UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Master File No. 09-CV-118 (Calvo)
FAIRFIELD GREENWICH LIMITED, et al.,	)	
	)	
Defendants.	)	
	)	
This Document Relates To: *Standard Chartered Bank International (Americas) Limited, et al.* v. *Miguel Calvo, et al.*, No. 10-CV-4684	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND MOTION FOR A PRELIMINARY INJUNCTION

Joseph E. Neuhaus
Patrick B. Berarducci
David R. Dehoney
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
neuhausj@sullcrom.com
berarduccip@sullcrom.com
dehoneyd@sullcrom.com

Attorneys for Plaintiffs Standard Chartered Bank International (Americas) Ltd. and StanChart Securities International, Inc.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs Standard Chartered Bank International (Americas) Limited ("SCBI"), and StanChart Securities International, Inc. ("StanChart") (collectively, the "Standard Chartered Entities"), submit this memorandum of law in support of their motion pursuant to Rule 65 of the Federal Rules of Civil Procedure for an order temporarily and preliminarily enjoining 38 private banking customers of SCBI ("Defendants") from pursuing arbitration claims against plaintiffs in a proceeding pending before the American Arbitration Association ("AAA"), captioned *Miguel Calvo, et al.*, v. *Standard Chartered Bank, et al.*, ICDR No. 50 148 T 00508 09.

PRELIMINARY STATEMENT

The scope of the *Calvo* arbitration proceeding is well beyond that contemplated by the arbitration agreements establishing the AAA's jurisdiction. The action involves numerous claims—including federal securities claims—brought by 38 individuals and entities against SCBI and StanChart. The claims arise from investments in Fairfield Sentry Ltd. and Fairfield Sigma Ltd. (the "Fairfield Funds") made through 24 separate investment accounts held at SCBI, formerly American Express Bank International ("AEBI"), and the purported basis of the AAA's jurisdiction over the action are arbitration clauses contained in more than 24 separately executed account agreements. StanChart is not a party to any of the agreements, but rather has a separate agreement governing each of the 24 separate investment accounts that calls for arbitration administered by a stock exchange or the Financial Industry Regulatory Authority ("FINRA"). Moreover, none of the AAA agreements authorizes parties to join their claims with other similarly-situated claimants—as Defendants have done—to create a consolidated, multi-party arbitration. This action seeks an injunction and declaratory judgment barring the arbitration of claims against StanChart and barring the multi-party arbitration instituted by Defendants.

On June 1, 2010, the arbitral tribunal (the "Tribunal") issued a decision refusing to dismiss StanChart or to dismiss the improperly joined claimants, and directed the Standard

Chartered Entities to proceed to arbitration. In addition, on June 22, 2010, the Tribunal ordered the Standard Chartered Entities to begin document production by July 13, 2010, since extended by Defendants to July 29, 2010, with an August 13, 2010 deadline to complete discovery. Among the materials to be produced are documents concerning the due diligence conducted by the Standard Chartered Entities on the Fairfield Funds and Bernard L. Madoff Investment Securities LLC ("BLMIS"). Many of these documents concern or originate from the entities that ran the Fairfield Funds ("Fairfield") and are clearly within the scope of the stay of discovery entered by this Court pursuant to the Private Securities Litigation Reform Act ("PSLRA") in *Anwar* v. *Fairfield Greenwich Group*, No. 09-CV-118 (S.D.N.Y.) ("*Anwar*") in which Defendants are potential putative class members. Plaintiffs separately seek an order staying discovery in the arbitration in accordance with the *Anwar* stay.

The Standard Chartered Entities therefore respectfully request this Court to temporarily and/or preliminarily enjoin the *Calvo* proceeding before the July 29, 2010 discovery date.

FACTS AND BACKGROUND

A. The Parties.

Plaintiff SCBI, formerly known as American Express Bank International, is an Edge Act corporation organized under the laws of the United States for the purpose of engaging in international or foreign banking and international or foreign financial operations. SCBI offers private banking services, principally to high net worth individuals in Latin America. It is a subsidiary of Standard Chartered Bank.

Plaintiff StanChart is a separate subsidiary of Standard Chartered Bank. It became a registered broker-dealer with the U.S. Securities and Exchange Commission ("SEC") and a member of FINRA on February 29, 2008.

Defendants are 38 former and current Chilean private banking customers of SCBI who held separate SCBI nondiscretionary investment accounts — 24 accounts in all — with SCBI. Through their accounts, Defendants purchased shares in Sentry, a third-party investment fund that invested substantially all its assets with BLMIS.[1] Each of the Defendants is either a wealthy individual or a corporate entity controlled by one or more wealthy individuals; in placing their orders for Sentry shares, each Defendant signed a Subscription Agreement agreeing to be treated as "Professional Investor[s]" based on their wealth (*i.e.*, a net worth of no less than $1,000,000) and sophistication. (*E.g.*, Ex. A (Subscription Agreement) ¶¶ 5(c), 8.)[2] Defendants lost their investments in Sentry when, to virtually everyone's astonishment, BLMIS was exposed in December 2008 as a massive Ponzi scheme.

B. The Parties' Pre-Arbitration Relationships.

1. Defendants Open Investment Accounts and Sign Brokerage Agreements with SCBI.

Defendants opened investment accounts with SCBI and, on various dates between June 2001 and June 2008, signed the brokerage agreement here at issue. (*See* Ex. B (the "SCBI Brokerage Agreement").) This Agreement provided various terms and conditions governing the relationship between Defendants and SCBI, including provisions concerning:

- ***Arbitration.*** Paragraph 6 of the SCBI Brokerage Agreement provides, *inter alia*, that SCBI and Defendants agreed to the arbitration of certain disputes before the AAA pursuant to the Federal Arbitration Act ("FAA").

- ***Amendments***. Paragraph 8 states that Defendants agree that (1) SCBI has the right to make amendments that modify, rescind or add to the provisions of the SCBI Brokerage Agreement, (2) those amendments can

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[1] One Defendant, Shiva Enterprises, Ltd., also purchased shares in Fairfield Sigma Ltd., a fund that also invested substantially all of its assets in Sentry.

