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October 31, 2014



By Hand

Honorable Victor Marrero,
United States District Judge,
Southern District of New York,
Daniel Patrick Moynihan United States Courthouse,
500 Pearl Street,
New York, New York 10007.

Re: *Anwar* v. *Fairfield Greenwich Ltd.*—Standard Chartered Cases,
No. 09-CV-118 (S.D.N.Y.) (VM) (FM)

Dear Judge Marrero:

As requested by the Court on September 29, 2014, we write on behalf of the Standard Chartered Bank Defendants ("SCB" or the "Bank") to (1) address further why the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") bars all claims pending against the Bank in these actions (the "SCB Cases") and requires dismissal of the SCB Cases in their entirety; and (2) respond to plaintiffs' September 12, 2014 letter asking this Court to take the extraordinary step of preventing the Bank from filing its contemplated motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, even though the motion, if granted, would dispose of 11 SCB Cases ripe for summary judgment in their entirety and effectively dispose of the remaining 46 SCB Cases, or at a minimum provide critical guidance to the parties and transferor courts.

## I. THE SCB CASES ARE SQUARELY PRECLUDED BY SLUSA

SLUSA bars any group of lawsuits brought on behalf of more than 50 plaintiffs, based upon state law, that allege a misrepresentation or omission in connection with the purchase or sale of covered (nationally traded) securities. All of those elements are met here. There are 75 plaintiffs in the 57 SCB Cases currently consolidated before this Court. Each plaintiff asserts state law claims based on alleged misrepresentations and/or omissions in the Bank's investment recommendations of Fairfield Sentry Ltd. or Fairfield Sigma Ltd. (the "Fairfield Funds"). Those funds purported to use brokerage accounts at Bernard L. Madoff Investment Securities LLC ("BLMIS") to invest in some of the most heavily traded U.S. stocks in the S&P 100 Index.

Plaintiffs' fundamental allegation—that the Bank induced them to invest in Madoff's Ponzi scheme based on omissions and representations about the Fairfield Funds and BLMIS that the Bank knew or should have known were false—is the stuff of a classic securities fraud claim. Thus, in accordance with Congress's intent to limit private securities litigation, plaintiffs' claims must be brought, if at all, under the federal securities laws such that they are subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA") and its heightened pleading requirements. This Court already has held that plaintiffs' allegations are insufficient to plead a federal securities fraud claim, and plaintiffs cannot now evade the PSLRA by pursing those same claims under state law. Accordingly, SLUSA requires the dismissal of all of the SCB Cases.

### A. Background and Procedural History

#### 1. Plaintiffs in the First-Filed SCB Cases Asserted Federal Securities Fraud Claims.

Shortly after Madoff's fraud was revealed in December 2008, the first wave of what are now 57 SCB Cases were filed by 28 plaintiffs. Three cases were filed in the Southern

District of Florida, one in the Central District of California, and two in this District.[1] Each of the original 28 plaintiffs sought damages for losses on their investments in the "split strike conversion" ("SSC") strategy through the Fairfield Funds, the largest of the so-called "feeder funds" to the now-notorious securities fraud perpetrated by BLMIS, an SEC-registered broker-dealer. BLMIS claimed to be buying and selling billions of dollars in publicly traded S&P 100 stocks, S&P 100 Index options, and U.S. Treasury bill-related investments on behalf of plaintiffs and other investors in the SSC strategy, but in fact was simply absconding with investors' money.

Twenty three plaintiffs framed the Bank's alleged wrongdoing as violating the Securities Exchange Act of 1934. In particular, plaintiffs alleged that the Bank committed federal securities fraud by inducing plaintiffs to invest in the Fairfield Funds based on unsupported investment advice that contained misrepresentations and omissions about the Fairfield Funds, BLMIS and the SSC strategy, and that "[r]easonable due diligence, including typical quantitative analysis, would have established that Fairfield Sentry, Ltd., Madoff and B[L]MIS were involved in a fraudulent scheme and that the investment returns touted by [the Bank] were not possible." (*Lopez* Am. Compl. ¶ 49; *Bhatia* Am. Compl. ¶ 32; *Tradewaves* Compl. ¶ 45.) Those plaintiffs also alleged that the Bank "knew or should have known that the Fairfield Funds invested a large portion of their investors' funds with Madoff and B[L]MIS," (*Lopez* Am. Compl. ¶ 48; *see also Bhatia* Am. Compl. ¶ 31; *Tradewaves* Compl. ¶ 44), and therefore it was BLMIS, not the Fairfield Funds' creator and manager Fairfield Greenwich

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[1] *Bhatia* v. *Standard Chartered Int'l (USA)*, No. 09-cv-2410 (S.D.N.Y.); *Headway Invs. Corp.* v. *Am. Express Bank Ltd.*, No. 09-cv-21395 (S.D. Fla.); *Tradewaves Ltd.* v. *Standard Chartered Int'l (USA) Ltd.*, No. 09-cv-9423 (S.D.N.Y.); *Valladolid* v. *Am. Express Bank Ltd.*, No. 09-cv-6937 (C.D. Cal.); *Lopez* v. *Standard Chartered Bank Int'l (Ams.)Ltd.*, 09-cv-22451 (S.D. Fla.); *Maridom Ltd.* v. *Standard Chartered*, 09-cv-22868 (S.D. Fla.).

Group ("FGG"), that was purporting to execute the SSC strategy. Five plaintiffs in three other SCB Cases (*Maridom*, *Headway*, and *Valladolid*) alleged the same wrongdoing on the part of the Bank, but sought to advance those allegations as state law claims to avoid from the outset the heightened pleading standards of the PSLRA.

**2. The Court Ruled That Plaintiffs in the *Anwar* Class Action Adequately Pled Federal Securities Fraud Claims, but Dismissed the Federal Securities Fraud Claims in the SCB Cases.**

In October 2009 and February 2010, the Judicial Panel on Multidistrict Litigation ("JPML") transferred the first four SCB Cases then-pending in the Southern District of Florida and Central District of California to this District for consolidated pretrial proceedings before this Court. *In re: Fairfield Greenwich Grp. Sec. Litig.*, 655 F. Supp. 2d 1352, 1353 (J.P.M.L. 2009); Transfer Order, *In re Fairfield Greenwich Grp. Sec. Litig.*, MDL No. 2088 (J.P.M.L. Feb. 3, 2010). The Court consolidated the SCB Cases for pretrial purposes with the consolidated class action styled *Anwar* v. *Fairfield Greenwich Ltd.*, No. 09-CV-118 (the "*Anwar* Class Action"), which was brought by Fairfield Funds investors against FGG, as well as various PricewaterhouseCoopers entities ("PwC") as the funds' auditors, and various Citco entities ("Citco") as the funds' administrator and custodian.

