts IV, V, VI, VII and VIII) (collectively, the "Singapore Cases") (the Florida Cases and the Singapore Cases are collectively referred to as the "Standard Chartered Cases").

On March 10, 2010, the Bank filed (i) a motion to dismiss the Singapore Cases under Federal Rules of Civil Procedure 12(b)(1), (3) and (6) and the doctrine of forum non conveniens, and (ii) a motion to dismiss the Florida Cases under Federal Rule of Civil Procedure

12(b)(6). After the Bank's motions were filed, an additional Madoff-related case against the Bank, *Pujals*, was transferred to this District by the Judicial Panel on Multidistrict Litigation ("JPML"). On April 16, 2010, this Court consolidated *Pujals* with *Anwar* v. *Fairfield Greenwich Group*, No. 09-CV-118, for all pretrial purposes. The consolidation of *Pujals* with *Anwar* gives rise to an additional basis for dismissal of plaintiffs' common-law claims: they are now preempted by SLUSA.

SLUSA provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging – (A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security." 15 U.S.C. §§ 78bb(f)(1), 77p(b). The requirements for SLUSA preemption are satisfied here. *First*, the Standard Chartered Cases constitute a covered class action because, with the addition of *Pujals*, they are a group of consolidated lawsuits involving 50 or more plaintiffs. *Second*, the claims the Bank seeks to dismiss are based on state law. *Third*, the claims involve the purchases or sales of "covered securities" because Madoff was supposedly investing in S&P 100 stocks. *Fourth*, the claims allege misrepresentations or omissions of material fact, including allegations of fraud by Madoff and allegations of misrepresentations or omissions of material fact by the Bank. *Fifth* and finally, the alleged misrepresentations or omissions were made "in connection with" the purchase or sale of the covered securities.

Multiple courts have already applied SLUSA preemption in cases where the plaintiffs attempted to shoehorn Madoff-related claims into state common-law causes of action. *See Barron* v. *Igolnikov*, No. 09-CV-4471, 2010 WL 882890 (S.D.N.Y. Mar. 10, 2010); *Backus* v. *Conn. Cmty. Bank, N.A.*, No. 09-CV-1256, 2009 WL 5184360 (D. Conn. Dec. 23, 2009);

Levinson v. *PSCC Servs. Inc.*, No. 09-CV-269, 2009 WL 5184363 (D. Conn. Dec. 23, 2009). As in those cases, plaintiffs here attempt to avoid the pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1, 78u-4), by pleading a variety of state common-law causes of action against the Bank. In truth, however, plaintiffs' claims are nothing more than "a securities fraud wolf dressed up in a [common law] sheep's clothing." *Felton* v. *Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 693 (S.D.N.Y. 2006). Plaintiffs' common-law claims should be dismissed under SLUSA.

BACKGROUND

Beginning in at least the early 1990s, Bernard Madoff told investors in BLMIS that he was investing their money in shares of common stock in Standard & Poor's 100 index companies, as well as options on that index, utilizing a strategy called "split-strike conversion." Plea Allocution, *United States* v. *Madoff*, No. 09-CR-213, 2009 WL 622150 (S.D.N.Y. Mar. 12, 2009). On December 11, 2008, however, it was revealed to the world that Madoff in fact had "never invested those funds in the securities, as [he] had promised." *Id*. Instead, for almost twenty years, Madoff had perpetrated a massive securities fraud upon investors in BLMIS, including those who invested directly in BLMIS and those who invested in BLMIS through "feeder funds," such as the Fairfield Funds, that had placed their assets with BLMIS. Plaintiffs are among the latter group of investors who invested in BLMIS through their purchases of shares in the Fairfield Funds.