[2] Except where otherwise indicated, citations to "Ex. __" refer to exhibits to the Declaration of Patrick B. Berarducci, executed on July 14, 2010.

be made retroactively, and (3) when SCBI makes an amendment, the notice requirement can be fulfilled "by mailing a written notice or a new printed agreement" to the customer, and that a customer's "use of the Account after delivery of notice of the change constitutes my agreement to be bound thereby."

- ***Receipt of Communications***. Pursuant to paragraph 7, Defendants agree that "[c]ommunications mailed to me at the address I have provided for delivery of written communications shall be deemed to have been personally delivered to me, and I agree to waive all claims resulting from failure to receive such communications."

(Ex. A (Subscription Agreement) ¶¶ 6-8.)[3] The parties' agreements do not expressly authorize consolidated or multi-party arbitration proceedings.

2. SCBI Plans to Transfer Certain of Defendants' Investments into Brokerage Accounts at StanChart, but the Transfer Does Not Occur as Planned.

Pursuant to the Gramm-Leach-Bliley Act of 1999, certain securities brokerage activities previously performed by U.S. banks had to be transferred from U.S. banks to registered broker-dealers as of January 1, 2009. (*See* Ex. D (Declaration of Vivian Velazquez, executed on February 22, 2010 ("Velazquez Decl.")) ¶ 5.) In connection with the preparation for this transfer, SCBI on October 1, 2008 sent its customers a letter (1) stating that SCBI intended to transfer some (but not all) investments held in investment accounts at SCBI to StanChart, a registered broker-dealer, in November 2008, and (2) further stating that the SCBI Brokerage

[3] A separate agreement, called the Nondiscretionary Investment Services Agreement (Ex. C (the "NISA")), which certain of the Defendants signed with respect to 13 of the 24 investment accounts, also contains a clause calling for AAA arbitration. (Ex. C § 9(a).) These two agreements, while broadly similar, contain differing provisions concerning, for example, governing law (*compare* Ex. B (SCBI Brokerage Agreement) ¶ 4 *with* Ex. C (NISA) ¶ 9(b)). The SCBI Brokerage Agreement was originally governed by Minnesota law, but amended in 2008 to provide for New York law. (Ex. F. (Oct. 1, 2008 Letter)) (Defendants have not challenged that amendment.) The NISA is governed by Florida law. Because not all of the Defendants executed a NISA, Defendants—and the Tribunal—have relied primarily on the SCBI Brokerage Agreement to establish arbitral jurisdiction. This memorandum will likewise focus on the SCBI Brokerage Agreement.

Agreement "will remain in effect and continue to serve as your brokerage account application and agreement" as to StanChart as of November 2008, except for an amendment to the governing law provision, selecting New York law. (Ex. F.) This letter was sent to all Defendants. (Ex. E. (Declaration of Steven Glover, executed on February 23, 2010 ("First Glover Decl.")) ¶ 5.)

Although brokerage accounts governed by the SCBI Brokerage Agreement were opened at StanChart on behalf of Defendants in November 2008, the process of transferring investments from SCBI to StanChart, which began in November 2008, was never completed as to Defendants' investments in Sentry. (*See* Ex. D (Velazquez Decl.) ¶¶ 5-8.) After Madoff's Ponzi scheme was discovered on December 11, 2008, SCBI halted the transfer process as to the Sentry shares and immediately attempted to redeem all its clients' positions in Sentry. (*Id.* ¶ 7.) Thus, Defendants' investments in Sentry remained in accounts at SCBI and those investments were never ultimately transferred to accounts at StanChart. (*Id.* ¶ 8.)

3. StanChart Replaces the SCBI Agreement with a New Agreement That Provides for FINRA Arbitration, Not AAA or ICDR Arbitration.

By letter dated March 1, 2009 and mailed to each account holder (Ex. F (First Glover Decl.) ¶¶ 6-7), Defendants were sent a new agreement (Ex. G (the "StanChart Brokerage Agreement")), effective November 5, 2008 (which was on or about the date that SCBI began to migrate investments to StanChart), and were advised that it would "replac[e] any previous version of that agreement." (Ex. H (Mar. 1, 2009 Letter).) The StanChart Brokerage Agreement provides for stock exchange or FINRA arbitration (Ex. G ¶ 7), not AAA or ICDR arbitration.

C. The Arbitration Proceedings.

1. Defendants File an Improper Demand for Consolidated Arbitration Against the Wrong Respondents, in the Wrong Forum, and Asserting Claims Substantially Similar to Those Asserted in *Anwar*.

On September 17, 2009, Defendants filed their Statement of Claim in the

International Centre for Dispute Resolution ("ICDR"), a division of the AAA, at its New York office. (*See* Ex. I ("Statement of Claim").) The Statement of Claim alleges, *inter alia*, that the Standard Chartered Entities (i) recommended investments in the Fairfield Funds without conducting reasonable due diligence; (ii) engaged in false and deceptive marketing of the Fairfield Funds; and (iii) recommended the Fairfield Funds without providing Defendants with a copy of the pertinent Private Placement Memorandum. (*Id.* at 2-3.) These claims are substantially similar to the claims in *Anwar*, which all likewise arise from investments in the Fairfield Funds. In fact, the claims in *Calvo* are nearly identical to claims asserted in the eight cases consolidated into *Anwar* that name Standard Chartered entities – including SCBI – as Defendants. Despite having AAA arbitration agreements only with SCBI, Defendants also named StanChart, among other SCBI affiliates, in their Statement of Claim. Moreover, Defendants attempted to bring all of their claims in a single proceeding without any agreement to permit consolidated arbitration.

2. Defendants Seek U.S. Court-Style Discovery Relating to Matters at Issue in *Anwar* and Related Cases.

On November 25, 2009, Defendants served the Standard Chartered Entities with 126 broad document requests. (Ex. J (Document Requests).) Defendants' document requests sought vast quantities of information regarding, among other things, Defendants' accounts at the Standard Chartered Entities; the Standard Chartered Entities' procedures and compliance processes; the Sentry investments; the marketing and distribution of those investments; and the due diligence of Sentry and Madoff. For example, Defendants requested "[a]ll documents concerning due diligence conduct by the Respondent Standard Chartered Entities . . . with respect to Fairfield Sentry." (Ex. J ¶ 68.) These requests involve due diligence materials received from Fairfield that go to issues at the core of *Anwar*, which is subject to this Court's

discovery stay under the PSLRA. Because Defendants are potential class members of *Anwar* (as well as a consolidated putative class action also currently pending before this Court, *Pujals* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-2878), and SCBI is a Defendant in multiple actions consolidated into *Anwar*, forcing the Standard Chartered Entities to produce this material would undermine that stay of discovery. Nevertheless, the Tribunal has refused to stay discovery on account of the *Anwar* stay and has ordered the Standard Chartered Entities to begin rolling production no later than July 13, 2010 (since modified to July 29) beginning with the due diligence documents common to *Anwar*. (*See* Ex. K (Prehearing Order No. 4) ¶ 5.)