In March 2010, the Bank filed two unified motions to dismiss the then-pending SCB Cases. While those motions were *sub judice*, the JPML transferred a related putative class action against the Bank, *Pujals* v. *Standard Chartered International (Americas) Ltd.*, No. 10-CV-2878, to this Court. (Dkt. No. 430.)[2] With the addition of *Pujals*, plaintiffs in the SCB

[2] In addition to *Pujals*, three more SCB Cases were transferred to this Court to be consolidated after the Bank submitted its motions to dismiss but before the Court ruled: *Carrillo* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-20762, *Almiron* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-20763, and *Lou-Martinez, et. al.* v. *Standard Chartered Bank International Ltd.*, No. 10-CV-23469. The *Lou-Martinez* and *Pujals* actions were later

Cases together sought damages on behalf of more than 50 persons, and accordingly, the Bank sought leave to seek dismissal of the SCB Cases pursuant to SLUSA. (Dkt. No. 446.) The Court denied that request without prejudice, ruling that "SLUSA preemption may be raised later in these proceedings." *Anwar*, No. 09-CV-118, 2010 WL 1948566, at *1 (S.D.N.Y. May 5, 2010).

In August 2010, the Court ruled on motions filed in the *Anwar* Class Action to dismiss the federal securities fraud and state law claims in that case. 728 F. Supp. 2d 372, 398-99, 462 (S.D.N.Y. 2010). Unlike the allegedly misleading investment advice in SCB Cases, the *Anwar* Class Action focused on allegations that FGG, PwC and Citco ignored obvious "red flags" of BLMIS's fraud in their roles as the Fairfield Funds' creator, manager and service providers. *Id.* at 389. The Court declined to apply SLUSA to the *Anwar* Class Action for two principal reasons: First, the alleged "chain of investment" from *Anwar* plaintiffs to Citco, then to BLMIS, and ultimately to the purported SSC investments in covered securities, was too attenuated to satisfy SLUSA's requirement that an alleged misrepresentation be "in connection with" covered securities transactions. *Id.* at 399. Second, SLUSA's policy objective of not allowing plaintiffs to "bypass the higher pleading standards of the PSLRA" was not implicated because the *Anwar* plaintiffs adequately pled federal securities fraud claims. *Id.* at 398-99.

On October 4, 2010, the Court ruled on the Bank's unified motion to dismiss plaintiffs' claims in the SCB Cases. *Anwar*, 745 F. Supp. 2d 360 (S.D.N.Y. 2010) ("*SCB I*").[3] The Court dismissed all federal securities fraud claims for failure to satisfy the heightened pleading requirements of the PSLRA. *Id.* at 369-71. In particular, the Court found allegations

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dismissed. *Anwar*, 826 F. Supp. 2d 578, 591-92 (S.D.N.Y. 2011) (dismissing *Lou-Martinez*); *Anwar*, 831 F. Supp. 2d 787, 789-90 (S.D.N.Y. 2011) (dismissing *Pujals*), *aff'd sub nom*, *Pujals* v. *Standard Chartered Bank*, 533 Fed. App'x 7 (2d Cir. 2013).

[3] On September 14, 2010, the Court granted the Bank's motion to dismiss two actions based on forum selection clauses and *forum non conveniens*. *Anwar*, 742 F. Supp. 2d 367, 375 (S.D.N.Y. 2010).

that the Bank "recommended Fairfield Sentry without conducting any diligence and that, if it had, the fraud would have been revealed" were insufficient to plead the strong inference of scienter required under the PSLRA. *Id.* at 371. The Court determined that the same alleged wrongdoing was sufficient to sustain certain state law claims under the more lenient pleading requirements applicable to them.

### 3. Additional Plaintiffs Filed a Flood of Cases Asserting State Law Claims Against the Bank Based on the Same Allegations of Misleading and Unsupported Investment Advice That Failed to Satisfy the PSLRA.

Following the Court's October 2010 decision, 67 additional plaintiffs filed 51 new actions against the Bank.[4] Each of those actions alleges the same wrongdoing as asserted in the earlier-filed SCB Cases, including allegations made in support of the now-dismissed federal securities fraud claims. Specifically, plaintiffs allege that the Bank induced them to invest in the Fairfield Funds based on investment advice that contained misrepresentations and omissions about the Fairfield Funds, the SSC strategy and BLMIS's role in executing the strategy. Plaintiffs further allege that the Bank recommended the Fairfield Funds as legitimate investments when it knew or should have known that the Fairfield Funds' reported returns from the strategy were "too good to be true." (Ex. A.)[5] Plaintiffs in the later-filed SCB Cases, however, knowingly couch their claims solely under Florida law, thus (like plaintiffs in *Maridom*, *Headway* and *Valladolid* before them) avoiding from the outset any scrutiny under the

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[4] Two additional cases transferred to this Court, *Leonardos* v. *Standard Chartered International (USA) Ltd.*, 10-cv-24430 and *Prionas Shipping Company Ltd.* v. *Standard Chartered International (USA) Ltd.*, No. 10-cv-24429, were voluntarily dismissed. (Dkt. No. 687.)

[5] Exhibit A identifies for each of the SCB Cases, including cases where federal securities fraud claims were asserted, the specific allegations that the Bank (i) induced plaintiffs' investments with misrepresentations or omissions; (ii) failed to disclose Madoff's role in executing Sentry's investment strategy; (iii) misrepresented the Fairfield Funds and the Bank's due diligence of those funds; and/or (iv) should have known that the Fairfield Funds' returns were too good to be true.

heightened pleading requirements of the PSLRA that the Court had ruled plaintiffs could not meet. The same law firm that pled a federal securities fraud claim on behalf of the plaintiff in *Lopez* (which was dismissed in *SCB I*) filed 41 of those new complaints on behalf of 53 plaintiffs.[6]

**B. The SCB Cases Satisfy Every Element of SLUSA and its Policy Objectives.**

Congress enacted SLUSA to prevent groups of plaintiffs from avoiding the PSLRA's limitations on federal securities litigation by seeking damages based solely on state law. *See Anwar*, 728 F. Supp. 2d at 398. In so doing, Congress "limit[ed] the availability of remedies under state law" in order to impose "national standards for securities class action lawsuits involving nationally traded securities," including groups of lawsuits brought by plaintiffs acting as a *de facto* class. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 87 & 88 n.13 (2006). SLUSA accomplishes its purpose by precluding state law causes of action where: (i) the action or actions being brought constitute a "covered class action" as defined in the statute; (ii) plaintiffs allege a "misrepresentation or omission of a material fact" or a manipulative or deceptive device; (iii) plaintiffs' claims involve the purchase or sale of "covered securities"; and (iv) the alleged misrepresentations, omissions and/or manipulative or deceptive devices are "in connection with" the purchase or sale of relevant covered securities. 15 U.S.C. § 78bb(f)(1). Due to its remedial purpose, courts employ a "presumption that Congress envisioned a broad construction" of the statute. *Dabit*, 547 U.S. at 86.

