UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.* v. FAIRFIELD GREENWICH LIMITED, *et al.*	:	Master File No. 09-cv-0118 (VM) (Bhatia) & (Tradewaves)
This Document Relates to: *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.*, No. 09-CV-2410; *Tradewaves Ltd., et al. v. Standard Chartered International (USA) Ltd., et al.*, No. 09-CV-9423	:	

BHATIA AND TRADEWAVES PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO STANDARD CHARTERED'S MOTION TO DISMISS

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Plaintiffs Bhatia and Tradewaves (collectively, "Plaintiffs")[1] respectfully submit this unified memorandum of law in opposition to the motion to dismiss their respective Complaints[2] and the supporting memorandum of law (the "Memo" and collectively with the motion to dismiss, the "Motion") [Dkt. Nos. 387, 400] filed by Standard Chartered International (USA) Ltd. ("SCI") and Standard Chartered PLC ("SC PLC" and collectively with SCI, "Standard Chartered").[3]

PRELIMINARY STATEMENT

Bhatia and Tradewaves placed their trust – and significant sums of money – with Standard Chartered.[4] As their investment advisor, Standard Chartered recommended that Bhatia and Tradewaves invest in Fairfield Sentry, Ltd. ("Fairfield"). Standard Chartered said it had conducted extensive due diligence on Fairfield. In selling this recommendation to address the investors' goals of a low-risk, long-term investment strategy, Standard Chartered's relationship manager(s) stated that Fairfield was a "cash substitute" that had achieved "mythical status" with a history of stable and steady returns with low volatility.

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1 The "Bhatia" plaintiffs are Jitendra Bhatia, Gopal Bhatia, Kishanchand Bhatia, Jayshree Bhatia and Mandakini Gajaria. The "Tradewaves" plaintiffs are Tradewaves Ltd., Parasram Daryani, Neelam P. Daryani, Vikas P. Daryani, Nikesh P. Daryani, Ashokkumar Damodardas Raipancholia, Dilip Damodardas Raipancholia, Rajeshkumar Damodardas Raipancholia, Kishu Nathurmal Uttamchandani, Prerna Vinod Uttamchandani, Rajendrakumar Patel, Vandna Patel, Arjan Mohandas Bhatia, Kishin Mohandas Bhatia, Suresh M. Bhatia, Bharat Mohandas, and Aarvee Ltd.

2 This response is unified as to common issues and particularized as to individual ones. The "Complaints" are the Amended Complaint filed by Bhatia on September 18, 2009, Case No. 09-cv-2410 ("Bhatia Compl.") and the Complaint filed by Tradewaves on November 12, 2009, Case No. 09-cv-9423 ("Tradewaves Compl.").

3 In its Memo, Standard Chartered incorporates by reference the Memorandum of Law of Standard Chartered Bank International (Americas) Ltd., SCI, Standard Chartered Bank and SC PLC in Support of Their Motion to Dismiss Plaintiffs' Complaints [Dkt. No. 385] that relates to the complaints filed by Headway Investment Corp., Ricardo Lopez, Maridom Ltd., and Maria Akriby Valladolid (collectively, the "Other SC Plaintiffs"). When referenced herein, this document will be referred to as the "Headway Memo." Plaintiffs incorporate the arguments on common or other relevant issues made by the Other SC Plaintiffs in opposition to the Headway Memo.

4 With the exception of one account, when the Plaintiffs opened their investment accounts, Standard Chartered was known as American Express Bank Ltd. ("AEB"). SCI is successor in interest and name to AEB. SC PLC is the ultimate parent of SCI. Bhatia Compl. ¶¶ 20-22, 38-43; Tradewaves Compl. ¶¶ 33-35, 55-60.

Standard Chartered also told Plaintiffs that, notwithstanding the closed-end nature of Fairfield, as customers of Standard Chartered, their money would be accepted. In truth, however, Standard Chartered had an agreement to distribute shares in Fairfield, a fact not disclosed to Bhatia and Tradewaves until after Bernard Madoff was arrested.[5] Although the terms of that agreement are not yet known, Standard Chartered presumably was paid handsomely for driving investors to the fund.

Over the years, Standard Chartered repeatedly urged Bhatia and Tradewaves to remain invested in Fairfield. When confronted by Plaintiffs after news of the Madoff scandal broke, Standard Chartered admitted: (a) it never conducted any due diligence on Fairfield; and (b) it knew (and didn't disclose) that Bernard L. Madoff Investment Securities LLC ("BMIS") was both the sub-custodian of 95% of Fairfield's assets and the executing broker for Fairfield.

Bhatia and Tradewaves weren't the only unwitting investors in so-called Madoff feeder funds, nor were they the only investors harmed by Standard Chartered's investment advice, as evidenced by the Other SC Plaintiffs' cases. The above-captioned consolidated proceedings involve numerous suits and potential class actions against Fairfield and Standard Chartered that, as Standard Chartered has acknowledged, share a "common factual backdrop" involving "overlapping allegations, witnesses, and evidence."[6]

In considering the Motion, the Court is faced with one overarching question:

> Whether Bhatia and Tradewaves should be permitted to take discovery and prove to this Court that Standard Chartered is responsible for its own bad acts in connection with a fraudulent scheme that originated in New York?

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[5] *See* Declaration of Harish Rupani (the "Rupani Decl.") Ex. B: June 19, 2009 letter from Bharat Vijayan (described in Tradewaves Compl. ¶ 71) ("AEB had entered into a contract to distribute the Fund").

[6] *See* Declaration of William M. O'Connor, Esq. (the "O'Connor Decl.") Ex. A: Standard Chartered Defendants' Opposition to Request of Headway Investment Corporation to "Sever" Certain Claims ("SC's Memo re Severing Claims"), at pp. 2, 5 (filed before the Judicial Panel on Multidistrict Litigation, *In re Fairfield Greenwich Group Securities Litigation*, MDL No. 2088); *In re Fairfield Group Securities Litigation*, 655 F.Supp.2d 1352 (U.S. Jud. Pan. Mult. Lit. 2009).

In its Motion, Standard Chartered obfuscates the issue by asking the Court to resolve disputed factual issues based on its own interpretation of documents outside the Complaints, raising an array of legal issues, and ignoring the plausible, well-pled allegations of the Complaints. As discussed below, each argument in the Motion should be rejected.[7] Bhatia and Tradewaves respectfully request that the Court deny the Motion and set a discovery schedule, so that they may begin the process of obtaining the evidence necessary to demonstrate Standard Chartered's liability. To the extent the Court is inclined to grant the Motion, Plaintiffs respectfully request an opportunity to file a motion for leave to amend under Rule 15.[8]

ARGUMENT

I. STANDARD CHARTERED'S EXTRANEOUS MATERIALS ARE IMPROPER

A. Standard Chartered's Submission of Documents Outside the Complaints Is Improper and These Materials Should Not Be Considered

In support of its Motion, Standard Chartered offers a series of documents through their attorney and Bharat Vijayan, a Senior Director of Standard Chartered Bank. As a preliminary matter, the attorney does not state the requisite foundational support to admit the documents into the record at any stage. Similarly, Mr. Vijayan was not the relationship manager for the Bhatia and Tradewaves accounts and thus lacks personal knowledge. Mr. Vijayan is the head of a unit created by Standard Chartered only after Madoff's arrest.[9] Mr. Vijayan does not know whether any of the materials were actually sent to or received by Plaintiffs, which is of utmost importance

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[7] Based on new information presented by the Motion and subsequently confirmed, namely that SCI is an "agreement corporation" acting like an Edge Act corporation, Bhatia and Tradewaves stipulate to the dismissal of the Third Claim in each of the Complaints asserting rescission under the Investment Advisers Act. Also, Tradewaves stipulates to the dismissal of its Eighth Claim for specific performance in the Tradewaves Complaint, as that claim was inadvertently included based on a scrivener's error.

[8] Fed. R. Civ. P. 15(a)(2) (leave to amend should be "freely" granted "when justice so requires"). *See, e.g.*, *Plymouth County Retirement Ass'n v. Schroeder*, 576 F.Supp.2d 360, 384 (E.D.N.Y. 2008) (granting leave to replead Section 10(b) and Rule 10b-5 claims).

[9] Declaration of Bharat Vijayan (the "Vijayan Decl.") ¶ 5.

since Bhatia and Tradewaves do not recall receiving many of the documents.[10] Such documents should not be considered on evidentiary grounds because they are not offered by witnesses with personal knowledge of the facts set forth therein and the circumstances of the subject transactions.[11]

When deciding a Rule 12 motion, "a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference . . . ."[12] However, a court may consider documents not incorporated by reference but on which the "plaintiffs relied on in bringing suit *and* that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit."[13] The Second Circuit further stresses "that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough."[14] Also, even if a document is integral to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document; moreover, it must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.[15]

Here, Bhatia and Tradewaves dispute the validity and enforceability of various documents. For example, the "Original Services Agreement" and "Amended Services Agreement" issued by SCI's predecessor, AEB, have materially different terms than the

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10 Rupani Decl., ¶¶ 6-8; Declaration of Jitendra Bhatia (the "Bhatia Decl."), ¶¶ 6-8.