3. The Standard Chartered Entities' Objections to the Tribunal's Jurisdiction Over StanChart and to Consolidated Proceedings and the Tribunal's Determinations.

On October 20, 2009, before any arbitration proceedings took place and before the Tribunal was appointed, the Standard Chartered Entities wrote a letter to the case manager at the ICDR objecting to, *inter alia*, (i) the AAA's jurisdiction over StanChart and two other SCBI affiliates named in the Statement of Claim, and (ii) the consolidation in one proceeding of claims belonging to 38 entities and individuals who had signed at least 24 separate agreements containing individual arbitration clauses. (Ex. L (Oct. 20, 2009 Letter).) The AAA case manager informed the Standard Chartered Entities that the Tribunal would hear these objections after it was appointed. (Berarducci Decl. ¶ 14.) The Standard Chartered Entities reiterated their objections in subsequent filings and, at a preliminary hearing on February 2, 2010, the Tribunal set a schedule for briefing on these threshold issues.

On June 1, 2010, the Tribunal issued a ruling on those objections, expressly noting that the Standard Chartered Entities did not waive their right to seek court determination (Ex. M (Award) at 16 n.7), but stating (1) that it had jurisdiction over StanChart (*id.* at 12-15),

and (2) that consolidated arbitration was permissible (*id.* at 15-22.)

First, the Tribunal erroneously found jurisdiction over StanChart notwithstanding that the only extant arbitration agreement between StanChart and Defendants called for FINRA or stock exchange arbitration. The Tribunal took the position that amending an arbitration clause to provide for FINRA instead of AAA arbitration by a mailing to clients was "procedurally . . . unconscionable" absent proof that each Defendant received actual notice of the change. (*Id.* at 13-14.) The Tribunal concluded that StanChart had not proven actual notice because it had not shown whether any of the Defendants had elected to have mail held in a "hold-mail" file at the offices of SCBI and StanChart in Miami, rather than sent to them. (*Id.* at 14.)[4] The parties never briefed this issue to the Tribunal, and, in fact, none of the Defendants had elected to have their mail placed in the "hold-mail" file as of March 1, 2009. (Supplemental Declaration of Steven Glover, dated July 13, 2010 ("Suppl. Glover Decl."), ¶¶ 5-6.) Thus, physical copies of the updated brokerage agreement were sent to the mailing address provided by each Defendant. (*Id.* ¶¶ 2, 6.)[5] The Tribunal also concluded that the amendment was substantively unconscionable, because it would require Defendants to pursue claims based on the same transactions in two different forums—in the AAA against SCBI, and FINRA against StanChart—hardly an unusual result even in court proceedings. (*See* Ex. M at 14-15.)

Second, the Tribunal found that consolidated arbitration was permissible even though the parties never agreed to such proceedings, relying principally on two bases: (1) the

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[4] The "hold-mail" file was explained by an employee of SCBI and StanChart: "Some customers ask Standard Chartered Entities not to send mail to them, but instead to hold it for them in a so-called 'hold-mail' file. Under the agreements with such customers, communications to the customer are deemed received when placed in the hold-mail file." (Ex. E ("First Glover Decl.") ¶ 3.) Notably, Defendants never argued in their briefing to the Tribunal that any of them were on "hold-mail."

[5] Some of the Defendants had provided the address of the Santiago representative office as their mailing address, to allow them to collect any mailings there. (Suppl. Glover Decl. ¶ 7.)

Tribunal analogized the consolidation of claimants in arbitration to the joinder of parties in court proceedings (*id.* at 15-16) even though, unlike the Federal Rules of Civil Procedure, the AAA rules do not permit such joinder, and (2) the Tribunal purported to construe the SCBI Brokerage Agreements to permit consolidation of arbitrations based on (i) a provision in the FINRA rules that permitted consolidation (which the Tribunal deemed to be evidence of custom and practice in the industry notwithstanding that the parties chose the AAA rules for their arbitrations), and (ii) the fact that some New York State cases permit consolidation in arbitrations not governed by the FAA (*id.* at 18-22), even though the *Calvo* arbitration is governed by the FAA.

D. The Standard Chartered Entities Seek a Determination from This Court.

On June 15, 2010, Plaintiffs SCBI and StanChart initiated an action in this Court seeking to enjoin Defendants from (i) pursuing claims against StanChart in the AAA, (ii) aggregating all of their claims in a single multi-party proceeding, or (iii) seeking discovery in *Calvo* in violation of the Private Securities Litigation Reform Act ("PSLRA") stay issued by this Court in *Anwar*. That same day, Plaintiffs sent the Tribunal a letter requesting a temporary stay of the arbitration proceedings pending this Court's resolution of these issues.

After a conference call with the parties on June 22, the Tribunal that day issued an order denying the request for a stay of the arbitration proceedings but granting a three-week stay of document production until July 13 (extended to July 29) "in order to afford [SCBI and StanChart] an opportunity to apply for a stay or injunction from the court," and ordering both parties to cooperate and "move expeditiously to present the matter to the court . . . . so as to maximize the time available to the court to resolve the issues presented to it." (Ex. K (Prehearing Order No. 4) ¶ 3.) This motion follows.