Dozens of lawsuits have been brought by investors in the Fairfield Funds against the entities that ran, marketed and managed the funds (collectively, "Fairfield"), as well as entities and individuals involved with the operation and administration of the Fairfield Funds,

including, for example, fund administrators and auditors. (*See, e.g.*, Second Consol. Am. Compl. ¶¶ 156, 165, *Anwar* v. *Fairfield Greenwich Ltd.*, No. 09-CV-118 (S.D.N.Y. Sept. 29, 2009) ("*Anwar*").) These lawsuits have been consolidated into *Anwar*, which now includes 116 named plaintiffs and alleges that the class of plaintiffs may number in the thousands. (*Anwar* Second Am. Compl. ¶¶ 1-116, 353.) The Court is respectfully referred to Section A of the Background Section of the Defendants' Memorandum in Support of the Motion to Dismiss Florida Cases ("Defs. Mem. in Supp. of Mot. to Dismiss"), where the general background of Madoff's fraud, the Fairfield Funds and the ensuing litigation is set forth in detail. (Defs. Mem. in Supp. of Mot. to Dismiss at 4-8.)

The Bank is among the defendants that have been named in litigation arising from investments in the Fairfield Funds. Actions have been filed against the Bank in the courts of New York, California and Florida, all of which are either now pending in this Court or subject to a conditional transfer order to this Court. On March 10, 2010, the Bank filed two unified motions to dismiss, one pertaining to the Florida Cases and the other to the Singapore Cases, pursuant to the scheduling order entered by this Court on January 29, 2010. At the time the unified motions were due, the Florida and Singapore Cases were the only Standard Chartered Cases pending before this Court and involved a total of twenty-eight plaintiffs, while *Pujals* remained in the Southern District of Florida pending resolution of the *Pujals* plaintiffs' opposition to the conditional transfer order. (*Bhatia* Am. Compl. ¶¶ 15-19 (five plaintiffs); *Tradewaves* Compl. ¶¶ 16-32 (seventeen plaintiffs); *Lopez* Am. Compl. ¶ 18 (one plaintiff); *Maridom* Am. Compl. ¶¶ 10-12 (three plaintiffs); *Headway* Compl. ¶ 2 (one plaintiff); *Valladolid* Am. Compl. ¶ 22 (one plaintiff).)

On April 1, 2010, the JPML transferred to this Court *Pujals* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 09-CV-21611, which was brought by two named plaintiffs on behalf of a putative class numbering in the "thousands."[1] (*See Pujals* Am. Compl. ¶¶ 10-11, 36.) On April 16, 2010, this Court consolidated *Pujals* into *Anwar* because "the complaints [in *Pujals* and *Anwar*] describe[] the same or substantially similar underlying events and operative facts, and assert claims arising out of the same or substantially similar actions against some or most of the same defendants." (Consol. Order at 1-2, *Anwar* v. *Fairfield Greenwich Ltd.*, No. 09-CV-118 (S.D.N.Y. Apr. 16, 2009).) As a result, the Standard Chartered Cases have now all been consolidated together, and into *Anwar*, for pretrial purposes.

Plaintiffs collectively advance three general types of claims against the Bank, each aimed at recovering losses resulting from Bernard Madoff's Ponzi scheme: (1) claims for common-law fraud and negligent misrepresentation, which allege that the Bank made misstatements or omissions relating to the safety of investments in the Fairfield Funds and the extent of due diligence conducted by the Bank;[2] (2) claims for gross negligence, negligence and breach of fiduciary duty, which allege that the Bank failed to conduct sufficient due diligence of the Fairfield Funds and BLMIS;[3] and (3) claims for unjust enrichment and breach of contract,

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[1] Another two actions, *Carrillo* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-20762, and *Almiron* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-20763, both filed in the Southern District of Florida, are currently subject to a Conditional Transfer Order to this District issued by the JPML on April 15, 2010. Plaintiffs in each case have filed a notice of opposition to the transfer order.

[2] *Lopez* Am. Compl. ¶¶ 25-26, 40, 46, 50; *Maridom* Am. Compl. ¶¶ 53, 60; *Bhatia* Am. Compl. ¶¶ 25, 30, 33, 96(a); *Tradewaves* Compl. ¶¶ 10, 38, 43, 50, 92(a).

which allege that the Bank improperly charged its clients fees based on net asset values that were inaccurate as a result of Madoff's Ponzi scheme.[4]

ARGUMENT

"SLUSA makes federal law the exclusive source of remedy for certain class actions alleging securities claims." *Felton*, 429 F. Supp. 2d at 689. SLUSA applies to both class actions and groups of lawsuits that meet certain criteria, including the participation of at least 50 plaintiffs. 15 U.S.C. § 78bb(f)(5)(B). The Standard Chartered cases fall into the category of lawsuits governed by SLUSA.