11 To the extent Standard Chartered requests that this Court take judicial notice under Fed.R.Evid. 201 of facts that are subject to reasonable dispute, Bhatia and Tradewaves object to such requests as improper and incorporate by reference the argument(s) on this point made by the Other SC Plaintiffs in opposition to the Headway Memo.

12 *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

13 *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F.Supp.2d 210, 217 (S.D.N.Y. 2008) (emphasis added). (emphasis added).

14 *Chambers v. Time Warner Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (citation omitted).

15 *Official Comm. Of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, L.L.P.*, 322 F.3d 147, 160, n.7 (2d Cir. 2003)) ("[O]ur review is limited to *undisputed* documents, such as a written contract attached to, or incorporated by reference in, the complaint.") (emphasis added).

"T&Cs," particularly where the Original Services Agreement and Amended Services Agreement include "Liabilities and Indemnities" clauses that do not exclude even ordinary negligence.[16] Thus, the only document supplied by Standard Chartered that purportedly limits liability to gross negligence and willful default is the T&Cs. Because this document is disputed, it should not be considered on a motion to dismiss.[17]

The Plaintiffs did not accept or sign the T&Cs and the Tradewaves Plaintiffs had not previously seen the T&Cs.[18] Also, Plaintiffs Prerna Uttamchandani and Kishin Nathurmal Uttamchandani were provided with a completely different document titled "Client Agreement" (not presented by Standard Chartered) with terms materially different than the T&Cs.[19] Thus, because there are questions about which documents were received and/or accepted by Bhatia and Tradewaves, none of the documents should be considered with the Motion.

Even if Standard Chartered could establish that the T&Cs were sent and received by Bhatia and Tradewaves (something that it hasn't done), the T&Cs are lengthy and do not highlight the material changes in terms from the prior terms and conditions governing the accounts. For example, a forum selection clause printed in tiny font, virtually undistinguishable, and not noticeable is not reasonably communicated.[20] Also, the inclusion of a "change-in-terms" provision in a form document does not automatically give Standard Chartered the right to

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16 "Original Services Agreement" means the American Express Bank Ltd. Private Banking Services Agreement, an undated document, which Standard Chartered asserts "originally applied to eleven of the plaintiffs' twelve accounts." "Amended Services Agreement" means the American Express Bank Ltd. Private Banking Services Agreement, an undated document, which Standard Chartered argues amended the Original Services Agreement in September 2006. "T&Cs" means the Standard Chartered Private Bank General Terms and Conditions, dated "Revised August 2008," which Standard Chartered asserts "became effective in the fall of 2008," "on or about October 3, 2008," and which Standard Chartered argues governs all of Plaintiffs' accounts. *See* Vijayan Decl., ¶ 15, Exs. O, ¶ 16, Ex. P, and ¶¶ 6, 18-21, Exs. A, Q, respectively.

17 *See Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

18 Rupani Decl., ¶ 8; Bhatia Decl., ¶ 9.

19 Tradewaves Compl. ¶ 89.

20 *See Oxman v. Amoroso*, 172 Misc.2d 773, 780, (NY City Court 1997) (invalidating a forum selection clause "in small and undistinguishable print"); *Lerner v. Karageorgis Lines, Inc.*, 66 N.Y.2d 479 (1985) (consumer contracts in New York must be in 10 point type to be enforceable).

unilaterally add new terms that materially change the rights of Bhatia and Tradewaves.[21] Moreover, such "change-in-terms" provisions are restricted to prospective modifications, not retroactive modifications.[22]

The T&Cs purportedly became effective in October 2008. In other words, after years of negligent, reckless, and fraudulent conduct, Standard Chartered sought to unilaterally change material terms between the parties by issuing a 57-page document, printed in miniscule type, weeks before the worldwide announcement of Madoff's arrest. Bhatia and Tradewaves are entitled to discovery on the circumstances under which Standard Chartered unilaterally issued the T&Cs, particularly in light of the timing of the T&Cs and Standard Chartered's creation of a special unit to deal with Madoff-related issues.

Even if the Court were to find that the T&Cs are relevant and applicable, discovery is appropriate to determine the precise terms of any "agreements" between Standard Chartered and Plaintiffs. The exculpatory clauses relied upon by Standard Chartered should not bar Plaintiffs' claims on a Rule 12 motion because the terms in the series of documents presented by Standard Chartered contain conflicting and inconsistent terms, and are not clear and unambiguous. Moreover, because the "law looks with disfavor upon agreements intended to absolve [a party] from the consequences of his [wrongdoing]," a release which purports to excuse a party from responsibility for misconduct is subject to the "closest of judicial scrutiny."[23] Given the ambiguous and inconsistent provisions found in the documents, the exculpatory provisions relied

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21 *See, e.g., Stone v. Golden Wexler & Sarnese, P.C.*, 341 F.Supp. 2d 189, 197-198 (E.D.N.Y. 2004) (applying Virginia law and finding that change-in-terms clause included by bank in customer agreement did not authorize bank to add an arbitration clause to the contract).

22 *See, e.g., Olson v. McKesson Corp.*, 2006 WL 2355393, at *2 (D. Ariz. Aug. 14, 2006) (citing Restatement (Second) of Contracts § 203 (1981)) (finding that no rational person would agree to permit unilateral retroactive modifications and any such agreement would be illusory because it would lack consideration).

23 *Golden Pacific Bancorp v. FDIC*, 273 F.3d 273, 514 (2d Cir. 2001) (quoting *Abramowitz v. N.Y. Univ. Dental Ctr. Coll. of Dentistry*, 494 N.Y.S.2d 721, 723, 110 A.D.2d 343 (2d Dep't 1985)); *see also Commercial Union Insurance Company v. Blue Water Yacht Club Association*, 289 F. Supp. 2d 337, 341-342 (E.D.N.Y. 2003) (denying motion to dismiss and construing ambiguities against drafter/movant).

upon by Standard Chartered do not meet the clear and unequivocal standard needed for enforcing exculpatory provisions under New York law.

There are also issues with the Fairfield documents presented by Standard Chartered. For example, the Fairfield Sentry Subscription Agreement for Account #*****017 is not properly executed.[24] In addition, Standard Chartered does not identify which version(s) of the two Fairfield Private Placement Memoranda were purportedly provided to each Plaintiff, receipt of which all Plaintiffs steadfastly deny.[25] Therefore, it is not clear which document, if any, applies to the various accounts, and Plaintiffs dispute the applicability of these documents. In *Azzolini v. Marriott International, Inc.*, such disputed applicability of a submitted document caused the District Court to reject its consideration when deciding a motion to dismiss.[26] This Court should do the same.

B. Alternatively, the Court Should Convert the Motion to a Rule 56 Motion and Permit Discovery and the Submission of All Relevant Evidence

If the Court is inclined to consider the documents at this early stage, the Court must convert the Motion into a summary judgment motion and afford Bhatia and Tradewaves the opportunity to conduct discovery.[27] When a court is presented with matters outside the pleadings and elects not to exclude the materials, "the court [is] obligated to convert the motion to one for summary judgment and give the parties an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56."[28] "This conversion

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[24] Vijayan Decl., ¶ 22, Ex. T.

[25] Rupani Decl., ¶ 7; Bhatia Decl., ¶¶ 7-8. Exhibit EE to the Vijayan Decl. is the Fairfield Private Placement Memorandum, dated July 1, 2003 (the "7/1/03 PPM") and Exhibit FF is the Fairfield Private Placement Memorandum, dated Oct. 1, 2004 (the "10/1/04 PPM," and together with the 7/1/03 PPM, the "PPMs").

[26] 417 F.Supp.2d 243, 246 (S.D.N.Y. 2005).

[27] *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006) (conversion ensures "a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it").

[28] *Chambers*, 282 F.3d at 154 (citations omitted). *See also* Fed. R. Civ. P. 12(d), 56(f).

requirement is 'strictly enforced' whenever a district court considers extra-pleading material in ruling on a motion to dismiss."[29]

As indicated by the affidavits submitted herewith, Bhatia and Tradewaves need discovery in order to present evidence essential to their opposition to the Motion under a summary judgment standard.[30] Accordingly, if the Court elects to consider Standard Chartered's extra-pleading materials, a ruling on the Motion should be deferred and a discovery schedule set.[31]

II. PLAINTIFFS' CLAIMS ARE PROPERLY BEFORE THIS COURT

A. The Claims of Bhatia and Tradewaves Should Be Litigated in This Court, Not Dismissed under the Doctrine of *Forum Non Conveniens*

1. Standard Chartered is estopped from raising its *forum non conveniens* argument.

Standard Chartered already conceded, and the U.S. Judicial Panel on Multidistrict Litigation (the "JPML") already determined, that this Court is an appropriate forum. Thus, Standard Chartered is estopped from making its *forum non conveniens* argument. Specifically, in opposing Headway Investment Corp.'s ("Headway") request to sever its claims against Standard Chartered from the claims raised in *Anwar* and *Bhatia*, Standard Chartered argued:

- In short, these actions involve overlapping allegations, witnesses, and evidence. "Severing" the Standard Chartered claims from one of these actions will merely create a procedural mess and piecemeal litigation.
- *Bhatia*, although it includes some distinct claims against Standard Chartered defendants, raises the same types of claims and allegations as *Anwar*.
- *Anwar*, *Bhatia* and *Headway* indisputably share a common factual backdrop . . . .