ARGUMENT

"In order to obtain a preliminary injunction, the moving party must show (1) the

likelihood of irreparable injury, and (2) either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in the movant's favor." *Tellium, Inc.* v. *Corning Inc.*, No. 03-CV-8487, 2004 WL 307238, at *3 (S.D.N.Y. Feb. 13, 2004) (citation omitted). *Accord Citigroup Global Markets, Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).[6]

I. THE STANDARD CHARTERED ENTITIES ARE HIGHLY LIKELY TO SUCCEED ON THEIR CLAIMS.

A. This Court Has Jurisdiction to Decide the Issues Presented.

This Court should conduct an independent de novo review of the legal issues presented herein.[7] Although "procedural questions . . . are presumptively" for the arbitrators to decide, gateway questions of "arbitrability" are entitled to independent judicial determination "unless the parties clearly and unmistakably provide otherwise." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 84 (2002); *see also First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). It is black-letter law that among the gateway questions of arbitrability that are entitled to independent judicial determination are questions of "whether the parties have submitted a particular dispute to arbitration," including whether the arbitration clause binds non-parties. *Howsam*, 537 U.S. at 82, 84 (citation omitted). In this case, StanChart did not "clearly and unmistakably" commit to a AAA tribunal the question of whether it agreed to arbitrate this dispute where StanChart specifically amended the claimed arbitration agreement to provide

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[6] "In the Second Circuit, the standard for a temporary restraining order is the same as for a preliminary injunction." *Jackson* v. *Johnson*, 962 F. Supp. 391, 392 (S.D.N.Y. 1997).

[7] The Court retains the power to decide these questions, and to enjoin the arbitration proceedings for lack of jurisdiction, even though the tribunal has issued a partial award on jurisdiction, where the objecting party reserved their right to seek a court resolution of the question. *E.g., Barrack, Rodos & Bacine* v. *Ballon Stoll Bader & Nadler, P.C.* ("*BR&B*"), No. 08-CV-2152, 2008 WL 759353, at *3-4 (S.D.N.Y. Mar. 20, 2008) (granting preliminary injunction enjoining arbitration after tribunal issued ruling upholding its power to decide arbitrability and finding jurisdiction).

instead for FINRA arbitration. Thus, StanChart is entitled to a judicial determination of whether it can be forced to arbitrate before the AAA.

The same is true of consolidated arbitration. The Second Circuit has long held that absent express agreement, a party cannot be forced to participate in consolidated, multi-party arbitration, *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 71, 74 (2d Cir. 1993), or joint hearings in separate arbitrations, *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 268 (2d Cir. 1999). The Supreme Court in *Stolt-Nielsen S. A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), recently reached the same conclusion with respect to class arbitration. In doing so, the Court explained that whether the parties had agreed to class arbitration was not akin to the type of "procedural" questions recognized in *Howsam* that the parties implicitly authorize the arbitrator to decide. *Stolt-Nielsen*, 130 S. Ct. at 1775. "An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate," because the substantive differences between ordinary bilateral arbitration and class arbitration, which (like consolidated arbitration) involves multiple disputes between multiple parties, were "too great" for such an inference. *Id.* at 1775-76. Accordingly, SCBI is entitled to a judicial determination of whether it agreed to consolidated arbitration.[8]

Even if this Court did not have independent jurisdiction to decide these issues, it has jurisdiction to review and vacate the Tribunal's June 1 Partial Award. The Supreme Court in

[8] While a court in this District has previously held that the issue of consolidated arbitration is for the arbitrator, not court, to decide, that precedent was based on the court's belief that the issue was "controll[ed]" by *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003). *See Blimpie Int'l, Inc.* v. *Blimpie of the Keys*, 371 F. Supp. 2d 469, 473 (S.D.N.Y. 2005). The Supreme Court's opinion in *Stolt-Nielsen* abrogated this precedent. The *Stolt-Nielsen* Court explained that *Bazzle* did not control the issue because only a plurality addressed it. 130 S. Ct. at 1771-72.

Stolt-Nielsen overturned the arbitral tribunal's determination to proceed with class arbitration on the grounds that the tribunal had "exceeded their powers" within the meaning of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4). The Court held that arbitrators exceed their mandate when they "stray[] from interpretation and application of the agreement and effectively 'dispense[] [their] own brand of industrial justice.'" 130 S. Ct. at 1767 (citation omitted). As in *Stolt-Nielsen* and as discussed further below (pp. 17-20), the Tribunal here, although purportedly construing the arbitration agreement, imposed its view that consolidated arbitration that included StanChart would be more efficient than separate arbitrations.[9]

This Court has jurisdiction to enforce its stay of discovery in *Anwar* under the All Writs Act, 28 U.S.C. § 1651, and the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B). *See infra* pp. 20-23.

B. StanChart Cannot Be Forced To Arbitrate in the AAA, Because the Only Arbitration Agreements Between StanChart and the Defendants Call for FINRA or Stock Exchange Arbitration.

"Under federal law, arbitration is 'a matter of consent, not coercion.'" *World Rentals & Sales, LLC* v. *Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1244 (11th Cir. 2008) (citation omitted). As such, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), and courts must "'rigorously enforce agreements to arbitrate,'" including the forum in which the parties agree to arbitrate. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Georgiadis*, 903 F.2d 109, 112-13 (2d Cir. 1990) (citation omitted) (rejecting claimant's attempt to compel AAA arbitration against broker-dealer where parties had

[9] In addition, as set forth below, the Tribunal's decision "manifest[ly] disregard[ed]" clear legal principles on each of the controlling points on which the decision rested. *T.Co. Metals, LLC* v. *Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010) (upholding the "manifest disregard" standard for reviewing arbitral awards).

entered into agreement with arbitration clause providing for NASD arbitration); *accord Luckie* v. *Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 514 (11th Cir. 1993) (holding that arbitration before the AAA could not be compelled where arbitration agreement provided for only NYSE, AMEX or NASD arbitration).

The only enforceable arbitration agreement between StanChart and Defendants calls for FINRA or stock exchange arbitration. Although on November 5, 2008, StanChart assumed the SCBI Brokerage Agreement—and its arbitration clause providing for, among others, AAA arbitration—StanChart amended the agreement in March 2009 to eliminate the AAA as a potential arbitral forum. The amended agreement, the StanChart Brokerage Agreement, provides for only FINRA or stock exchange arbitration.

There is no basis to question the validity of StanChart's amendment to the arbitration agreement. The amendment was made pursuant to a change-in-terms provision contained in the SCBI Brokerage Agreement:

> **Amendments** I [customer] agree that you [SCBI] shall have the right to amend this agreement by modifying or rescinding any of its existing provisions or by adding any new provision. Any such amendment shall be effective as of a date to be established by you. I understand and acknowledge that you may modify or change the terms and conditions by mailing a written notice or a new printed agreement to me.