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[6] Among the later-filed cases is a second putative class action, styled *Caso* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-9196, which was filed in this District and consolidated with the SCB Cases in December 2010. The Court compelled the named plaintiff in *Caso* to individual arbitration in May 2012. (Dkt. Nos. 882, 1151.)

The SCB Cases are plainly precluded under SLUSA. The SCB Cases (i) make up a consolidated "group of lawsuits" with 75 plaintiffs seeking damages based upon state law that qualify as a "covered class action" under SLUSA; (ii) allege misrepresentations and/or omissions in the Bank's investment advice; (iii) involve purchases and sales of "covered securities" professedly by the Fairfield Funds and BLMIS; and (iv) allege that the Bank's investment advice was given "in connection with" plaintiffs' attempts to take an interest in those covered securities through the Fairfield Funds. The essence of plaintiffs' claims is that SCB's misleading and unsupported investment advice induced them to attempt to invest in the covered securities purchased and sold as part of the SSC strategy (through the Fairfield Funds) with the expectation of achieving future returns that were not realized. The claims against the Bank necessarily allege, necessarily involve, and rest on the covered securities transactions that BLMIS purported to execute for the Fairfield Funds. Thus, SLUSA applies. *Romano* v. *Kazacos*, 609 F.3d 512 (2d Cir. 2010).

Further, as this Court recently observed, "[t]he SLUSA issue is one in which the law has been evolving and [was] clarified recently by the Second Circuit." (9/29 Conf. Tr. at 10.) Since this Court's ruling on SLUSA in the *Anwar* Class Action, the Second Circuit has held expressly that SLUSA precludes claims alleging misrepresentations and/or omissions arising out of investments in feeder funds to BLMIS's SSC strategy. *In re Herald, Primeo & Thema Sec. Litig.*, 730 F.3d 112 (2d Cir. 2013) ("*Herald I*") *reh'g denied* 753 F.3d 110 (2d Cir. 2014) ("*Herald II*"). (*See also* Dkt. Nos. 1226, 1236, 1246 and 1276 (SCB's prior submissions on SLUSA's application in light of *Herald.*)) Finally, plaintiffs' claims here are based on alleged wrongdoing originally pled as federal securities fraud claims. Knowing that their allegations fail to meet the requirements of the PSLRA, plaintiffs have tried to avoid dismissal by filing

complaints asserting only state law claims. This is precisely what SLUSA says you cannot do—it is SLUSA's purpose "to negate the artful pleading by which certain plaintiffs evaded the dictates of the PSLRA." *Herald I*, 730 F.3d at 118.

**1. The 57 SCB Cases Are a "Group of Lawsuits" That Qualify as a "Covered Class Action" Under SLUSA.**

A "covered class action" for purposes of SLUSA includes "any group of lawsuits filed in or pending in the same court and involving common questions of law or fact," as long as "(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). Individual cases that are coordinated and/or consolidated in a multidistrict litigation constitute a "group of lawsuits" and thus a covered class action under SLUSA. *Markey* v. *Citigroup, Inc.*, No. 09 MD 2070 (SHS), 2013 WL 6728102, at *5 (S.D.N.Y. Dec. 20, 2013) (collecting cases); *Amorosa* v. *Ernst & Young LLP,* 682 F. Supp. 2d 351, 373–77 (S.D.N.Y. 2010) ("an action need not have been formally joined or consolidated with other actions in order to be a 'covered class action' and subject to SLUSA's preemption provision"); *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 246-47 (S.D.N.Y. 2004) (consolidation for pretrial purposes sufficient to qualify as a "group of lawsuits" under SLUSA).

The SCB Cases are a "group of lawsuits." First, the SCB Cases seek damages on behalf of 75 named plaintiffs. Second, the SCB Cases have been consolidated for pretrial purposes before this Court. (*See, e.g.*, Dkt. No. 282, 607.)[7] Third, the SCB Cases involve "the

[7] These cases also have been coordinated throughout pretrial proceedings. At plaintiffs' request, the Court appointed the Standard Chartered Plaintiffs' Steering Committee to, among other things, "initiate, coordinate and conduct all discovery on behalf of all plaintiffs," "[s]peak for all Standard Chartered Plaintiffs at pretrial proceedings and in response to any inquiries by the Court," and to "[n]egotiate and enter into stipulations on behalf of the Standard Chartered Plaintiffs . . . regarding this

same or substantially similar underlying events and operative facts"—*i.e.*, they all allege that the Bank induced them to invest in the Fairfield Funds based on unsupported investment advice that contained misrepresentations and/or omissions about the Fairfield Funds, the SSC strategy and BLMIS's role in executing that strategy. (Ex. A.) Therefore, there are "more than 50 actions pending in this district as a multidistrict litigation in which damages are sought for more than 50 people. It is plainly a covered class action which cannot be maintained in this or any state court." *In re Adelphia Commc'ns. Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529, 2010 WL 3528872, at *5 (S.D.N.Y. Aug. 30, 2010).

Plaintiffs contend that the SCB Cases are not a "group of lawsuits" because plaintiffs did not "voluntarily" join their lawsuits together. (*See* Dkt. No. 1223; 9/ 29 Conf. Tr. at 33-35.) But SLUSA does not require that a group of plaintiffs voluntarily band together. As has been recognized in this District, it is irrelevant that some SCB Cases are being handled by different lawyers, or were transferred to this Court by the JPML over objection:

> It is true that [plaintiff] did not purposefully direct his lawsuit to this Court, nor is his complaint a verbatim copy of the other complaints, nor is he represented by the same counsel as other plaintiffs. SLUSA, however, does not instruct the Court to consider any of these factors. . . . Instead, it directs the Court to consider whether the lawsuits proceeded "as a single action for any purpose."