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[29] *Id*. at 154-55 (quoting *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000)) ("[W]hen a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record. In contrast, on summary judgment the court is required to consider all relevant, admissible evidence submitted by the parties and contained in "pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits . . . ." Fed. R. Civ. P. 56(c).").

[30] *See, e.g.*, O'Connor Decl., ¶¶ 7-11; Rupani Decl., ¶¶ 9, 15; Bhatia Decl., ¶¶ 10, 14.

[31] *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 69-70 (2d Cir. 2008) (holding "plaintiffs should have been given a reasonable opportunity to meet facts outside the pleadings" and grant of summary judgment was improper).

- Moreover, not only will the Standard Chartered defendants be subject to the same discovery from plaintiffs in *Bhatia* and *Headway*, the Standard Chartered defendants will require discovery from the Fairfield defendants in both cases. The role of the Fairfield defendants is central to the Standard Chartered defendants' defenses in *Headway* (and in *Bhatia*).

- Such discovery should be conducted in a coordinated fashion, overseen by a single court, in order to prevent duplication and avoid the possibility of conflicting pretrial rulings. Transfer of these claims for pretrial purposes will serve the convenience of the parties and promote the just and efficient conduct of the actions.

- Where, as here, the same alleged fraud or wrongdoing permeates multiple actions, however, centralization is appropriate regardless of whether the actions involve separate and individualized facts.[32]

The JPML agreed with Standard Chartered and transferred *Headway* to this Court.[33] Similarly, in transferring the *Valladolid, Lopez, and Maridom* actions against Standard Chartered, the JPML's Transfer Order found that this district was a proper forum "for actions arising out of investments in Fairfield Greenwich Group funds . . . ."[34]

Judicial estoppel "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [the party] in a prior legal proceeding."[35] Here, it is clear that Standard Chartered is taking a position that is contrary to its position before the JPML, a position the JPML adopted.[36] Indeed, Standard Chartered specifically used the *Bhatia*

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[32] O'Connor Decl., Ex. A: SC's Memo re Severing Claims, at pp. 2, 3, 5, 6, 8 (citations omitted).

[33] *In re Fairfield Greenwich Group Sec. Litig.*, 655 F.Supp.2d 1352, 1353 (U.S.Jud.Pan.Mult.Lit. 2009) ("we find that these actions involve common questions of fact"; permitting the litigation to proceed in this Court "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation"; and this district is a proper forum "because (1) parties, witnesses and documents are likely located in the New York vicinity, and (2) most responding parties agree that the New York district is a suitable transferee forum.").

[34] *In re Fairfield Greenwich Group Securities Litigation*, MDL No. 2088, Transfer Order (February 2, 2010) (re Valladolid, Lopez and Maridom). In addition to these actions, two new cases against Standard Chartered were recently transferred by the JPML to this Court for consolidation with these proceedings. *In re Fairfield Greenwich Group Securities Litigation*, Conditional Transfer Order (CTO-3) (April 15, 2010) (re *Carlos Carrillo v. Standard Chartered International (Americas) Ltd., et al.*, S.D. Florida, C.A. No. 1:10-20762, *Ricardo Almiron v. Standard Chartered International (Americas) ltd., et al.*, S.D. Florida, C.A. No. 1:10-20763).

[35] *Bates v. Long Island R.R.*, 997 F.2d 1028, 1037 (2d Cir. 1993).

[36] *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999) ("A party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner.").

case as a means to demonstrate the need to transfer *Headway* to this Court. It cannot then claim that Bhatia and Tradewaves should not be before this Court.

2. A *forum non conveniens* analysis favors keeping the Complaints before this Court.

Even if Standard Chartered is not estopped from making a *forum non conveniens* argument, its prior statements to the JPML belie its current argument. Courts in the Second Circuit apply a three-part test to analyze a *forum non conveniens* argument: (1) the degree of deference that should be accorded the plaintiff's choice of forum; (2) whether an adequate and available alternative forum exists; and (3) the appropriateness of litigating the action in the plaintiff's choice of forum, which is assessed by balancing the private interests of the litigants and the public interest concerns of the Court.[37]

First, although it is true that foreign plaintiffs are not accorded the same degree of deference as American plaintiffs, this Court has found that "where there are legitimate reasons for bringing suit in this jurisdiction, foreign plaintiffs' choice of forum may still be entitled to deference."[38] Standard Chartered already acknowledged that these cases bear a connection to the other litigation pending before this Court.[39] Moreover, Standard Chartered's prior statements to the JPML are consistent with at least one decision in this district denying a motion to dismiss because the convenience of trying the claims of the foreign plaintiff in conjunction with the other related cases warranted rejection of the *forum non conveniens* argument.[40]

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[37] *See, e.g., Terra Securities ASA Konkursbo v. Citigroup, Inc.*, --- F.Supp.2d ---, 2010 WL 546970, *7 (S.D.N.Y. Feb. 17, 2010) (Marerro, J.) ("*Terra Securities*") (citing *Norse Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2004) and *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001)).

[38] *Terra Securities*, 2010 WL 546970, at *8.

[39] O'Connor Decl., Ex. A: SC's Memo re Severing Claims, at p. 5 ("*Anwar*, *Bhatia* and *Headway* indisputably share a common factual backdrop . . . .").

[40] *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F.Supp.2d 348, 370 (S.D.N.Y. 2002).

The actions filed by Bhatia and Tradewaves were not brought here to gain a tactical forum-shopping advantage. Rather, as this Court found in connection with consolidating the various actions, these cases are based on "the same or substantially similar underlying events and operative facts" as the other litigation consolidated before this Court.[41] Moreover, by using *Bhatia* as a basis for consolidating *Headway* before this Court, Standard Chartered impliedly acknowledged that the choice of forum by Bhatia and Tradewaves is entitled to some deference.[42] The JPML agreed.[43]

Second, although Singapore may be an alternative and adequate forum, given the centralized litigation before this Court concerning actions arising out of investments in the Fairfield Greenwich Group funds, a Singapore court could dismiss on *forum non conveniens* grounds.[44] In addition, a Singapore has discretion to deny service of legal process on a defendant outside of Singapore.[45] In that regard, it is noteworthy that, unlike the vast majority of defendants moving to dismiss on *forum non conveniens* grounds, Standard Chartered has not represented that it would consent to service of process in Singapore.

Third, courts may disturb a plaintiff's choice of forum "only where the balance of private and public interest considerations 'strongly' favors the moving defendant."[46] In *Gulf Oil Corp. v. Gilbert*, the Supreme Court identified a number of private and public interest factors that may be considered.[47] Some of those factors strongly favor keeping the litigation in this Court:

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41 *See* Order, entered May 6, 2009 (consolidating *Bhatia*) [Dkt. No. 122] and Order, entered December 10, 2009 (consolidating *Tradewaves*) [Dkt. No. 308].

42 O'Connor Decl., Ex. A: SC's Memo re Severing Claims, at p. 2.

43 *In re Fairfield Greenwich Group Sec. Litig.*, 655 F.Supp.2d at 1353 (finding that "most responding parties agree that the New York district is a suitable transferee forum").

44 Declaration of GOH Phai Cheng, S.C. ("Phai Cheng Decl.") ¶¶ 13-16.

45 Phai Cheng Decl. ¶ 11.

46 *Terra Securities*, 2010 WL 546970, at *11 (citations omitted).

47 330 U.S. 501, 508-09 (1947).

Ease of access to evidence: Standard Chartered already identified the Fairfield entities as central to its defenses. Discovery from the Fairfield entities will be readily accessible through these proceedings. Also, Standard Chartered's headquarters is in New York. On the other hand, transporting the Fairfield entities and other witnesses from New York to Singapore would prove costly. Moreover, although some witnesses and documentary evidence are in Dubai and Singapore, there is no reason to believe, particularly in the context of these consolidated proceedings, that more of the evidence will be located in Singapore than anywhere else. In this age of electronic databases, the location of documentary evidence is of less importance.[48]

It is not uncommon in international litigation for documents or witnesses to be located abroad. This Court has determined that the Hague Convention on the Taking of Evidence Abroad, to which Singapore is a signatory, is an adequate means to compel documents and witness testimony in this country.[49] Similarly, this Court has held that "the use of international letters rogatory is a viable alternative to forum non conveniens dismissal."[50]

Lack of compulsory process for unwilling witnesses: Courts in Singapore will not compel unwilling witnesses who do not reside in Singapore to appear.[51] A failure to call a necessary witness may result in the court drawing an adverse inference.[52] In that potential witnesses, such as Messrs. Menon, Mittal, Holmes, reside outside of Singapore, Plaintiffs would be prejudiced if made to proceed in Singapore.