(Ex. B (SCBI Brokerage Agreement) ¶ 8). This District has upheld amendments to form agreements pursuant to such change-in-terms provisions where the original contract puts a party on notice that certain subjects are within the ambit of possible terms that could be amended. *See In re Am. Express Merchs. Litig.*, No. 03-CV-9592, 2006 WL 662341, at *8 (S.D.N.Y. Mar. 16, 2006) (upholding arbitration clause that was added to a credit card agreement pursuant to a change-in-terms provision where the original agreement contained terms concerning dispute resolution), *rev'd on other grounds*, 554 F.3d 300, 321 (2d Cir. 2009) *and vacated*, 130 S. Ct.

2401 (2010); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237 (S.D.N.Y. 2005) (upholding a unilateral amendment to include arbitration clause); *see also Stinger* v. *Chase Bank, USA, NA*, 265 F. App'x 224, 228-29 (5th Cir. 2008) (unilateral amendment to arbitration clause in credit cardholder agreement not unconscionable under Delaware law where notice given). Because the SCBI Brokerage Agreement contained an arbitration clause, Defendants were on notice that the arbitral forum could be amended pursuant to the change-in-terms provision, and StanChart's amendment was therefore valid and enforceable.

The Tribunal's holding that proof of actual notice is required to effect such a change is contrary to clear law. Notice of an amendment to a form contract is presumed where the agreement is sent pursuant to normal mailing procedures. *See, e.g.*, *Dzanoucakis* v. *Chase Manhattan Bank, USA*, No. 06-CV-5673, 2009 WL 910691, at *8 (E.D.N.Y. Mar. 31, 2009) ("[P]roof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed . . . . [T]estimony or affidavit of non-receipt is insufficient, standing alone, to rebut the presumption." (citations omitted)). "[M]ere denial of receipt does not rebut that presumption." *Leon* v. *Murphy*, 988 F.2d 303, 309 (2d Cir. 1993) (citation omitted).[10] The Tribunal did not offer any reason or case law for ignoring this clear law.

The Tribunal's finding of substantive unconscionability was equally divorced from any recognized contract principle. The Tribunal found the StanChart Brokerage Agreement to be substantively unconscionable because enforcement of the arbitration clause in the

[10] Indeed, in finding StanChart to be bound to the AAA arbitration clause in the first place, the Tribunal relied on an earlier October 1, 2008 notice letter announcing the transfer of investment accounts to StanChart, which was sent using the same notice procedures. (Ex. E (First Glover Decl.) ¶¶ 3-5.) The receipt of other mailings "bolsters the inference" that the mailing in question was received. *Leon*, 988 F.2d at 309.

StanChart Brokerage Agreement would require Defendants to pursue "the same claim" in two fora against affiliated entities. But it is well-established that the FAA "*requires* piecemeal resolution [of disputes between multiple parties] when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). The Tribunal's contrary policy conclusion – that piecemeal resolution of disputes would be "grossly unreasonable or unconscionable" (Ex. M (Award) at 14) – was an abuse of power, unsupported by case law, and should be overturned.

C. The Standard Chartered Entities Cannot Be Forced To Participate in a Consolidated, Multi-Party Arbitral Proceeding.

In the *Calvo* arbitration, Defendants seek to join together and assert claims against SCBI brought by 38 different individuals and entities, notwithstanding that Defendants' right to arbitrate arises from at least 24 separate arbitration agreements, none of which provide for such consolidated, multi-party arbitration. Absent consent, which it has not given, SCBI cannot be forced to participate in such an excessively broad proceeding.

"Underscoring the consensual nature of private dispute resolution, . . . parties are generally free to structure their arbitration agreements as they see fit," including the ability to "specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen S. A.*, 130 S. Ct. at 1774 (internal quotation marks omitted) (collecting cases). "[I]t follows that a party may not be compelled under the FAA to submit to class [or consolidated] arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. These principles have been applied to all types of multi-party arbitration proceedings, including whether agreements permit class arbitration, *id.*; *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (collecting cases), consolidated arbitration involving separate claimants who are parties to separate arbitration agreements, *Boeing*, 998 F.2d at 73-74; *Protective Life Ins. Corp.* v. *Lincoln*

Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) (per curiam), and joint arbitration hearings involving claimants in separate but related arbitration proceedings, *Glencore*, 189 F.3d at 268. These cases remain good law, and binding precedent, after *Stolt-Nielsen*. In fact, the Supreme Court cited *Boeing* and *Glencore* approvingly, criticizing the arbitrators' rejection of *Boeing* and *Glencore* and explaining that "these decisions were available to the parties when they entered into their contracts." *See* 130 S. Ct. at 1769 n.5.[11]

Here, it is clear that the parties' agreements do not affirmatively authorize consolidated, multi-party proceedings. The SCBI Brokerage Agreement provides for arbitration of controversies "arising out of, or relating to, *my* [Claimant's] *accounts*, to transactions with you or your Brokers and/or employees *for me* or to this agreement or the breach thereof," (Ex. B (SCBI Brokerage Agreement) ¶ 6 (emphasis added)), while the NISA is similarly limited in scope, providing for arbitration only "*between Customer and AEBI* and/or any Agents" (Ex. C (NISA) ¶ 9(a) (emphasis added)). Nevertheless, the Tribunal purported to find an intent to

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[11] The same result would be reached under state-law principles of contract interpretation. In interpreting an FAA arbitration agreement under New York law, which governs the SCBI Brokerage Agreement, "courts may not consolidate arbitrations in contravention of the parties' agreement even if consolidation would ensure a more economical proceeding. . . . A court's failure to give effect to provisions in separate agreements contemplating separate arbitrations is an unauthorized reformation of those contacts." *In re Cullman Ventures, Inc.*, 252 A.D.2d 222, 228-29 (1st Dep't 1998) (citing *Salvano* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 181-82 (1995)); *see also Matter of Cohen* v. *S.A.C. Capital Advisors, LLC*, No. 112479/05, 2006 WL 399766, at *2-3 (Sup. Ct. N.Y. County Jan. 3, 2006) (denying petition to consolidate arbitrations because, under the FAA, consolidation is not permitted absent the parties' agreement on the issue). Florida law, which governs the NISA, is in accord. *See Seretta Constr., Inc.* v. *Great Am. Ins. Co.*, 869 So. 2d 676, 680 (Fla. Dist. Ct. App. 2004) ("The sole question for the circuit court is whether there is a written agreement among the parties providing for consolidated arbitration. Here, the answer is no."). These cases deal with contract interpretation, and under the FAA, courts (and arbitrators) are bound to abide by the agreement the parties have reached on the question of joinder and arbitration. This is a different question from whether, under arbitrations governed by New York state arbitration law, and not the FAA, courts may compel consolidation. As discussed below, the Tribunal erroneously cited cases addressing the latter question even though the arbitration at issue is governed by the FAA.