*In re Citigroup Sec. Litig.*, 987 F. Supp. 2d 377, 388 (S.D.N.Y. 2013) (citations omitted); *see also* 15 U.S.C. § 78b(f)(5)(B) (group of lawsuits requires only that "damages are sought on behalf of more than 50 persons" and that cases "are joined, consolidated, or otherwise proceed as a single action for any purpose"). Indeed, SLUSA's remedial purpose would be undermined

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litigation." (Dkt. No. 602). At plaintiffs' request, the Steering Committee included counsel for the named plaintiff in the *Caso* putative class action. (Dkt. No. 739.)

completely if plaintiffs could evade it simply by engaging separate counsel and claiming lack of intent to "join."

**2. SLUSA's Second Requirement That Plaintiffs Allege "a Misrepresentation or Omission of a Material Fact" or the Use of "any Manipulative or Deceptive Device or Contrivance" Is Met Here.**

SLUSA applies to actions "alleging . . . a misrepresentation or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device." 15 U.S.C. § 78bb(f)(1). As set forth, *supra*, pp. 3-6, the gravamen of plaintiffs' claims is that the Bank's investment advice was misleading and unsupported by any due diligence, and contained misrepresentations and omissions of material fact. (Ex. A.)[8] In fact, plaintiffs consistently have attempted to frame the Bank's wrongdoing in terms of fraud. And plaintiffs are attempting now to double down on their fraud theory by advancing the same type of argument often advanced in securities fraud claims—namely, that the Bank induced them to invest in the Fairfield Funds in order to receive "kickbacks" from FGG. (9/12 Ltr. at 3.)

**3. The SCB Cases Involve Purchases and Sales of "Covered Securities."**

SLUSA also requires that plaintiffs' claims involve "a purchase or sale of covered securities." 15 U.S.C. § 78bb(f)(1)(A). They do—plaintiffs attempted to invest in covered securities through the Fairfield Funds.[9] For purposes of SLUSA, a "covered security is one traded nationally and listed on a regulated national exchange," *Dabit*, 547 U.S. at 85; *see also* 15

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[8] Plaintiffs label their claims in terms of a "breach of fiduciary duty, negligence and fraudulent and negligent misrepresentations and omissions of material fact," but all contend that the Bank wrongly "recommended that each of the SC Plaintiffs invest in [the Fairfield Funds]" which "were worthless because of Bernard Madoff's fraud." (9/12 Ltr. at 1.)

[9] In the Court's ruling on SLUSA in the *Anwar* Class Action, the Court had no occasion to consider whether investments in the Fairfield Funds were tantamount to investments in covered securities, because the defendants there "d[id] not argue that the Plaintiffs' investments . . . amount[ed] to 'covered securities' under SLUSA." *Id.* at 398.

U.S.C. § 77r(b)(1), and the relevant purchase or sale must have been made by or on behalf of someone other than the fraudster, *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1069 (2014) ("*Chadbourne*"). The Second Circuit has considered and held that investments in feeder funds to BLMIS's SSC strategy are sufficient to satisfy SLUSA's "covered securities" element. *Herald II*, 753 F.3d at 113; *Herald I*, 730 F.3d at 118-20.

In *Herald I*, the Second Circuit applied SLUSA to bar claims asserted by investors in feeder funds to BLMIS's SSC strategy because the alleged wrongdoing related to the covered securities transactions supposedly executed in connection with that strategy. 730 F.3d at 118-20 & n.7. Following *Herald I*, the Supreme Court held in *Chadbourne* that SLUSA's "covered securities" element was not satisfied in a case where the purported investments in covered securities only were made by and on behalf of the fraudster. *Chadbourne*, 134 S. Ct. at 1069. In denying a request for rehearing based on *Chadbourne*, the Second Circuit held that investors in Madoff feeder funds, unlike plaintiffs in *Chadbourne*, tried to purchase and sell covered securities. *Herald II*, 753 F.3d at 113.[10] Specifically, because "Madoff Securities . . . fraudulently induced attempted investments in covered securities, albeit through feeder funds (not alleged in the instant complaint as anything other than intermediaries)," plaintiffs "tried to take . . . an ownership position in the statutorily relevant securities," which triggers SLUSA. *Id.*

In short, where, as here, Madoff's victims "'attempted investments in covered securities, albeit through feeder funds,'" SLUSA's "covered securities" element is satisfied. *In re Harbinger Capital Partners Funds Inv. Litig.*, No. 12-CV-1244, 2014 WL 3694991, at *2

[10] In *Chadbourne*, plaintiffs' investments were not themselves "covered securities" and were not represented to be tied to any such securities. *Id.* at 1064; *see also Roland* v. *Green*, 675 F.3d 503, 522 (5th Cir. 2012) ("The CDs were debt assets that promised a fixed rate of return not tied to the success of any of SIB's purported investments . . . .") Thus, unlike here, no plaintiff had attempted to take any interest in covered securities by purchasing the investments at issue.

(S.D.N.Y. July 7, 2014) (applying *Herald II*); *see also Goodman* v. *AssetMark, Inc.*, No. 09-CV-5603, 2014 WL 5302962, at *5 (E.D.N.Y. Oct. 17, 2014) (applying *Herald II* to preclude breach of fiduciary duty claims alleging defendant provided unsupported and misleading investment advice related to covered securities, even though plaintiffs themselves did not directly purchase any covered securities).[11] It does not matter for SLUSA purposes that the Fairfield Funds purported to purchase and sell covered securities through BLMIS, rather than plaintiffs trading those securities themselves. "[I]t is enough that the fraud alleged 'coincide' with a [covered] securities transaction—whether by the plaintiff or by someone else." *Dabit*, 547 U.S. at 85 (SLUSA bars claims even where purchases or sales of covered securities were made by third parties and not plaintiffs).

**4. The SCB Cases Allege Misrepresentations and Omissions in the Bank's Investment Advice That Were Made "in Connection with" Purchases and Sales of Covered Securities.**

Finally, SLUSA requires that the Bank's alleged wrongdoing be "in connection with" the purchase or sale of covered securities. 15 U.S.C. § 78bb(f)(1)(A). The Second Circuit has articulated three tests that govern SLUSA's "in connection with" requirement. The first two tests apply to actions, like the SCB Cases, that are founded on allegedly misleading investment advice. Under these tests, set forth in *Romano* v. *Kazacos*, SLUSA's "in connection with" requirement is satisfied where (i) the advice allegedly induced an investment in covered