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[48] *In re Livent Inc. Sec. Litig.*, 78 F.Supp.2d 194, 211 (S.D.N.Y. 1999) ("current computer technology, in which documents can be scanned and placed on a secure website for viewing by counsel for the parties and by the court, makes the documentary evidence factor far less important than it might have been in the past"); *Miller v. Calotychos*, 303 F.Supp. 2d 420, 429 (S.D.N.Y. 2004) (Marrero, J.) ("[l]ocation of records is not a compelling consideration where they can be easily transported").

[49] *See, e.g.*, *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F.Supp.2d 348 (denying motions to dismiss on grounds of *forum non conveniens* and forum selection clauses).

[50] *Id*. (citations omitted).

[51] Phai Cheng Decl. ¶ 22.

[52] Phai Cheng Decl. ¶ 23.

Practical problems involving the efficiency and expense of a trial: As Standard Chartered previously argued, keeping all actions before this Court would "promote the just and efficient conduct of the actions."[53] A separate proceeding in Singapore would result in duplication of effort and costs and "the possibility of conflicting pretrial rulings."[54] Separately, Plaintiffs, as non-residents of Singapore, could be required to provide security for defense costs, which could make litigating in Singapore cost-prohibitive.[55]

Administrative difficulties flowing from court congestion: Admittedly, the Southern District of New York is a congested court. But this Court has determined that court congestion coupled with great local interest in another country is insufficient to merit dismissal.[56]

Standard Chartered also argues that the application of Singapore law weighs in favor of dismissal. Even if Singapore law applies (an issue that Plaintiffs do not concede), any need for this Court to apply foreign law does not itself mandate dismissal.[57]

In sum, this Court and the Second Circuit recognize that "Congress did not want to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[58] This case presents the question of what responsibility Standard Chartered has for its role in peddling fraudulent securities abroad in furtherance of a scheme of international scope that originated in New York. That question is properly before this Court.

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53 O'Connor Decl., Ex. A: SC's Memo re Severing Claims, at p. 6 (citations omitted).

54 *Id*.

55 Phai Cheng Decl. ¶¶ 17-21.

56 *Terra Securities*, 2010 WL 546970, at * 12.

57 *Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A.*, 232 F.Supp. 433, 443 (S.D.N.Y. 1964) ("The task of deciding foreign law is a chore that the federal courts are called upon to perform with regularity.").

58 *Terra Securities*, 2010 WL 546970, at * 12 (quoting *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983)) (internal quotations omitted).

B. The Forum Selection Clause(s) Unilaterally Imposed By Standard Chartered Should Not Be Enforced

Standard Chartered glosses over the relevant analysis when it argues that the Court should dismiss the Complaints based on the forum selection clause in the T&Cs.[59] The four-part analysis under *Phillips v. Audio Active, Ltd.* (cited by Standard Chartered) does not mandate dismissal of the Complaints.[60] Even if the forum selection clause were reasonably communicated and mandatory (which Bhatia and Tradewaves dispute), the T&Cs' forum selection clause does not apply to the Plaintiffs' non-contract claims.[61]

Bhatia and Tradewaves do not assert breach of contract claims. With the exception of Bhatia's specific performance claim, the substance of Plaintiffs' claims does not originate from any contract. Rather, the claims asserted by Bhatia and Tradewaves arise from common law and statutory rights, and are thus not covered by the T&Cs forum selection clause. Even if the forum selection clause could be found to cover any of the claims, it would be unjust and unreasonable to enforce it against Bhatia and Tradewaves. Contracts of adhesion, or terms imposed by fraud or overreaching, should not be enforced.[62]

Here, the T&Cs, which were unilaterally issued by Standard Chartered on the eve of Madoff's arrest, well after many of the acts complained of occurred, contain a material change

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[59] Memo, pp. 21-23.

[60] 494 F.3d 378 (2d Cir. 2007) (describing four-part test for enforcement of forum selection clauses, but finding that such contract clauses do not apply to claims arising outside of the contract).

[61] *Phillips*, 494 F.3d at 387-392 (holding that the substance of statutory and common law claims (including unjust enrichment) did not arise out of the contract containing the forum selection clause). *See also New Moon Shipping Co., Ltd. v. MAN B&W Diesel AG*, 121 F.3d 24 (2d Cir. 1993) (same as to tort claims); *DeSola Group, Inc. v. Coors Brewing Co.*, 199 A.D.2d 141 (1st Dep't 1993) (where claim does not relate to contract and complaint does not refer to contract, the forum selection clause will not apply).

[62] *Phillips*, 494 F.3d at 392 (acknowledging fraud and overreaching as grounds for not enforcing forum selection clauses). *Cf. Gillman v. Chase Manhattan Bank*, 537 N.Y.S.2d 787 (1988) (procedural element of unconscionability goes to the lack of meaningful choice by one party and substantive element goes to terms that unreasonably favor one party); and *Matter of State of New York v. Avco Fin. Servcs.*, 429 N.Y.S.2d 181 (1988) (goal of invalidating unconscionable contracts is to avoid a powerful party "surprising" the other party with some oppressive term).

by making the previously discretionary forum selection clause mandatory. Not only were the parties of unequal bargaining power over such terms, but Standard Chartered, as a distributor of Fairfield, may have been in a position to possess relevant information concerning then-soon-to-be-unfolding events. It is not beyond question that Standard Chartered may have issued the T&Cs as a protective measure. Discovery concerning the circumstances under which the T&Cs were issued is needed.

C. This Court Has Subject Matter Jurisdiction Over the Securities Claims

"Although the Exchange Act is silent as to its extraterritorial application, federal courts have exercised subject matter jurisdiction over claims 'implicating transnational securities fraud.'"[63] The analysis focuses on whether the wrongful conduct occurred in the U.S., the "conduct" test, or whether the wrongful conduct, even if it occurred in a foreign country, had a substantial adverse effect in the U.S., the "effects" test.[64]

The conduct test is a two-part inquiry into (a) whether the alleged acts constitute the core of the alleged fraud and (b) whether the acts directly caused the alleged losses.[65] "Inherent in the Conduct Test is the principle that Congress did not want 'the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'"[66] And where, as here, there is a chain of events (with multiple bad actors) and the fraudulent conduct begins in the U.S., federal courts exercise jurisdiction.[67]

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63 *Terra Securities*, 2010 WL 546970, at *3 (citations omitted).

64 *Id*.

65 *Id*. at *4 (citations omitted).

66 *Id.* at *4 (quoting *Psimenos*, 722 F.2d at 1045 (2d Cir. 1983)).

67 *Id.* at *5 (citing *Cromer Finance Ltd. v. Berger*, 137 F.Supp.2d 452, 480 (S.D.N.Y. 2001) ("although the named Plaintiffs are foreign citizens, and the Fund operated as an off-shore fund, the fraud was run from the United States and it was the decisions made in the United States that led directly to the investors' losses.").

Standard Chartered argues that the Court should dismiss the securities claims because there is no connection between its wrongful acts and the U.S.[68] But there is no question that Madoff's international Ponzi scheme was centered in and run from New York. Standard Chartered furthered the effects of that scheme with its own bad acts. Thus, this Court should decide what responsibility Standard Chartered has for its role in this international fraud.[69]

Standard Chartered knew when it enticed Bhatia and Tradewaves to invest that BMIS, an SEC-registered broker-dealer and investment advisor located in New York, in its capacity as a sub-custodian and executing broker for Fairfield, would have custody of and control over most of Plaintiffs' investments in Fairfield.[70] It also knew that Fairfield had an office in New York, that the investment in Fairfield would be governed by New York law, and that Bhatia and Tradewaves would be made to consent to jurisdiction in New York courts.[71] Moreover, SCI is organized under Connecticut law, apparently is an "agreement corporation" regulated by the Federal Reserve Board, and maintains its primary U.S. business address in Manhattan.

Standard Chartered brought Fairfield to Bhatia and Tradewaves and, in doing so, it also brought Madoff to them. Now, Standard Chartered must answer for its actions. Even if the Court considers this to be a close case, it may defer ruling on subject matter jurisdiction and permit the parties to obtain discovery of Standard Chartered's involvement in this chain of events, including what it was paid, when, and by whom, for selling Fairfield to Plaintiffs.[72]

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[68] Memo, p. 29.

[69] *Cf. In re Bayer AG Securities Lit.*, 423 F.Supp.2d 105, 113 (S.D.N.Y. 2005) (citing *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998)) (acknowledging a tipping factor when there has also been economic activity in the U.S. or harm to a U.S. party).

[70] Memo, pp. 2, 13.

[71] *See* Vijayan Decl., Exs. S-DD (Fairfield Subscription Documents ¶¶ 16 (governing law) and 19 (New York courts).

[72] *Cf. Europe and Overseas Commodity Traders, S.A.*, 147 F.3d 118 at 121 n.1 (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972) ("In a close case, the factual basis for a court's subject matter jurisdiction may remain an issue through trial, and, if and when doubts are resolved against jurisdiction, warrant dismissal at that time."). If the Court dismisses the federal-law claims, the Court has discretion

III. PLAINTIFFS STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. Bhatia and Tradewaves State Valid Claims against SC PLC

With the exception of the Third Claim in the Complaints, all of Plaintiffs' claims are made against both SC PLC and SCI. SC PLC seeks to hide behind its corporate form to protect itself from liability for the fraud committed by its subsidiary, SCI, a fraud that SC PLC could have and should have prevented.