Under SLUSA, a claim is preempted if: (1) the action is a "covered class action," (2) the claim is based on state law, (3) the claim involves "covered securities," and (4) the claim alleges a misrepresentation or omission of material fact (5) in connection with the purchase or sale of the covered securities. *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 243 (S.D.N.Y. 2004) (citing 15 U.S.C. § 77p(b); *Hardy* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 189 F. Supp. 2d 14, 17 (S.D.N.Y. 2001)).

When interpreting SLUSA, courts are required to employ a "presumption that Congress envisioned a broad construction" of the statute. *Merrill Lynch, Pierce, Fenner &*

(*continued*)

[3] *Lopez* Am. Compl. ¶¶ 72, 80, 81(b), 81(e), 81(g), 81(i), 81(j), 87; *Headway* Compl. ¶¶ 63, 65, 68-70, 73-75, 110-111, 129-130; *Maridom* Am. Compl. ¶¶ 38-41, 43; *Valladolid* Am. Compl. ¶¶ 14-15, 63-64, 67-70, 78-81, 87, 93-94; *Bhatia* Am. Compl. ¶¶ 9, 105(g), 105(i), 110(c); *Tradewaves* Compl. ¶¶ 11, 101(g), 101(i), 106(c).

[4] *Pujals* Am. Compl. ¶¶ 46-60. Plaintiffs additionally assert claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, Section 20(a) of the Exchange Act and Sections 206 and 215 of the Investment Advisers Act. Because SLUSA preempts only state law causes of action, those claims are not discussed herein.

Smith Inc. v. *Dabit*, 547 U.S. 71, 72, 86 (2006). "A narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]." *Id*. at 86 (citation omitted). Thus, SLUSA preemption is not limited to causes of action that could be brought as federal securities actions. *Id*. So long as an action alleges a misrepresentation or omission, SLUSA preemption is implicated. *See Backus*, 2009 WL 5184360, at *10 ("Courts in this circuit 'must look beyond the face of the complaint to the substance of plaintiff's allegations to determine whether SLUSA preemption applies.'" (quoting *Paru* v. *Mut. of Am. Life Ins. Co.*, No. 04-CV-6907, 2006 WL 1292828, at *3 (S.D.N.Y. May 11, 2006))).

A. Plaintiffs Have Brought a Covered Class Action.

SLUSA defines "covered class action" to include both single class actions and groups of lawsuits that meet particular criteria:

> The term "covered class action" means—
>
> (i) any single lawsuit in which—
>
> > (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
> >
> > (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

> (I) damages are sought on behalf of more than 50 persons; and
>
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

The Standard Chartered Cases satisfy the requirements set forth in Section 78bb(f)(5)(B)(ii) for a "group of lawsuits" covered by SLUSA. The actions have been consolidated into *Anwar* for pretrial purposes, thus satisfying Section 78bb(5)(B)(ii)(II) by creating a "group of lawsuits" that are "consolidated" and involve "common questions of law or fact."[5] *See supra* at 4-6. The actions satisfy the other element for a covered "group of lawsuits" set out in Section 78bb(f)(5)(B)(ii)(I) because they seek damages on behalf of fifty or more persons. The fifty-plaintiff requirement is satisfied when the number of plaintiffs in a represented class is greater than fifty, even if the action involves less than fifty named plaintiffs.

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[5] Whereas Section 78bb(f)(5)(B)(i) requires that the "questions of law or fact common to those persons or members of the prospective class . . . predominate over any questions affecting only individual persons or members," Section 78bb(f)(5)(B)(ii) requires only that the actions "involv[e] common questions of law or fact" and have been "joined, consolidated, or otherwise proceed as a single action for any purpose." This difference reflects Congress' view that cases joined, consolidated or proceeding as a single action for any purpose are per se sufficiently similar to be covered by SLUSA.