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[11] Plaintiffs' attempts to distinguish *Herald I* and *Herald II* on the facts are unavailing. *First*, plaintiffs' contention that the Bank is further removed from Madoff's fraud than plaintiffs in *Herald* is beside the point. (9/29 Conf. Tr. at 30-31.) The proximity of the *Herald* defendants' wrongdoing to Madoff's fraud had nothing to do with the Second Circuit's holding that plaintiffs had "tried to take . . . an ownership interest" in covered securities for purposes of SLUSA. *See Herald II*, 753 F.3d at 113. That is exactly what plaintiffs have done here. *Second*, plaintiffs' suggestion that the Fairfield Funds were more than a mere intermediary to BLMIS's SSC strategy (*Id.* (arguing Fairfield Funds not "a cursory pass[-]through entity")), which the feeder funders in *Herald II* were alleged to have been, 753 F.3d at 113, ignores the fact that plaintiffs here too allege the Fairfield Funds were a mere "funnel" to Madoff, *SCB I*, 745 F. Supp. 2d at 371-72.

securities, or (ii) plaintiffs' claims "necessarily allege," "necessarily involve," or "rest on" a subsequent purchase of covered securities. 609 F.3d at 522 (internal quotation marks omitted). The third test is set forth in the Second Circuit's recent *Herald I* decision and is not specific to actions based on allegedly misleading investment recommendations. Under the *Herald I* test, SLUSA's "in connection with" requirement is met if the alleged wrongdoing "relates to" purchases and sales of covered securities. *Herald I*, 730 F.3d at 119 & n.5. Plaintiffs' claims meet all of these tests.[12]

***Under Romano's Tests, the Bank's Allegedly Misleading Investment Advice Was "in Connection with" Covered Securities Transactions.*** In *Romano*, the plaintiffs asserted state law claims for negligence, breach of fiduciary duty, negligent misrepresentation, breach of contract and unfair and deceptive practices against Morgan Stanley & Co. ("Morgan Stanley"), alleging that Morgan Stanley gave misleading advice to plaintiffs concerning the sufficiency of their assets to retire early and take lump sum retirement benefits. After Morgan Stanley advised that they could retire, plaintiffs invested some of their retirement benefits in covered securities and lost money. *Romano*, 609 F.3d at 515-16. The *Romano* plaintiffs' claimed that Morgan Stanley knew or should have known that their retirement assets were not sustainable over the long term, but *did not* allege that Morgan Stanley recommended any of the covered securities that plaintiffs purchased. *Id.* at 515-17. The Second Circuit nevertheless held that Morgan Stanley's investment recommendations were "in connection with" the covered securities purchases, and plaintiffs' claims were barred under SLUSA. *Id.* at 523-24.

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[12] In this Court's prior SLUSA ruling in the *Anwar* Class Action, the Court had no occasion to apply these tests. The tests set forth in *Romano* govern application of SLUSA's "in connection with" requirement in the context of misleading investment recommendations, and the Court did not have the benefit of the *Herald* decisions, which the Second Circuit issued after its ruling.

In *Romano*, the Second Circuit applied two independent tests, both of which are also satisfied in the SCB Cases. Under the first test, the "in connection with" requirement is met where the challenged investment advice "somehow induced" a covered securities transaction. *Id.* at 522 (quotation marks and citations omitted). This test was satisfied in *Romano* because, although not expressly alleged, "[plaintiffs in *Romano*], in essence, assert[ed] that defendants fraudulently induced them to invest in securities with the expectation of achieving future returns that were not realized." *Id.* at 523.[13] Likewise here, plaintiffs in the SCB Cases (unlike plaintiffs in the *Anwar* Class Action), assert that they were induced to invest in the SSC strategy through the Fairfield Funds based on allegedly unsupported and misleading investment recommendations about the funds and BLMIS's role in executing the funds' supposed covered securities trading.[14]

The second test applied by the Second Circuit in *Romano* "is met where plaintiff's claims 'turn on injuries caused by acting on misleading investment advice'—that is, where plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities." 609 F.3d at 522 (citation omitted). That standard was satisfied in *Romano* because "the injury complained of resulted from the diminution in value of [plaintiffs'] investment accounts," which held the covered securities.[15] *Id.* at 522-24. Again, the same is true in the SCB

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[13] Key for the *Romano* Court was that "this was a string of events that were all intertwined." *Id.* at 524 (citation and internal quotation marks omitted). It was of no moment that eighteen months passed between the allegedly unsupported investment recommendation (to retire and take a lump sum benefit) and the purchase or sale of securities. *Id.*

[14] Plaintiffs further allege that the Bank represented the Fairfield Funds "were like a cash substitute" and were "risk reducers" for their portfolios. (*See, e.g., Lopez* Am. Compl. ¶¶ 25-26; 9/29 Conf. Tr. at 37.)

[15] The *Romano* plaintiffs characterized their losses as "employment damages" resulting from the lost wages they incurred due to Morgan Stanley's alleged advice to retire early. *Id.* at 522-23. This did not deter the Second Circuit from concluding that their claims were barred by SLUSA because it was "apparent . . . that the injury complained of resulted from the diminution in the value of [plaintiffs'] investment accounts. *Id.* at 524.

Cases—plaintiffs' alleged injuries resulted from the diminution of value of shares in the Fairfield Funds, nearly all of the assets of which were supposed to be invested in covered securities through the SSC strategy but were instead stolen by BLMIS.[16]

***Under the Test Set Forth in Herald, SCB's Alleged Wrongdoing Is Also "in Connection with" Covered Securities Transactions Because It "Relates to" Those Transactions.*** The Bank's alleged wrongdoing also "relates to" covered securities transactions. In *Herald*, investors in three Madoff feeder funds brought state law claims against two banks for allegedly aiding, abetting and failing to disclose Madoff's fraud. *Herald I*, 730 F.3d at 116-17. Plaintiffs argued that their claims were not barred by SLUSA because it was not appropriate to "elide their purchase of 'uncovered' interests in the foreign feeder funds with Madoff's 'downstream' transactions in covered securities." *Id.* at 118. The Second Circuit rejected plaintiffs' layers of separation argument, focusing instead on whether the attempted investments in the SSC strategy through feeder funds had any relation, beyond being an "extraneous detail," to the factual predicate of the defendants banks' alleged liability. *Id.* at 118-19. The Second Circuit held that because plaintiffs alleged that the defendants' wrongdoing "relate[ed] directly to Madoff's purported transactions in covered securities," the alleged wrongdoing was sufficiently "in connection with the purchase or sale of a covered security" to trigger SLUSA. *Id.* at 118-19 & n.5.

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[16] Plaintiffs' have attempted to distinguish *Romano* by arguing that *Romano* "could 'satisfy SLUSA's in connection with' requirement because [the retirees], in essence, assert[ed] that defendants fraudulently induced them to invest in securities with the expectation of achieving future returns that were not realized." (11/19/2013 Ltr. at 9 n.9.) But that description perfectly mirrors plaintiffs' uniform theory against SCB—namely, that the Bank's misrepresentations and omissions about Madoff's role and the Bank's due diligence induced plaintiffs to invest in the Fairfield Funds' SSC strategy (covered securities) with the expectation of future returns that were not realized.