Specifically, Standard Chartered argues that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."[73] It is telling, however, that Standard Chartered fails to include the Supreme Court's subsequent statement that "there is an equally fundamental principal of corporate law … that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notable fraud, on the shareholder's behalf."[74] Most common law jurisdictions permit "plaintiffs to pierce the corporate veil either 'to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.'"[75]

To determine whether a parent sufficiently dominates a subsidiary to warrant piercing the corporate veil, the Second Circuit enumerated a non-exhaustive list of factors for courts to consider, and found that the application of these factors to a given set of facts "differs with the

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to maintain supplemental jurisdiction over the remaining state-law claims, particularly where, as here, those claims have a common factual backdrop to other litigation pending before the Court and Plaintiffs are potential members of the putative *Anwar* class action over which the Court has original jurisdiction. 28 U.S.C. § 1367.

[73] Memo, p. 27 (quoting *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998)).

[74] *Bestfoods*, 524 U.S. at 62.

[75] *Thrift Drug, Inc. v. Universal Prescription Administrators*, 131 F.3d 95, 97 (2d Cir. 1997) (quoting *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 3 F.3d 24, 26 (2d Cir. 1993)).

circumstances of each case."[76] Because of the fact-intensive nature of the inquiry, the Second Circuit holds that such a determination is not suited for resolution upon a motion to dismiss.[77] This Court has followed the Second Circuit's direction and denied a motion to dismiss under similar circumstances.[78]

Here, the Complaints contain allegations that SC PLC is responsible, along with its subsidiary, SCI, for the fraud and other bad acts committed at Plaintiffs' expense. Bhatia and Tradewaves allege, and Defendants concede, that SC PLC is the sole shareholder and owner of SCI.[79] Furthermore, Bhatia and Tradewaves allege that "Standard Chartered PLC influenced, directed and controlled defendant Standard Chartered [International] (USA) [Ltd.] with regard to its actions, representations and omissions" set forth elsewhere in the Complaints.[80] Under *O'Mahoney*, which follows the Second Circuit's rulings, the allegations in the Complaints are sufficient, at the pleading stage, to establish colorable claims against SC PLC.

B. Bhatia and Tradewaves State Claims for Common Law and Securities Fraud

1. Bhatia and Tradewaves adequately plead justifiable reliance.

Reliance, also known as transaction causation, "requires a showing that 'but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the

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[76] *WM. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 139 (2d Cir. 1991) (quoting *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.), *cert. denied*, 488 U.S. 852, (1988)) (citations omitted).

[77] *WM. Passalacqua Builders, Inc.*, 933 F.2d at 139 (finding that "[t]he *jury* must decide whether-considering the totality of the evidence, *see William Wrigley, Jr. Co. v. Waters*, 890 F.2d 594, 601 (2d Cir. 1989) – the policy behind the presumption of corporate independence and limited shareholder liability – encouragement of business development – is outweighed by the policy justifying disregarding the corporate form – the need to protect those who deal with the corporation.") (emphasis added).

[78] *O'Mahoney v. Accenture Ltd.*, 537 F.Supp.2d 506, 515 (S.D.N.Y. 2008) (Marrero, J.) (citation omitted) ("On the record before it, and absent discovery as to the pertinent inquiry, it is unclear to what extent [the parent] participated in the alleged fraud or retaliation, whether [the parent] maintained control over [the subsidiary], or whether the Court can pierce the corporate veil to hold [the parent] liable for the acts of its subsidiary.").

[79] Bhatia Compl. ¶¶ 87, 89; Tradewaves Compl. ¶¶ 83, 85; Memo, p. 6.

[80] Bhatia Compl. ¶ 88; Tradewaves Compl. ¶ 84.

detrimental securities transactions.'"[81] Plaintiffs allege they relied upon three distinct misrepresentations or omissions made by Standard Chartered: (1) that Fairfield was a safe investment that was a "cash substitute"; (2) that Standard Chartered had conducted extensive due diligence in recommending the investment in Fairfield; and (3) that Standard Chartered did not disclose the structure of Fairfield or its relationship with BMIS.[82]

Standard Chartered seeks to avoid liability for its own bad acts by hiding behind disclosures made by Fairfield, an entity that is unrelated to Standard Chartered and not a defendant in these cases.[83] Standard Chartered should not be permitted to hide behind disclosures of risk that it did not make, particularly when there is a dispute over whether Plaintiffs actually received those disclosures.[84]

As an initial matter, Standard Chartered submitted two different versions of the PPMs. Bhatia and Tradewaves did not receive either of the PPMs. Rather than affirmatively stating that Bhatia and Tradewaves received the PPMs, which it cannot do, Standard Chartered relies solely on language contained in subscription agreements stating that Plaintiffs received such documents.[85]

Notwithstanding the foregoing, Standard Chartered's reliance on the "bespeaks caution" doctrine does not protect it in this case.[86] The "bespeaks caution" doctrine is not limitless and requires that, among other things, the cautionary language contained *with* the disclosure must

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81 *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, --- F.Supp.2d ---, 2009 WL 4668579 (S.D.N.Y. 2009) (Marrero, J.) (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005)).

82 Bhatia Compl. ¶¶ 6, 25, 30, 35, 46; Tradewaves Compl. ¶¶ 6, 7, 38, 43, 48, 52.

83 Memo, pp. 31-32 (quoting Fairfield Private Placement Memorandum dated October 1, 2004, at iii).

84 Rupani Decl., ¶ 7; Bhatia Decl., ¶¶ 7-8.

85 The Vijayan Decl. states only that copies of the PPMs are attached thereto. Vijayan Decl., ¶¶ 23-24.

86 *See SEC v. Meltzer*, 440 F.Supp.2d 179, 191 (E.D.N.Y. 2006) (quoting *In re Initial Public Offering Sec. Litig.*, 358 F.Supp.2d 189, 211 (S.D.N.Y. 2004)) ("bespeaks caution" doctrine requires specific cautionary language to render reliance on misstatements unreasonable). *See also Olkey v. Hyperion 1999 Term Trust*, 98 F.3d 2, 5 (2d Cir. 1996) (finding "bespeaks caution" doctrine satisfied when "assurances were balanced by extensive cautionary language" and "prospectuses warn investors of exactly the risk the plaintiffs claim[ed] was not disclosed.").

warn of the specific contingency that lies at the heart of the alleged misrepresentation.[87] Here, the alleged misrepresentations and omissions were wholly separate from the risk disclosures contained in the Fairfield offering documents both in time and place as well as source. As a result, the "bespeaks caution" doctrine does not apply to the present case and thus does not shield Standard Chartered from liability.

Even if the Court finds that the "bespeaks caution" doctrine applies, the disclosures contained in the Fairfield offering documents are of no consequence. "[A] potential investor can reasonably assume that an investment advisor has a reasonable basis in fact for making predictions. Representations and opinions made without factual basis and in reckless disregard of their truth or falsity are therefore actionable."[88] Moreover, at least one court in this district restricted the scope of the application of the "bespeaks caution" doctrine when the defendant knew the statement was false at the time it was made.[89]

Bhatia and Tradewaves trusted that Standard Chartered, their investment advisor, had a reasonable basis in fact for recommending Fairfield as a "cash substitute." That reasonable basis was Standard Chartered's repeated representations, now known to be false, that it had conducted extensive due diligence on Fairfield. In light of Standard Chartered's admission that it never conducted the purported due diligence,[90] the representation that the investment in Fairfield was safe and a "cash substitute" was made without a factual basis and in reckless disregard for its truth or falsity.

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87 *In re Australia & New Zealand Banking Group Sec. Litig.*, 2009 WL 4823923, at *13 (S.D.N.Y. Dec. 14, 2009) (citations and quotations omitted) (emphasis added).

88 *Ricy Finance Corp. v. Paine, Webber, Jackson & Curtis, Inc.*, 1986 WL 1195, at *6 (S.D.N.Y. Jan. 17, 1986) (citing *Rolf v. Blythe, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *Marx v. Computer Sciences Corp.*, 507 F.2d 485, 489 (2d Cir. 1974)).

89 *See In re Prudential Securities Inc. L.P. Litig.*, 930 F.Supp. 68, 72 (S.D.N.Y. 1996) (finding "cautionary language does not protect material misrepresentations or omissions when defendants knew they were false when made.") (citations omitted).

90 Bhatia Compl. ¶ 63; Tradewaves Compl. ¶ 68.

Bhatia and Tradewaves also allege that they relied upon Standard Chartered's misrepresentations that it had conducted extensive due diligence on Fairfield as an independent basis for investing in Fairfield.[91] The Fairfield offering documents do not contain any disclosures that contradict these misrepresentations of purported due diligence. Nor could they, as these misrepresentations have nothing to do with Fairfield; these misrepresentations are solely the responsibility of Standard Chartered.[92]

2. The allegations of the Complaints contain sufficient particularity.

Standard Chartered erroneously contends that Plaintiffs' allegations as to the misrepresentations and omissions were not pled with sufficient specificity to withstand a motion to dismiss.[93] To be sure, "[t]he Second Circuit has interpreted Rule 9(b) to require that a securities fraud complaint: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[94] However, the Second Circuit has also held that "even with the heightened pleading standards under Rule 9(b) and the Securities Reform Act we do not require the pleading of detailed evidentiary matter in securities litigation."[95] Plaintiffs are required to plead securities fraud claims with particularity in order to "provide a defendant in a securities fraud case with fair notice of a plaintiff's claim, safeguard his reputation from improvident charges of wrongdoing, and protect him against strike suits."[96]

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91 Bhatia Compl. ¶¶ 6, 30; Tradewaves Compl. ¶¶ 6, 43.