Further, consolidation for pretrial purposes satisfies the requirement that the actions be "joined, consolidated, or otherwise proceed as a single action for any purpose." 15 U.S.C. § 78bb(f)(5)(B)(ii)(II); *see also In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d at 246 (consolidation for pretrial purposes sufficient for designation as a "group of lawsuits" under SLUSA); *Gordon Partners* v. *Blumenthal*, No. 02-CV-7377, 2007 WL 431864, *17-18 (S.D.N.Y. Feb. 9, 2007) (recognizing "group of lawsuits" under SLUSA where actions were "consolidated . . . for pre-trial purposes" and "proceeded as a single action for pre-trial purposes"); *Gordon Partners* v. *Blumenthal*, No. 02-CV-7377, 2007 WL 1438753, at *3 (S.D.N.Y. May 16, 2007) (consolidation for pretrial purposes sufficient for designation as a "group of lawsuits" under SLUSA); *Amorosa* v. *Ernst & Young LLP*, 672 F. Supp. 2d 493, 499, 517-18 (S.D.N.Y. 2009) (SLUSA applied where case not formally consolidated but was coordinated with other cases as part of MDL); *Amorosa* v. *Ernst & Young LLP*, No. 03-CV-3902, 2010 WL 245553, at *6 (S.D.N.Y. Jan. 20, 2010) (approving of *Amorosa* v. *Ernst & Young LLP*, 672 F. Supp. 2d 493 (S.D.N.Y. 2009)).

Winne v. *Equitable Life Assurance Soc'y of U.S.*, 315 F. Supp. 2d 404, 410 (S.D.N.Y. 2003) (fifty-plaintiff requirement satisfied where class action plaintiff brought the action "on behalf of himself and a class of all others similarly situated . . . which may number in the thousands"). Consolidated with *Pujals*, the Standard Chartered Cases now involve thirty named plaintiffs and a putative class action brought on behalf of a class alleged to number in the thousands. *See supra* at 4-6.

B. Plaintiffs' Common-Law Claims Allege Misrepresentations or Omissions in Connection with the Purchase or Sale of Covered Securities.

Plaintiffs' claims fall squarely within the scope of SLUSA because they allege a misrepresentation or omission of material fact in connection with the purchase or sale of covered securities. 15 U.S.C. § 78bb(f)(1). All of plaintiffs' claims arise from their investments in BLMIS through the Fairfield Funds. Such investments are "covered securities" for the purposes of SLUSA—defined as securities that are traded nationally and listed on a regulated national exchange, 15 U.S.C. § 77r(b), *cited in* 15 U.S.C. §§ 78bb(f)(5)(E), 77p(f)(3)—because BLMIS purported to invest in publicly traded stocks in the S&P 100 Index.[6] *See Barron*, 2010 WL 882890, at *5 (holding that the "covered security" element was satisfied because Madoff purported to invest in the S&P 100 Index, which is composed of "covered securities"); *Levinson*, 2009 WL 5184363, at *8 (applying SLUSA where plaintiffs invested in funds that, in turn, invested with Madoff).

Plaintiffs' claims all involve allegations of misrepresentations or omissions sufficient to trigger SLUSA preemption. *First*, it is sufficient that plaintiffs' claims are grounded

[6] *Maridom* Am. Compl. ¶ 30; *Valladolid* Am. Compl. ¶ 46; Decl. of Patrick B. Berarducci in Support of Defendants' Motion to Dismiss Florida Cases, Exs. P-X; Decl. of Bharat Vijayan in Support of Defendants' Motion to Dismiss Singapore Cases, Exs. EE-FF.