permit consolidated arbitration based on two primary considerations, both so completely baseless that they belie that the real basis for the Tribunal's decision was a view that consolidation was simply more efficient.[12]

The primary basis for the Tribunal's determination were rules from a different arbitral forum, FINRA. Relying on the fact that the FINRA arbitration rules permit consolidation of arbitrations, even though the AAA rules do not, the Tribunal purported to find an industry practice that created an ambiguity in the AAA arbitration clause, which it construed against the drafter, SCBI/AEBI. (Ex. M (Award) at 19-20.) This was clearly wrong for at least four reasons. First, the FINRA rules do not provide a basis for circumventing New York's clear rule that "ambiguity does not arise from [mere] silence," *Nissho Iwai Eur. PLC* v. *Korea First Bank*, 99 N.Y.2d 115, 121-22 (2002), and that "courts may not by construction add or excise terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing," *Reiss* v. *Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001) (internal quotation marks omitted). Second, even assuming that custom and usage could *create* ambiguity,[13] using the

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[12] As *Stolt-Nielsen* makes clear, the mere fact that the Tribunal purported to interpret the parties' contracts does not prove that its conclusion was based on contract interpretation instead of underlying policy considerations. *Compare Stolt-Nielsen*, 130 S. Ct. at 1780-82 (Ginsburg, J., dissenting) (describing that the arbitrators' decision was based on the law, construction of similar contract clauses and intent of parties) *with id.* at 1769 n.7 (majority op.) ("the arbitrators need not have said they were relying on policy to make it so"). Tellingly, here, the Tribunal began its analysis with an argument that this case involved "joinder" – that is, a multi-party arbitration initiated by a single claimants' counsel – rather than consolidation, and that if "joinder were the appropriate label" the Tribunal would find it easy to conclude that the multiparty arbitration should proceed based expressly on policy considerations: that respondents would supposedly suffer no prejudice, that the claims presented "ar[ose] out of the same series of occurrences," and that they shared "questions of law and fact . . . that would lead to a significantly more expeditious and cost effective resolution of the matters raised." (Ex. M (Award) at 16.) The Tribunal only then begrudgingly proceeded to consider the question of the "parties' intentions." (*Id*.)

[13] Florida law, applicable to the NISA, expressly rejects the use of custom and practice to create ambiguity. *See Peach State Roofing, Inc.* v. *2224 South Trail Corp.*, 3 So. 3d 442, 445

purported industry custom and practice of FINRA arbitration to interpret the SCBI Brokerage Agreement makes no sense because the parties clearly contracted around the FINRA rules by agreeing to the AAA and its rules. FINRA arbitration rules apply to FINRA arbitration, not AAA arbitration.[14] Third, federal law precludes interpreting an arbitration agreement to require the parties to expressly *exclude* consolidated arbitration in order to avoid such an arbitration, as the Tribunal effectively did here. (*See* Ex. M (Award) at 20 (stating that SCBI, as drafter, "could have specifically referred to the exclusion of multi-party forms other than class actions if that had been [its] intent").)[15] The *Stolt-Nielsen* Court expressly rejected the proposition that the party objecting to class arbitration must "establish that the parties . . . intended to *preclude* class arbitration." *See Stolt-Nielsen*, 130 S. Ct. at 1775. Instead, the proper analysis is "whether the parties agreed to *authorize* class arbitration." *Id.* at 1776. The same applies to consolidated arbitration. *Boeing*, 998 F.2d at 71, 74; *Glencore*, 189 F.3d at 268. Fourth, and relatedly, the most critical aspect of the FAA analysis is whether the parties *intended* to authorize consolidated arbitration, but the interpret-against-the-drafter rule has nothing to do with the parties' intent. *In re Avon Sec. Litig.*, No. 91-CV-2287, 2004 U.S. Dist. LEXIS 8942, at *17 n.5 (S.D.N.Y. Mar. 26, 2004) (interpreting against the drafter "does not really disclose anything about the intention

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(Fla. Dist. Ct. App. 2009) ("Without a finding of ambiguity, the trial court erred in holding that the contract included an implied term based on custom and practice."); *Metro Dev. Group, L.L.C.* v. *3D-C & C, Inc.*, 941 So. 2d 11, 14 (Fla. Dist. Ct. App. 2006).

[14] Moreover, even if FINRA arbitration rules were taken as general brokerage industry custom and practice -- which they are not -- SCBI, an Edge Act bank, was not part of the "brokerage industry." SCBI is not, and never has been, a member of FINRA or a registered broker-dealer, nor has SCBI otherwise agreed to submit to arbitration before FINRA (or its predecessor, the National Association of Securities Dealers).

[15] As the Supreme Court explained in *Stolt-Nielsen*, "While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." 130 S. Ct. at 1773 (citations and internal quotation marks omitted).

of the parties to a contract"). Rather it reflects a policy choice about what a contract means when it is otherwise silent on a point; here, federal law supplies that policy and that policy calls for no consolidation of arbitration claims.[16]

The second consideration cited by the Tribunal was a line of New York state cases that as a matter of policy (and not contract interpretation) consolidated arbitrations. (Ex. M (Award) at 20-21.)[17] Those cases – none of which was cited or discussed by the parties – all dealt with arbitrations governed entirely by state arbitration law, not the FAA, and turned on questions of efficiency and commonality, not whether the parties authorized such proceedings. *See Matter of Cowper Co.* v. *Hires-Turner Glass Co.*, 51 N.Y.2d 937 (1980); *Yaffe* v. *Mintz & Fraade, P.C.*, 270 A.D.2d 43 (1st Dep't 2000); *Gershen* v. *Hess*, 163 A.D.2d 17 (1st Dep't 1990). Here, the parties, and the Tribunal, agreed that the FAA governed their arbitration agreements,[18] and the FAA clearly requires that parties authorize consolidated proceedings irrespective of considerations of efficiency. To the extent "New York [state] arbitration law allows courts to order consolidation without the consent of all parties involved, such a law would be preempted by the FAA." *Home Ins. Co.* v. *New England Reinsurance Corp.*, No. 98-CV-5772, 1999 WL 681388, at *7 (S.D.N.Y. Aug. 31, 1999). It was plainly improper for the Tribunal to attach any significance to preempted state law under the guise of contract interpretation.