92 Bhatia Compl. ¶ 63; Tradewaves Compl. ¶ 68.

93 Memo, pp. 33-34.

94 *In re Philip Services Corp. Sec. Litig.*, 383 F.Supp.2d 463, 471 (S.D.N.Y. 2004) (citations and quotations omitted).

95 *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001).

96 *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F.Supp.2d 148, 158 (S.D.N.Y. 2008) (quoting *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007)).

When viewed with this purpose in mind, the allegations in the Complaints are sufficiently specific to put Standard Chartered on notice of the fraudulent statements upon which the Section 10(b) claims depend:

> 24. From November 2004 through June 2007, [Standard Chartered] invested Plaintiffs' funds in Fairfield Sentry, Ltd.
>
> 25. [Standard Chartered's] relationship manager and officer, Surendran Menon ("Menon") recommended such investment, as a "cash substitute," touting its apparent history of stable and steady returns, and advised Plaintiffs that [Defendants] had conducted extensive due diligence on Fairfield Sentry, Ltd. before recommending the investment to its clients.
>
> 26. Menon represented that the Fairfield Entities had achieved "mythical status" for the ability of Fairfield Sentry, Ltd. to generate steady and consistent returns with low volatility.
>
> 27. [Standard Chartered] further advised Plaintiffs that Fairfield Sentry, Ltd. would be part of the select few investments which would form the core of the Plaintiffs' portfolio, due to its consistent returns and the lack of available shares which would come into the market.
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> 28. [Standard Chartered] stressed that Fairfield Sentry, Ltd. was a closed end fund, but because of [Standard Chartered's] reputation, [Standard Chartered[was able to convince the Fairfield Entities to accept the investments by [Standard Chartered's] customers.
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> 29. [Standard Chartered] represented to Plaintiffs that an investment in Fairfield Sentry, Ltd. was highly sought after and Plaintiffs should not miss such an investment opportunity.
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> …
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> 63. At the February 2, 2009 meeting, [W. Richard] Holmes admitted [] that in recommending Fairfield Sentry, Ltd. as an investment, [Standard Chartered] had done none of their own due diligence or investigations but had instead relied wholly upon representations made by the Fairfield Entities.[97]

Read in the context of the whole of each of the Complaints, the allegations satisfy the pleading requirements of Rule 9(b) and the PSLRA as articulated by the Second Circuit. They

[97] Bhatia Compl. ¶¶ 24-29, 63; Tradewaves Compl. ¶¶ 37-42, 68. The only distinction between the two Complaints with respect to the quoted language is in paragraphs 38 and 39 of the Tradewaves Complaint, in which Tradewaves alleges that Mortezah Farzaneh made such recommendations and representations in addition to Surendran Menon.

specify the statements that Bhatia and Tradewaves contend were fraudulent, as well as the speaker(s). Defendants argue that the paragraphs listed above do not adequately identify the speaker or speakers of the fraudulent statements because the speaker or speakers' names are not mentioned in each individual paragraph. Such an argument, however, puts form over substance, as the paragraphs listed above can lead to but one conclusion: that the individuals mentioned were the speakers of each of the fraudulent statements contained in those paragraphs.

Likewise, the "where" and "when" can be reasonably inferred from the context. As Standard Chartered concedes, Bhatia and Tradewaves opened all the accounts at issue in the proceeding at the defendants' Singapore branch.[98] Defendants' relationship managers and officers (the speakers were based in Singapore and Dubai, respectively.[99] As the Complaints allege that the speakers recommended that Fairfield would "form the core" of Bhatia's and Tradewaves' respective portfolios,[100] the reasonable inference to be made is that these statements were made in or about November 2004. Finally, in paragraph 63 of the Bhatia Complaint and paragraph 68 of the Tradewaves Complaint, Bhatia and Tradewaves allege why the statements were fraudulent, namely, because the statements were untrue and because Standard Chartered later admitted it knew that the statements were untrue at the time they were made.

Standard Chartered also incorrectly argues that Bhatia's and Tradewaves' allegations are clumped together as to the two defendants and thus fail to satisfy Rule 9(b). The cases cited by Standard Chartered are factually distinct and thus inapplicable. In *In re Blech Sec. Litig.*, the defendants were unrelated entities and individuals.[101] Similarly, in *Sofi Classic S.A. de C.V. v.*

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98 Memo, p. 8.

99 Memo, p. 2.

100 Bhatia Compl. ¶ 27; Tradewaves Compl. ¶ 40.

101 928 F.Supp. 1279 (S.D.N.Y. 1996).

Hurowitz, the defendants were multiple officers of a single company.[102] Here, on the other hand, the defendants are a parent and a subsidiary. As set forth in Section III.A, Bhatia and Tradewaves allege that SC PLC, the parent, is liable for the actions of SCI, the subsidiary.

When each of the Complaints is examined as a whole, the Plaintiffs' allegations with respect to Standard Chartered's misrepresentations and omissions were pled with sufficient specificity as required by the Second Circuit's interpretation of Rule 9(b) and the PSLRA. Standard Chartered has adequate notice as to the basis of the claims against it.

3. The alleged misrepresentations and omissions are false and/or material, and therefore actionable.

A fact is material when there is a substantial likelihood that the disclosure of the truth "would have been viewed by the reasonable investor as having significantly altered the total mix of information available."[103] "But plaintiffs do not have to show that the misrepresentation or omission would have been outcome-determinative."[104] "Under Second Circuit precedent, 'a complaint may not properly be dismissed pursuant to Rule 12(b)(6) … on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.'"[105]

Plaintiffs allege that Standard Chartered made material misrepresentations regarding the safety of the investment in Fairfield, as well as its purported due diligence in recommending that

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102 44 F.Supp.2d 231 (S.D.N.Y. 2006) (Marrero, J.).

103 *The City of Sterling Heights Police and Fire Retirement System v. Abbey National, PLC*, 423 F.Supp.2d 348, 355-56 (S.D.N.Y. 2006) (quoting *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 180 (2d Cir. 2001)) (quotations omitted). *See also Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Management LLC*, 595 F.3d 86, 92 (2d Cir. 2010) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)).

104 *In re Quintel Entertainment Inc. Sec. Litig.*, 72 F.Supp.2d 293, 294 (S.D.N.Y. 1999) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)).

105 *SEC v. Pimco Advisors Fund Management LLC*, 341 F.Supp.2d 454, 464 (S.D.N.Y. 2004) (Marrero, J.) (quoting *Goldman v. Belden*, 745 F.2d 1059, 1067 (2d Cir. 1985)).

investment.[106] They also allege that Standard Chartered omitted to disclose a material fact, namely that BMIS served as both sub-custodian and executing broker for Fairfield, an inherent conflict of interest Another material fact that Standard Chartered omitted to disclose was that it had an agreement to distribute Fairfield.[107]

Standard Chartered knew that its statements regarding the due diligence were untrue at the time they were made, which makes such statements misleading and material.[108] If they had known that Standard Chartered never conducted the due diligence, Bhatia and Tradewaves would not have believed Standard Chartered's fraudulent statements that the investment in Fairfield was as safe as a "cash substitute." Thus, this Court can reasonably infer that the disclosure of the truth "would have been viewed by the [Bhatia and Tradewaves] as having significantly altered the total mix of information available."[109]

Defendants cite two inapposite cases in support of their contention that the misrepresentations regarding the safety of the Fairfield Sentry investment were immaterial.[110] First, Standard Chartered cites *In re Merrill Lynch Tyco Research Sec. Litig.* for the proposition that "[t]o withstand a motion to dismiss [a] plaintiff[] must detail specific contemporaneous data or information known to the defendant that was inconsistent with the representation in question."[111] Standard Chartered argues that, absent the provision of such "specific contemporaneous data or information," a misrepresentation cannot be material. This argument is untenable, as demonstrated by the quoted excerpt from *Merrill Lynch Tyco Research Sec. Litig.*

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106 Bhatia Compl. ¶ 30; Tradewaves Compl. ¶ 43.

107 *See* Rupani Decl.: Ex. B ("AEB has entered into a contract to distribute the Fund").

108 *See, e.g., In re Initial Public Offering Sec. Litig.*, 241 F.Supp.2d at 380 ("An untrue statement, *i.e.*, a misstatement that comprises a half-truth or a whole lie (as opposed to an omission), is *always* misleading because a speaker, having begun to speak, is obliged to do so completely and truthfully.") (citations and quotations omitted) (emphasis in original).

109 *Abbey National, PLC*, 423 F.Supp.2d at 355-56.