Here too plaintiffs' allegations with the respect to the Bank relate directly to Madoff's purported transactions in covered securities—the SSC strategy. Plaintiffs allege a failure to disclose BLMIS's role in executing the SSC strategy, and that the Bank should have concluded that the Fairfield Funds' reported returns were too good to be true and could not have been generated from the SSC strategy. (Ex. A.)[17] As the Second Circuit has made clear, this is more than sufficient to satisfy SLUSA's "in connection with" requirement under *Herald.* 730 F.3d at 118-19 & n.5.

* * *

In sum, the SCB Cases are a covered class action that allege misrepresentations and omissions in the Bank's investment advice made in connection with plaintiffs' attempted investments in covered securities through the Fairfield Funds. As such, the SCB Cases are precluded by SLUSA. This Court already has held that plaintiffs' allegations of wrongdoing do not meet the PSLRA's heightened pleading requirements; therefore, the SCB Cases should be dismissed in their entirety.

## II. THE COURT SHOULD NOT GRANT PLAINTIFFS' REQUEST TO PREVENT THE BANK FROM MOVING FOR SUMMARY JUDGMENT.

The Bank's contemplated motion for summary judgment, if granted, would dispose entirely of the SCB Cases ripe for summary judgment. In addition, the Court's ruling would provide crucial guidance to the parties in the remaining actions on what, if any, plaintiff-specific issues remain for discovery and/or further consideration by the Court (there may be no

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[17] Among other things, plaintiffs allege the Fairfield Funds were "highly risky, if not a vehicle investing in an outright fraud" because "the Fairfield Sentry Fund was supposedly receiving returns from BLMIS that, over time, were substantially out of line with prevailing market trends in the types of securities in which the Fairfield Sentry Fund was supposedly investing (stocks included in the S&P 100 index and out-of-the-money puts and calls related to those stocks)." (Ex. A (listing cases making this or similar allegations that Fairfield Funds returns were too good to be true).)

need for further discovery or consideration other than to apply the Court's summary judgment rulings to the remaining SCB Cases). Critically, at minimum, the Court's ruling would make clear what factual issues remain in the SCB Cases, and the legal standard that governs any surviving claims, before the actions sent to this Court by the JPML are remanded to a transferor court in Florida or California for trial. Respectfully, the Bank submits that the Court's consideration of SCB's contemplated motion is necessary for the purpose of judicial economy and avoidance of inconsistent judgments, *see In re: Fairfield*, 655 F. Supp. 2d at 1353, and the Court should not deprive the Bank of the opportunity to make its motion under the Rule 56 of the Federal Rules of Civil Procedure.

The Court has permitted plaintiffs to pursue to date two types of claims: (1) that the Bank allegedly breached a common law duty by recommending an investment in the Fairfield Funds without "studying it sufficiently to become informed as to its nature, price, and financial prognosis" (the "Due Diligence Claims"), *SCB I*, 745 F. Supp. 2d at 376; *Anwar*, 826 F. Supp. 2d 578, 590 (S.D.N.Y. 2011); *Anwar*, 891 F. Supp. 2d 548, 557 (S.D.N.Y. 2012); and (2) that the Bank allegedly made a fraudulent or negligent misrepresentation by failing to disclose "that Madoff was actually executing the split-strike conversion strategy" (the "Omission Claims"). *SCB I*, 745 F. Supp. 2d 360 at 375-78. Eleven of the 57 SCB Cases have proceeded through full discovery on their Due Diligence Claims and Omission Claims and are ready for consideration pursuant to Rule 56. The parties in 42 other SCB Cases, all of which also assert Due Diligence Claims and/or Omission Claims, agreed to a Court-approved procedure to defer

plaintiff-specific discovery pending guidance from the Court's summary judgment rulings. (Dkt. No. 826; Dkt. No. 1193.)[18]

On August 29, 2014, SCB submitted a letter to the Court requesting a pre-motion conference to schedule briefing on the Bank's contemplated unified motion for summary judgment with respect to the 11 ripe cases. (Dkt. No. 1314.) SCB proposed to move for summary judgment on three grounds: (1) that the Due Diligence and Omission Claims of certain plaintiffs are time-barred by Florida's four-year statute of limitations; (2) that all of plaintiffs' Due Diligence Claims fail because plaintiffs cannot establish that the Bank conducted no due diligence or that the Bank otherwise breached its Florida common law duty to conduct due diligence; and (3) that plaintiffs' Omissions Claims fail because they cannot establish the elements of scienter, reliance or proximate cause.

In response, on September 12, 2014, plaintiffs submitted a 10-page, single-spaced letter seeking to preclude the Bank from filing its contemplated motion altogether. Plaintiffs' letter wholly ignores statute of limitations issues and devotes just a single paragraph to the Omission Claims. Rather, plaintiffs focus on the Due Diligence Claims, urging that there is "a plethora of evidence" that SCB "fail[ed] to conduct serious due diligence" or had an "utter lack of candor with its own clients," such that factual issues prevent summary judgment. (9/12 Ltr. at 1-2.) Plaintiffs' entire argument, however, is devoid of any relevant legal authority and is based on a false due diligence duty of plaintiffs' own creation. That expert created duty would have required the Bank to ferret out BLMIS's Ponzi scheme, a fraud that persisted without public

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[18] In so doing, the parties and the Court recognized that "judicial economy would best be served, if plaintiff-specific discovery was limited to a subset of actions, which actions would then be the subject of any dispositive motions, including any summary judgment motions, because the Court's rulings in those actions likely will make clear what (if any) plaintiff-specific issues remain for trial[.]" (Dkt. No. 826.)

detection for at least 20 years (until Bernard Madoff himself revealed it on December 11, 2008). That is not the duty set by Florida law, which is what controls here.

At the September 29, 2014 pre-motion conference, the Court requested that the Bank provide further briefing on SLUSA and respond to plaintiffs' September 12 letter in 25 pages. (9/12 Conf. Tr. at 47-50.) Plaintiffs have been given an opportunity to submit a 25-page reply letter. (*Id.* at 50-51.) Further, in an effort to resolve plaintiffs' "weaker claims" without the need for motion practice (*id.* at 4), the Court requested that the Bank identify for plaintiffs any claims subject to statute of limitations defenses so that the affected plaintiffs would have "an opportunity to examine [the Bank's] theory" and either "find a theory under which the statute" does not apply "or perhaps withdraw those claims on statute of limitations grounds." (*Id.* at 46.) The Bank did so, but plaintiffs declined to engage.