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[16] Moreover, the Tribunal applied its interpretation-against-the-draftsman reasoning to StanChart as well, notwithstanding that StanChart, without question, did not draft an arbitration agreement providing for AAA jurisdiction.

[17] The Tribunal did not specify the significance of this second consideration, simply "not[ing]" the point. (Ex. M (Award) at 20-21.)

[18] The SCBI Brokerage Agreement specifically provides that the arbitration "shall be . . . conducted pursuant to the Federal Arbitration Act." (Ex. B at ¶ 6.) In addition, as an international arbitration, this arbitration would be governed by the FAA in any event. *See Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

D. Defendants Should Not Be Permitted to Seek Discovery in *Calvo* That is Barred by the Private Securities Litigation Reform Act ("PSLRA").

Pursuant to its authority under the PSLRA, 15 U.S.C. § 78u-4(b)(3)(B), and the All Writs Act, 28 U.S.C. § 1651, this Court should enjoin Defendants from taking discovery in *Calvo* in contravention of the PSLRA discovery stay issued by this Court in *Anwar*.

The PSLRA requires that discovery be automatically stayed in "any private action" that alleges violations of, among others, Section 10(b) of the Securities Exchange Act. Congress enacted this provision because "the cost of discovery often forces innocent parties to settle frivolous securities [claims]." H.R. CONF. REP. NO. 104-369, at 736 (1995) (Conf. Rep.). Thus, courts have recognized that the primary purpose of the stay is to ensure that Defendants charged with violations of the federal securities laws are not forced to endure the burdens of discovery before a "'court has sustained the legal sufficiency of the complaint.'" *Rampersad* v. *Deutsche Bank Sec., Inc.*, 381 F. Supp. 2d 131, 134 (S.D.N.Y. 2003) (citation omitted). By the plain language of the statute, the PSLRA stay should apply to the *Calvo* arbitration because it is a "private action" alleging federal securities fraud. "'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted). The "provisions of the PSLRA create significant federal rights that previously did not exist," and "reflect[] certain substantive policy judgments" even if "procedural in operation." *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801-02 (8th Cir. 2001) (enjoining state court proceedings that would have circumvented the PSLRA lead-plaintiff provisions).

Moreover, whether or not the PSLRA directly imposes a stay on the *Calvo* arbitration, a stay of production in *Calvo* is necessary to effectuate the PSLRA stay that this

Court has already ordered in *Anwar*. It is well established that courts have the authority to effectuate the purposes of the PSLRA by staying proceedings that are related to a federal securities action but in which the PSLRA would not otherwise apply. Such stays are particularly appropriate where the related proceeding (i) involves the same underlying facts or overlapping legal claims as the federal securities action, (ii) requires broad discovery that would be duplicative of that in the federal securities action, (iii) involves plaintiffs that are putative class members in the federal securities action, and/or (iv) would create a significant risk of inconsistent rulings. *E.g.*, *Newby* v. *Enron Corp.*, 338 F.3d 467, 476 (5th Cir. 2003) (staying discovery in state court proceedings that asserted claims related to those in a federal securities MDL that was subject to a PSLRA stay); *In re Cardinal Health, Inc. Sec. Litig.*, 365 F. Supp. 2d 866 (S.D. Ohio 2005) (same); *In re Crompton Corp. Sec. Litig.*, No. 03-CV-1293, 2005 WL 3797695, at *1 (D. Conn. Jul. 22, 2005) (same, where plaintiffs in state action were putative class members of a federal securities class action that was subject to a PSLRA stay and there was a significant risk of inconsistent rulings); *Grant* v. *AOL Time Warner, Inc. (In re AOL Time Warner, Inc.)*, No. 02-CV-8853, 2003 U.S. Dist. LEXIS 16895, at *4 (S.D.N.Y. Sept. 23, 2003) (staying non-ERISA-specific discovery in ERISA actions because the discovery sought was "very broad" and "a significant portion" concerned issues common to coordinated federal securities fraud actions that were subject to a PSLRA discovery stay); *see also In re First BanCorp Derivative Litig.*, 407 F. Supp. 2d 585, 587 (S.D.N.Y. 2006) (exercising discretion to stay discovery in federal derivative actions that were related to a federal securities MDL).[19]

[19] Indeed, Congress has codified this doctrine as regards related cases pending in state court. The Securities Litigation Uniform Standards Act ("SLUSA") grants courts the authority to "stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph." 15 U.S.C. § 78u-4(b)(3)(D). *See also In re Crompton Corp. Sec.*

All of these considerations apply to the *Calvo* arbitration. *Calvo* involves substantially similar underlying facts and legal claims as *Anwar*, and discovery in *Calvo* and *Anwar* (if they proceed to discovery) would overlap significantly. (See *supra* pp. 6-7.) *Calvo* and *Anwar* also involve the same parties: Defendants are putative class members in two of the *Anwar* actions (*Anwar* and *Pujals*), and SCBI is a defendant in many of those actions. Moreover, this Court is already considering motions to dismiss in *Anwar* that address the claims asserted in *Calvo*. Thus, the Standard Chartered Entities "would be extremely burdened if they had to produce virtually the same discovery that has been stayed pending this Court's resolution of the motion[s] to dismiss in this action [*Anwar*] prior to this Court's decision on th[ose] motion[s]. In seeking to curb abuses in securities class action litigation, Congress specifically sought to prevent 'costly extensive discovery . . . until a court could determine whether a filed suit had merit.'" *In re Crompton Corp. Sec. Litig.*, No. 03-CV-1293, 2005 U.S. Dist. LEXIS 23001, at *11-12 (D. Conn. July 25, 2005) (citation omitted). Moreover, given this overlap, there is a significant risk of inconsistent rulings from this Court and the *Calvo* Tribunal. *Id.* at *12. Finally, giving some putative class members the unfair advantage of discovery, at Standard Chartered's expense, is fundamentally inconsistent with the purposes of the PSLRA. *See BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000) (recognizing need to enjoin state court plaintiffs from obtaining unfair advantage versus federal plaintiffs).