110 Memo, p. 35, incorporating Headway Memo, p. 26.

111 2004 WL 305809, at *4 (S.D.N.Y. Feb. 18, 2004).

being taken from the section of that opinion discussing the requirement that a plaintiff plead with particularity the alleged misrepresentations.[112] The Court in *Merrill Lynch Tyco Research Sec. Litig.* did not address the issue of materiality.

Second, Standard Chartered quotes *Stevelman v. Alias Research Inc.*, wherein the Second Circuit stated that a challenge to "[m]anagement's optimism that is shown only after the fact to have been unwarranted" is an impermissible attempt to plead fraud by hindsight.[113] The quoted language is taken from the portion of that decision addressing scienter, not materiality.[114] Again, the Second Circuit did not address the issue of materiality at all in the decision.

With respect to Standard Chartered's misrepresentations of its purported due diligence, its reliance on the cases cited in the Headway Memo is similarly misplaced. Each of the cases addresses statements that a court found to be puffery. The degree of due diligence is not the issue here. The issue here is that Standard Chartered fraudulently represented that it had conducted due diligence, when, as it later admitted, it knew it had not.

Standard Chartered also argues that the dual roles held by BMIS were disclosed in the 10/1/04 PPM. Defendants quote the following language from the 10/1/04 PPM:

> When the Fund invests utilizing the 'split strike conversion' strategy … it will not have custody of the assets so invested. Therefore, there is always the risk that the personnel of any entity with which the Fund invests could misappropriate the securities or funds (or both) of the Fund.[115]

Nowhere in the above-quoted passage, however, does Fairfield disclose that BMIS served as both the sub-custodian and executing broker for Fairfield. Despite Standard Chartered's argument to the contrary, nowhere in either of the PPMs does Fairfield make such a disclosure.

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112 *Id.*

113 174 F.3d 79, 85 (2d Cir. 1999).

114 *Stevelman*, 174 F.3d at 85.

115 Memo, p. 35 (quoting 10/1/04 PPM, at p. 19). Identical language is found on page 21 of the 7/1/03 PPM.

Although the PPMs state that BMIS served as a sub-custodian for the fund, neither of the PPMs includes a disclosure that BMIS also served as executing broker, a fact that should have been disclosed. This omission serves as a basis for Plaintiffs' claims.

4. Bhatia and Tradewaves allege facts that give rise to a strong inference of scienter.

Rule 9(b) requires only that there be a "minimal factual basis for [the] conclusory allegations of scienter."[116] Scienter, *i.e.*, an intent to deceive, manipulate defraud, need not be pleaded with particularity.[117] "A strong inference of fraudulent intent may be established by alleging that defendants: (1) benefited in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor."[118]

To plead scienter in a securities fraud claim, a complaint may (1) allege facts constituting strong circumstantial evidence of conscious misbehavior or recklessness, or (2) allege facts showing that defendants had both motive and opportunity to commit fraud.[119] "Motive entails concrete benefits that could be realized by one or more of the false statements and wrongful

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[116] *Cohen v. Koenig*, 25 F.3d 1168, 1173 (2d Cir. 1994) (quoting *Connecticut National Bank v. Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987)). *See also Press v. Chemical Investment Services Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (stating that the Second Circuit is "not inclined to create a nearly impossible pleading standard when the 'intent' of a corporation is at issue").

[117] *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

[118] *Abbey National, PLC*, 423 F.Supp.2d at 356 (quoting *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000)). *See also Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 194 (2d Cir. 2008).

[119] *Abbey National, PLC*, 423 F.Supp.2d at 356 (citing *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000)). *See also Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 446 F.Supp.2d 163, 180-81 (S.D.N.Y. 2006) (quoting *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001) ("Facts giving rise to a strong inference of scienter can be alleged by one of two methods: the plaintiff may plead 'motive and opportunity to commit fraud' or 'strong circumstantial evidence of conscious behavior or recklessness.'")).

nondisclosures alleged," while "opportunity entails the … likely prospect of achieving concrete benefits by the means alleged."[120]

Here, Bhatia and Tradewaves sufficiently allege that Standard Chartered had both the motive and the opportunity to commit fraud. Plaintiffs allege that Standard Chartered assessed and collected quarterly fees as payment for investment advisory services to Bhatia and Tradewaves.[121] These fees constitute concrete benefits that could be and were realized by Standard Chartered. Furthermore, Standard Chartered apparently had a contractual relationship with Fairfield, pursuant to which it was presumably compensated based on the number of investors and/or the amount of capital that it directed toward Fairfield. Such an arrangement may be significant when considered in the context of the allegations by Bhatia and Tradewaves that, when they asked whether they should sell their investment in Fairfield, Standard Chartered repeatedly encouraged them to remain in the sham investments.[122]

In addition, Bhatia and Tradewaves allege that Standard Chartered, by knowingly lying to them about its purported due diligence, acted with sufficient recklessness to establish scienter. In *Novak*, the Second Circuit held that, to sufficiently allege recklessness to establish scienter, a plaintiff must allege "facts demonstrating that defendants failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud."[123] The Court further stated that a plaintiff adequately alleges recklessness when he "specifically alleges defendants' knowledge of facts or access to information contradicting their public statements."[124]

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120 *Pension Committee of the University of Montreal Pension Plan*, 446 F.Supp.2d at 181 (quoting *Shields*, 25 F.3d at 1130).

121 Bhatia Compl. ¶¶ 37, 60; Tradewaves Compl. ¶¶54, 65.

122 Bhatia Compl. ¶ 44; Tradewaves Compl. ¶ 61.

123 216 F.3d at 308.

124 *Id*. *See also Cornwell v. Credit Suisse Group*, --- F.Supp.2d ---, 2010 WL 537593, at *6 (S.D.N.Y. Feb. 11, 2010) (Marrero, J.) (same); *In re Emex Corp. Sec. Litig.*, 2002 WL 31093612, at *6-7 (S.D.N.Y. Sept. 18, 2002) ("Securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically

Here, Standard Chartered claimed to have conducted extensive due diligence prior to recommending the investment in Fairfield and then later admitted that, in recommending the investment, they had never conducted any due diligence at all.[125] These allegations, when read together, demonstrate that Standard Chartered had knowledge of facts contradicting its representations to Plaintiffs, *i.e.*, it knew it had not conducted the due diligence it claimed to have conducted. Such allegations of recklessness are sufficient to satisfy the pleading standards of scienter.

Standard Chartered relies on *In re Bayou Hedge Fund Litigation* in support of its arguments concerning scienter (and preemption under the Martin Act). But the case is inapposite because of certain material distinctions.[126] First, the complaint in *Bayou Hedge Fund* did not allege that the investment adviser "ever recommended that South Cherry invest in Bayou Fund. And South Cherry does not rely on these misrepresentations to obtain relief."[127] Unlike South Cherry, Bhatia and Tradewaves allege that Standard Chartered recommended the Fairfield investment and that they relied on Standard Chartered's misrepresentations and omissions.[128] Next, that court found that South Cherry did not allege that the adviser deliberately shut its eyes to the facts or participated in the fraud.[129] Here, Plaintiffs allege, *inter alia*, that Standard Chartered admitted it lied and Standard Chartered had a contract to sell Fairfield.[130] The resulting inference of recklessness is at least as compelling as any opposing inference. Finally,

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alleged defendants' knowledge of facts or access to information contradicting their public statements.") (citations omitted).

125 Bhatia Compl. ¶¶ 25, 63; Tradewaves Compl. ¶¶ 38, 68.

126 534 F.Supp.2d 405 (S.D.N.Y. 2007), *aff'd, South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009).

127 *Id.* at 416.

128 Bhatia Compl. ¶¶ 6, 30; Tradewaves Compl. ¶¶ 6, 43.

129 *In re Bayou Hedge Fund Litig.*, 534 F.Supp.2d at 417.

130 Bhatia Compl. ¶ 63; Tradewaves Compl. ¶¶ 68, 71.

the court in *Bayou Hedge Fund* found preemption under the Martin Act because of the alleged "securities violations within or from the state of New York."[131] As discussed in Section III.D.1, the Martin Act does not apply here because Plaintiffs did not purchase securities "within or from" New York.

C. Plaintiffs State Claims under Section 20(a) of the Exchange Act

Under Section 20(a), to establish a *prima facie* case of liability, a plaintiff must allege: (1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) that the controlling person was in some meaningful sense a culpable participant in the primary violation.[132] "[T]he 'control person' provisions are broadly construed as they 'were meant to expand the scope of liability under the securities laws.'"[133] Moreover, "a [section] 20(a) control person claim need be pleaded only in accordance with the pleading standard prescribed in Federal Rule of Civil Procedure 8(a)."[134]

Standard Chartered makes two flawed arguments.[135] First, Standard Chartered argues that Bhatia and Tradewaves fail to plead a primary violation of Section 10(b) of the Exchange Act and Rule 10b-5. As set forth in Section III.B, Bhatia and Tradewaves sufficiently plead a primary violation. As a result, the Complaints satisfy the first element of claims under Section 20(a).

Second, Standard Chartered argues that Bhatia and Tradewaves do not adequately plead the third element of a claim under Section 20(a), namely SC PLC's "culpable participation" in the primary violation. Specifically, Standard Chartered incorrectly argues that, to adequately

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131 *In re Bayou Hedge Fund Litig.*, 534 F.Supp.2d at 421.