The SCB Cases should be disposed of on SLUSA grounds. In the event they are not, the Court should allow for proper briefing and full consideration of the three grounds on which the Bank intends to move for summary judgment. As the Court recognized during the September 29 conference, "[t]his is a very complicated case" that has proceeded through years of discovery and several important pretrial rulings. (*Id.* at 2-3.) Before 55 of the 57 SCB Cases are potentially remanded back to their original transferor courts for separate trials before multiple federal district judges, this Court should determine whether any triable issues remain, and, if so, which ones.[19]

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[19] Although plaintiffs have been afforded a full opportunity to address their "motion" to prevent summary judgment motion practice (with both an opening 10-page single spaced letter and a 25-page reply), the Bank has not been afforded the same opportunity to present the law and facts which entitle it to summary judgment. Fed. R. Civ. P. 56(a) (authorizing party to move on "each claim . . . or the part of each claim . . . on which summary judgment is sought") As the Supreme Court has recognized, summary judgment motion practice "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and

**A. Plaintiffs Have Refused To Withdraw Any Time-Barred Claims, Making Them Appropriate for Resolution on Summary Judgment.**

On October 2, 2014, the Bank identified for plaintiffs the claims in the 11 cases barred by Florida's statute of limitations, and the legal basis. (Oct. 2, 2014 Letter with attached chart, Ex. B.) Plaintiffs refused to withdraw those claims or to provide any theory as to why they are timely. (Oct. 6, 2014 email, Ex. C.)

Plaintiffs' Due Diligence and Omission Claims are all subject to a four-year statute of limitations period under Florida law. Fla. Stat. § 95.031; Fla. Stat. § 95.11.(3)(a) (four-year limitations period for actions founded on negligence); Fla. Stat. § 95.11.(3)(j) (four-year limitations period for actions founded on fraud); *Berg* v. *Wagner*, 935 So. 2d 100, 102 (Fla. Dist. Ct. App., 4th Dist. 2007) (four-year limitations period for breach of fiduciary duty claims). Plaintiffs in 8 of the 11 cases assert untimely Due Diligence Claims, and plaintiffs in 5 of the 11 cases assert untimely Omission Claims. The Bank's anticipated motion, if granted, would resolve all claims in 4 of the 11 cases, and limit claims in 4 others. Equally important, the Court's ruling will inform whether claims in the remaining 46 cases are also barred, and could substantially curtail deferred plaintiff-specific discovery.

**B. Plaintiffs Provide No Basis To Preclude the Bank's Summary Judgment Motion on the Due Diligence Claims.**

There is only one Florida common law duty to conduct due diligence on an investment before recommending it. Whether couched in terms of fiduciary duty, negligence or

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inexpensive determination of every action." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (citations omitted). "Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, a court has no power to prevent a party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greensheilds Sec. Inc.* v. *Lau*, 825 F.2d 647, 652 (2d Cir. 1987) (internal citations omitted)).

gross negligence claims, that duty is "to recommend an investment only after studying it sufficiently to become informed as to its nature, price, and financial prognosis." *Anwar*, 891 F. Supp. 2d at 557 (quoting *Ward* v. *Atlantic Sec. Bank*, 777 So.2d 1144, 1147 (Fla. Dist. Ct. App. 2001)). That duty is breached in the context of fraudulent investments only if plaintiffs can establish the Bank acted in bad faith or willful ignored obvious "red flags" of BLMIS's Ponzi scheme. *See In re Old Naples Sec., Inc.*, 343 B.R. 310, 323-24 (M.D. Fla. Bankr. 2006) (citing evidence, not expert opinions, establishing that certain red flags were obvious signs of fraud).

In their September 12 letter, plaintiffs substitute this legal standard—recognized numerous times by this Court in these proceedings—with one created by their own experts.[20] Plaintiffs tell this Court that the Bank owed a duty to conduct "rigorous" due diligence, which, according to their experts, required testing the plausibility of BLMIS's reported trading results,[21] gaining "reasonable assurance that the claimed assets actually existed,"[22] meeting with Madoff and others at his firm prior to April 2008,[23] and/or "investigat[ing] Sentry's . . . risks, including proper mitigation (satisfaction) of those risks." (9/12 Ltr. at 2-3, 5, 7, 9; 9/29 Conf. Tr. at 36.) But Florida law does not impose a duty to ferret out well-concealed fraud, and certainly does not

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[20] The Court explicitly recognized the relevant duty in *Anwar*, 891 F. Supp. 2d 548, 556 (S.D.N.Y. 2012), *Anwar*, 826 F. Supp. 2d 578, 590 (S.D.N.Y. 2011), and *SCB I*, 745 F. Supp. 2d at 376.

[21] There is no admissible evidence that the trading reported by BLMIS was implausible. None of plaintiffs' experts ever looked at BLMIS's reported trades.

[22] There is no dispute that the Bank obtained audited financial statements for the Fairfield Funds for each year plaintiffs invested, which showed billions of dollars of assets on the books. PwC signed off on each and every one of those statements, representing that its audit plan included "examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements," which provided PwC with "reasonable assurance" that Sentry actually possessed and correctly valued its assets. (*See* Plaintiffs' exhibits referenced in n.18 of their Sept. 12, 2014 letter.) There is no basis in Florida law to impose on the Bank a duty to redo the work of a Big Four auditor.

[23] The Bank's anticipated motion will also demonstrate that there is no dispute the Bank met with Madoff in April 2008 and did not uncover obvious signs of his well-concealed fraud. There is no evidence to suggest that meeting with Madoff earlier in time would have yielded a different result.

frame the duty as turning on whether, after the fact, "experts" armed with the benefit of hindsight can second guess the recommendation. *See Rich* v. *Wachovia Bank, N.A.*, 2010 U.S. Dist. LEXIS 59483, at *24 n.5 (S.D. Fla. Apr. 7, 2010) (under Florida law, banks have no due diligence duty to be "clairvoyant in [their] investment recommendations"). Indeed, as set forth in Exhibit D, most of the assertions plaintiffs make in their September 12 letter in an attempt to create material issues are wholly irrelevant to the grounds on which the Bank intends to move. Others in fact support the Bank's contemplated motion.