on and entirely dependent upon the massive fraud perpetrated by Bernard Madoff and, according to some plaintiffs, Fairfield. *See Barron*, 2010 WL 882890, at *5 (SLUSA precluded Madoff-related claims against mutual fund because, among other things, "it is only necessary to demonstrate deception in connection with the purchase or sale of a covered security, not the deception of plaintiff herself"); *Potter* v. *Janus Inv. Fund*, 483 F. Supp. 2d 692, 702 (S.D. Ill. 2007) (SLUSA preempted negligence and breach of fiduciary duty claims alleging that defendants failed to prevent fraudulent trades by third parties); *LaSala* v. *Bordier et CIE*, 452 F. Supp. 2d 575, 586 (D.N.J. 2006), *vacated on other grounds*, 519 F.3d 121 (3d Cir. 2008) ("[T]he plain meaning of SLUSA supports Defendants' argument that SLUSA preemption applies when a third party makes the misrepresentations or omissions of fact at issue.").

Second, SLUSA preemption is equally appropriate even if the Court analyzes only plaintiffs' allegations against the Bank. All of plaintiffs' common-law claims incorporate by reference or are grounded on allegations of misrepresentations or omissions, including, for example, that the Bank misled plaintiffs regarding the safety and value of the Fairfield Funds, failed to conduct sufficient due diligence, and/or charged fees based on an improperly inflated value of the Fairfield Funds.[7] These allegations are sufficient to implicate SLUSA. *See In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 442-43 (S.D.N.Y. 2001) (Marrero, J.) (holding that fraud, negligence, and negligent misrepresentation claims were all precluded by SLUSA because they were "grounded on alleged misstatements"); *Levinson*, 2009 WL 5184363, at *13 ("Courts have held that non-fraud based claims are preempted by SLUSA if they

[7] *Lopez* Am. Compl. ¶¶ 25-26, 40, 46, 50; *Bhatia* Am. Compl. ¶¶ 25, 30, 33, 96(a); *Tradewaves* Compl. ¶¶ 10, 38, 43, 50, 92(a); *Maridom* Am. Compl. ¶¶ 53, 60.

incorporate by reference allegations of false or misleading statements."). It is immaterial for the purposes of SLUSA that some of plaintiffs' claims do not allege scienter. *See In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 769 ("Nothing in the language of Section 77p suggests that it bars only state law claims that plead a certain level of scienter."); *Kingdom 5-KR-41, Ltd.* v. *Star Cruises PLC*, No. 01-CV-2946, 2004 WL 444554, at *3 (S.D.N.Y. Mar. 10, 2004) (same); *Winne*, 315 F. Supp. 2d at 415 ("[SLUSA] preempts claims based on the making of any 'untrue statement or omission' without any limitations based on the intent of the person making them."). In fact, courts have already applied SLUSA preemption to Madoff-related claims that are nearly identical to those asserted by plaintiffs here. For example, in *Barron* v. *Igolnikov*, a plaintiff that had invested in mutual funds that placed some of their assets in BLMIS feeder funds sued the mutual fund manager, among others, under various common-law theories. Plaintiff asserted claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, gross negligence and unjust enrichment, based on the principal contention that defendants failed to alert plaintiff to certain "red flags" associated with Madoff and "failed to provide proper account statements that accurately reflected plaintiff's and the class's account values." 2010 WL 882890, at *2. These claims were preempted by SLUSA. *Id*. at *4-5; *see also Levinson*, 2009 WL 5184363, at *8-12 (applying SLUSA where plaintiffs invested in funds that, in turn, invested with Madoff); *Backus*, 2009 WL 5184360, at *9 (applying SLUSA preemption to scheme to charge fees based on misrepresentation of value of a security).

CONCLUSION

Plaintiffs' state law claims are precluded by the Securities Litigation Uniform Standards Act. Accordingly, Standard Chartered Bank, Standard Chartered International (USA)

Ltd., Standard Chartered Bank International (Americas) Ltd., and Standard Chartered PLC respectfully request that the Court dismiss the state law claims in *Headway*, *Lopez*, *Maridom*, *Valladolid*, *Bhatia* and *Tradewaves*.

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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
smithbr@sullcrom.com
berarduccip@sullcrom.com

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

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