The size and scope of the *Anwar* and *Calvo* proceedings, both arising out of the largest Ponzi scheme in history, are additional reasons favoring a stay of discovery in *Calvo* pending this Court's rulings on the motions to dismiss. *Calvo*, as presently constituted,

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Litig., No. 03-CV-1293, 2005 U.S. Dist. LEXIS 23002 (D. Conn. Aug. 16, 2005) (ordering return of discovery materials that were produced in a related state action, noting that "Congress intended that courts use the stay provision of SLUSA liberally").

resembles a large-scale federal securities action rather than an ordinary arbitration. With 38 separate claimants involving 24 separate investment accounts, *Calvo* is broader in scope than the *combined scope* of the eight cases pending in federal court against Standard Chartered entities.[20] *Calvo* thus presents precisely the type of proceeding that should not proceed to discovery prematurely. In *In re Taxable Municipal Bonds Litigation*, MDL No. 863, 1992 WL 205083 (E.D. La. Aug. 12, 1992), the court confronted a similar situation involving multiple state and federal suits and several arbitrations, all involving demands for discovery. Due to the extraordinary practical burdens created by the proceedings going forward separately, the court recognized that "some action by the Court to coordinate the parties in these actions [was] necessary." *Id.* at *1. Invoking the All Writs Act, the court coordinated discovery in the state and federal suits and stayed the arbitrations. *Id.* at *2-3.

Here too, some action by the Court is necessary to coordinate the *Calvo* arbitration with the multiple federal suits consolidated in the Fairfield MDL. At a minimum, this requires a stay of ongoing discovery in *Calvo* until the federal motions to dismiss are resolved.[21]

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[20] Excluding the putative class action, *Pujals*, the eight cases pending in federal court against Standard Chartered entities involve a combined 30 plaintiffs and 20 separate investment accounts.

[21] Even if the foregoing does not demonstrate that Standard Chartered Entities are likely to succeed on the merits of the jurisdictional, consolidation and PSLRA arguments, it should at the very least establish sufficiently serious questions regarding the merits of those issues. The balance of hardships tips decidedly in the favor of the Standard Chartered Entities because, absent an injunction, they will be irreparably harmed for the reasons described in the following section. For Defendants, in contrast, a temporary or preliminary injunction will mean only a brief postponement of the arbitration, in which the hearing is not scheduled to begin until November 2010. Thus, a temporary or preliminary injunction is appropriate at this time. *See Citigroup Global Markets, Inc.*, 598 F.3d at 34 (affirming district court order that had enjoined an arbitration based on significant questions of arbitrability and a balance of hardships that "tipped decidedly in [plaintiff]'s failure given that an injunction would simply freeze the arbitration without destroying [defendant]'s ability to continue that arbitration in the event that the district court determined that the dispute" was arbitrable).

II. STANCHART AND SCBI WILL SUFFER IRREPARABLE HARM.

"Within the arbitration context, the Second Circuit has held that a party forced to arbitrate a dispute that is beyond the purview of the arbitration agreement suffers irreparable harm." *BR&B*, 2008 WL 759353, at *5 (citing *Merrill Lynch Inv. Managers* v. *Optibase*, Ltd., 337 F.3d 125, 129 (2d Cir. 2003)). "[T]he Second Circuit has held that a party necessarily suffers irreparable harm if 'forced to expend time and resources arbitrating an issue that is not arbitrable, and for which any award would not be enforceable.'" *UBS Sec. LLC* v. *Voegeli*, 684 F. Supp. 2d 351, 354 (S.D.N.Y. 2010) (citation omitted). "[T]he time and resources [plaintiff] would expend in arbitration is not compensable by any monetary award of attorneys' fees or damages pursuant to the provisions of the [arbitration agreement] or the Arbitration Act." *Maryland Cas. Co.* v. *Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 985 (2d Cir. 1997). "Furthermore, it is not merely expense that underlies the prohibition against forcing a party to arbitrate a dispute that it did not agree to arbitrate." *Voegeli*, 684 F. Supp. 2d at 354. A party also is irreparably harmed, "regardless of the final result through arbitration or judicial review," by being deprived of the right to select the manner "in which it wishes to resolve disputes." *Interactive Brokers, LLC* v. *Duran*, No. 08-CV-6813, 2009 WL 393827, at *5 (N.D. Ill. Feb. 17, 2009). *See also Voegeli*, 684 F. Supp. 2d at 354.

Just as in these cases, the harm that the Standard Chartered Entities will suffer if forced to proceed in the *Calvo* arbitration is real and irreparable. StanChart and SCBI should not be compelled to incur either the expense or burden of participating in a large consolidated arbitration, or the increased and aggregated risks inherent in such arbitration. Absent an order from this Court, document production must begin on July 29, 2010, with a compressed schedule thereafter that culminates in a hearing that is set to begin on November 29, 2010 and end on December 17, 2010. The Standard Chartered Entities will thus be required to produce massive

quantities of documents at a very significant expense that will be impossible to retrieve, the confidentiality of which is protected only by the arbitral Tribunal's order.

CONCLUSION

For the foregoing reasons, the Standard Chartered Entities respectfully request that this Court issue an order temporarily and/or preliminarily enjoining Defendants from pursuing their claims or obtaining discovery in the *Calvo* arbitration.

Dated: July 14, 2010
New York, New York

Respectfully submitted,

/s/ Joseph E. Neuhaus

Joseph E. Neuhaus
Patrick Berarducci
David R. Dehoney
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Tel: (212) 558-4000
Fax: (212) 558-3588
neuhausj@sullcrom.com
berarduccip@sullcrom.com
dehoneyd@sullcrom.com

Attorney for Plaintiffs Standard Chartered Bank International (Americas) Limited and StanChart Securities International, Inc.