Plaintiffs here were permitted by this Court to proceed to discovery on their Due Diligence Claims based on the theory that the Bank conducted no due diligence. *SCB I*, 745 F. Supp. 2d at 376-77. Discovery has revealed that premise to be false. The Bank will demonstrate, based on undisputed evidence, that the Bank obtained information on the Fairfield Fund's nature, price and financial prognosis, and it made an informed and good faith judgment that the Fairfield Funds were what they appeared to be at the time—legitimate and desirable investments for clients, many of whom were clamoring for access to the SSC strategy. Moreover, there is no admissible evidence from which a jury could reasonably conclude that the Bank ignored obvious risks of Madoff's fraud.[24] Plaintiffs cannot prove their Due Diligence Claims as a matter of law.

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[24] Numerous courts have held, and plaintiffs' experts did not dispute, that the supposed "red flags" surrounding BLMIS and the SSC strategy were not obvious indicia that BLMIS was operating a Ponzi scheme. *See, e.g.*, *McBride* v. *KMPG Int'l*, 2014 WL 4063044, at *14 n.4 (Sup. Ct., N.Y Cnty. Aug. 15, 2014) (collecting cases); *see also Newman* v. *Family Mgmt. Corp.*, 530 F. App'x 21, 26 (2d Cir. 2013); *In re Tremont Sec. Law, State Law & Ins. Litig.*, 2013 WL 5179064, at *6 (S.D.N.Y. Sept. 16, 2013); *Prickett* v. *New York Life Ins. Co.*, 896 F. Supp. 2d 236, 246-47 (S.D.N.Y. 2012); *Meridian Horizon Fund, LP* v. *Tremont Grp. Holdings, Inc.*, 747 F. Supp. 2d 406, 413 (S.D.N.Y. 2010), *aff'd*, 487 Fed. App'x 636 (2d Cir. 2012); *SEC* v. *Cohmad Sec. Corp.*, 2010 WL 363844, *3-4 (S.D.N.Y. Feb. 2, 2010); *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 414 (S.D.N.Y. 2010); *In re Tremont Sec. Law, State Law and Ins. Litig.*, 703 F. Supp. 2d 362, 371 (S.D.N.Y. 2010); *SSR II, LLC* v. *John Hancock Life Ins. Co. (U.S.A.)*, 2012 WL 4513354, at *6 (Sup. Ct., N.Y. Cnty. Sept. 28, 2012); *Baker* v. *Andover Assocs.*

**C. Plaintiffs Provide No Basis To Preclude the Bank's Summary Judgment Motion on the Omission Claims.**

Plaintiffs' Omission Claims all fail for lack of evidence on the essential elements of those claims. Plaintiffs provide no basis on which to preclude the Bank's anticipated motion on this ground, and, if granted, the Bank's anticipated motion would resolve all Omission Claims in the 11 cases ripe for summary judgment.[25]

To prove their Omission Claims, plaintiffs must establish, among other elements, that the Bank omitted a material fact as part of its recommendations of the Fairfield Funds with the intention to induce reliance, and that plaintiffs would not have invested had that fact been disclosed. *See Ward*, 777 So.2d at 1146 (fraud claim); *SCB I*, 745 F. Supp. 2d at 372 (citing *Jaffe* v. *Bank of Am., N.A.*, 667 F. Supp. 2d 1299, 1319 (S.D. Fla. 2009) (negligent misrepresentation have the same elements except no actual knowledge of falsity required).) As implicit from the silence in plaintiffs' September 12 letter, discovery has revealed no evidence that the Bank intended to induce anyone to invest by omitting information about BLMIS's role in the Fairfield Funds. That alone is fatal. Moreover, if given the opportunity, the Bank will establish through undisputed evidence that BLMIS's role in the Fairfield Funds was either

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*Mgmt. Corp.*, 2009 WL 7400085, at *20 (N.Y. Sup. Ct., Westchester Cnty. Nov. 30, 2009). Moreover, the proffered recollection from former Bank "salesman" Sebastian Gonzalez, who was never identified as a potential witness in the SCB Cases, cannot create a triable issue. Gonzalez's declaration was obtained and disclosed in violation of the Rule 26 of the Federal Rules of Civil Procedure and its contents are inadmissible under the Federal Rules of Evidence. *See Litton Sys., Inc.* v. *Am. Tel. & Tel. Co.*, 700 F.2d 785, 816 (2d Cir. 1983) (holding employee's out-of-court statement summarizing what other employees said does not "bring the events [the declarant] summarized within the scope of his agency or employment under 801(d)(2)(D)" (internal quotation marks omitted)); *Thomas* v. *Stone Container Corp.*, 922 F. Supp. 950, 957 (S.D.N.Y. 1996) ("[O]ffice . . . gossip does not become admissible simply because it is put into the mouth of someone whose statements are not subject to hearsay objection.").

[25] In any event, the Court's decision would provide guidance with respect to deferred plaintiff-specific discovery for the 46 other SCB Cases.

(i) adequately disclosed through private placement memoranda, marketing materials or other publicly available information; or (ii) would not have altered plaintiffs' decisions to invest.[26]

**CONCLUSION**

For the foregoing reasons, the Court should dismiss the SCB Cases pursuant to SLUSA. To the extent that the Court does not dismiss all claims, the Bank should be permitted to file a unified motion for summary judgment following the procedure set forth in Rule 56 of the Federal Rules of Civil Procedure and the Local Rules of this District.

Respectfully submitted,

Sharon Nelles 10/5

Sharon L. Nelles

(Attachments)

cc: Standard Chartered Plaintiffs' Steering Committee (by E-mail)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by Standard Chartered Defendants.

**SO ORDERED.**

11-4-14
DATE

VICTOR MARRERO, U.S.D.J.

[26] Rather than confront these fundamental deficiencies in the evidence, plaintiffs contend only that certain private placement memoranda were "false and misleading." (9/12 Ltr. at 10.) Even if correct, this would not preclude summary judgment where disclosures were made to plaintiffs elsewhere, or where the omitted facts would not have altered plaintiffs' decision to invest. With respect to plaintiffs' belated claim that the Bank "did not disclose the highly material fact that it received half of Fairfield'smanagement fee for recommending investments in Sentry," (*id.*), only one plaintiff ever pled a fraud or negligent misrepresentation claim based on the nondisclosure of fees, and the Court promptly dismissed that claim as a matter of law. *Anwar*, 286 F.R.D. 258, 260 (S.D.N.Y. 2012) ("Barbachano's allegation that Standard Chartered engaged in fraudulent conduct due to its receipt of 'trailer fees' is the sort of 'generalized motive . . . which could be imputed to almost any bank' and is therefore not sufficiently concrete to serve as a foundation for inferring fraudulent intent." (citation omitted)).