132 *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998).

133 *Dietrich v. Bauer*, 126 F.Supp.2d 759, 764 (S.D.N.Y. 2001) (quoting *Terra Resources I v. Burgin*, 664 F.Supp. 82, 88 (S.D.N.Y. 1987)).

134 *Cornwell*, 2010 WL 537593, at *8.

135 Memo, p. 37, incorporating Headway Memo, pp. 34-35.

allege culpable participation, plaintiffs "must allege, at a minimum, particularized facts of the controlling person's conscious misbehavior or recklessness," *i.e.*, scienter.

The Second Circuit, in *Suez Equity Partners, L.P. v. Toronto-Dominion Bank,* vacated the dismissal of the plaintiff's Section 20(a) claim, holding that allegations that the primary violator was an officer of the defendant-bank and had responsibility over the defendant-bank's relationship with the plaintiff were sufficient to state a claim.[136] Here, Bhatia and Tradewaves clearly satisfy the standard articulated by the Second Circuit in *Suez Equity Partners, L.P.* Bhatia and Tradewaves sufficiently plead a primary violation of Section 10(b) and Rule 10b-5. Plaintiffs also allege that "Standard Chartered PLC acted as a controlling person within the meaning of Section 20(a) of the Exchange Act, of defendant Standard Chartered [International (USA) Ltd.] by virtue of its 100% ownership and control of Standard Chartered [International (USA) Ltd.]" and "[b]y virtue of its 100% control of Standard Chartered [International (USA) Ltd.], defendant SC PLC had the ability to prevent the actions, misrepresentations and omissions committed herein."[137]

Moreover, Bhatia and Tradewaves specifically allege culpable participation on the part of SC PLC: "Standard Chartered PLC influenced, directed and controlled defendant Standard Chartered [International (USA) Ltd.] with regard to its actions, representations and omissions set forth herein."[138] Contrary to Standard Chartered's argument,[139] that language alleges culpable

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136 250 F.3d 87, 101 (2d Cir. 2001). *But see, e.g., In re Alstom SA Secs. Litig.*, 406 F.Supp.2d 433, 490 (S.D.N.Y. 2005) (Marrero, J.) (holding that plaintiffs "must plead culpable participation in order to state a claim under Section 20(a).").

137 Bhatia Compl. ¶¶ 87, 89; Tradewaves Compl. ¶¶ 83, 85. *See Cromer Finance Ltd.*, 137 F.Supp.2d at 484 (quoting *SEC v. First Jersey, Inc.*, 101 F.3d 1450, 1472-73 (2d Cir. 1996)) (control over a primary violator "may be established by showing that the defendant possessed the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.") (internal citations and quotations omitted).

138 Bhatia Compl. ¶ 88; Tradewaves Compl. ¶ 84.

139 Memo, p. 37, incorporating Headway Memo, p. 34.

participation because the use of the past tense of the verbs "influence," "direct," and "control" suggests past action or behavior on the part of SC PLC.[140] Plaintiffs do not, with these words, allege that SC PLC *could have* influenced, directed and controlled SCI. Rather, they affirmatively allege that SC PLC *did* influence, direct and control SCI. Furthermore, by linking the allegations of SC PLC's actual influence, direction and control of SCI to SCI's "actions, representations and omissions set forth" elsewhere in the Complaints, Bhatia and Tradewaves affirmatively allege that SC PLC actively participated in those "actions, representations and omissions," *i.e.*, the underlying primary violation.

D. Plaintiffs State Valid Common Law Claims, Which Are Not Preempted

1. The Martin Act does not preempt the claims against Standard Chartered.

a. The Martin Act does not apply.

Standard Chartered argues that if the Court finds that these claims have sufficient connection to this district to be heard by this Court, then, presumptively, the Martin Act must apply.[141] In so doing, Defendants attempt to create a false "either-or" choice for the Court to make where none exists. As set forth in Section II, the determination of whether this case has sufficient connection to remain in this district is based on a wide array of factors. On the other hand, as set forth below, the Martin Act only applies if the sale or purchase of securities occurred "within or from" New York, a much narrower inquiry.[142]

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140 *See, e.g.*, Webster's Desk Dictionary of the English Language, 466 (1990) (defining "influence" in its verb form as "5. to exercise influence on. 6. to move or impel (a person), as to some action."); Webster's Desk Dictionary of the English Language, 255 (1990) (defining "direct" in its verb form as, among other definitions, "2. to manage or supervise. 3. to command or order. 7. to cause to move, act, or work toward a given end result. 10. to give guidance or orders."); Webster's Desk Dictionary of the English Language, 199 (1990) (defining "control" in its verb form as, among other definitions, "1. to exercise restraint or direction over.").

141 Memo, pp. 4, 39.

142 N.Y. General Business Law § 352-c[1] ("… within or from this state …").

For the Martin Act to apply, the securities purchased by Bhatia and Tradewaves must have been purchased "within or from" New York.[143] Bhatia and Tradewaves do not allege, and Standard Chartered do not assert, that the purchases of the interests in Fairfield occurred "within or from" New York. Thus, a necessary factual predicate for the application of the Martin Act is absent and Standard Chartered's Motion must be denied.

Ignoring the language of the Martin Act, Standard Chartered argues that all that is needed for the statute to apply are allegations that a "substantial portion of the events giving rise to a claim occurred in New York."[144] This statement runs contrary to the plain language of the statute. Furthermore, there are no such allegations in the Complaints.

Standard Chartered's argument is contrary to New York courts' decisions interpreting the statute. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, the plaintiffs sued, among others, the administrator of two foreign hedge funds.[145] The administrator argued that plaintiffs' claims for breach of fiduciary duty and negligence against it were barred by the Martin Act. The District Court disagreed:

> Although the Citco Defendants communicated regularly with Lauer in New York, they performed most of their work for the funds in Curacao, Netherlands Antilles. In addition, the securities were mostly marketed and sold to foreign investors, and only a limited number of investors in the United States participated. Thus, plaintiffs' claims for breach of fiduciary duty and negligence are not preempted by the Martin Act.[146]

Similarly, in *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, the District Court found that the Martin Act did not preempt plaintiffs' breach of fiduciary claim.[147] The

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143 *See, e.g., Lehman Brothers Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 159, 165 (S.D.N.Y. 2001) (holding that the Martin Act "does not bar the Defendants' negligence-based claims because the [negotiable certificates of deposit] were not offered or sold 'within or from' New York, as required by the statute.").

144 Memo, p. 39.

145 592 F.Supp.2d 608 (S.D.N.Y. 2009).

146 *Pension Committee of the University of Montreal Pension Plan*, 592 F.Supp.2d at 639-640.

147 376 F.Supp.2d 385 (S.D.N.Y. 2005).

plaintiffs had alleged the shares in the fund were marketed and sold in New Jersey rather than New York. Defendants responded by pointing to allegations in the complaint that misconduct took place in New York, including the allegation that "the Funds' purchase and sale of securities occurred in New York." In denying the defendants' motion, the Court held that:

> [C]onstruing the Complaint in the light most favorable to the plaintiffs, it appears that the conduct was not confined to New York and, indeed, that some plaintiffs may have interacted with defendants exclusively outside of New York. The Court therefore cannot say that plaintiffs can prove no facts in support of their claim that would entitle them to relief even if defendants' preemption argument is correct.[148]

In both *Pension Committee of the University of Montreal Pension Plan* and *Fraternity Fund Ltd.*, despite the fact that some purchases did occur "within or from" New York, the District Court found the Martin Act to be inapplicable. Here, none of the purchases made by Bhatia and Tradewaves are alleged to have occurred "within or from" New York. As such, no basis exists for the Court to find that the Martin Act applies. The policies underlying the Martin Act also support this result.[149] The Martin Act does not eviscerate common law causes of action, "except where those causes of action fell squarely within the range of cases on which the Attorney General has been empowered to act."[150]

b. Even if the Martin Act applies, it does not preempt all claims against Standard Chartered.

In an attempt to persuade this Court that preemption is the definitive state of the law, Standard Chartered cites a plethora of cases in which courts have found that common law claims

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148 *Fraternity Fund Ltd.*, 376 F.Supp.2d at 410.

149 *See, e.g.*, *Nanopierce Technologies, Inc. v. Southridge Capital Management LLC*, 2003 WL 22052894, at *5 (S.D.N.Y. Sept. 2, 2003) ("Although there is a paucity of precedent supporting this argument, the Court finds it persuasive. It is undeniable that the courts which precluded common law causes of action because they were preempted by the Martin Act did so in order to preserve the "consistency [of the] enforcement mechanism." *CPC Int'l Inc. v. McKesson Corp.*, 519 N.Y.S.2d 804, 514 N.E.2d 116, 119. The purpose of such decisions was explicitly to avoid actions that were "inconsistent with the Attorney-General's exclusive enforcement powers." *Eagle Tenants Corp. v. Fishbein*, 182 A.D.2d 610, 582 N.Y.S.2d 218, 219. In cases where the Attorney General has, by operation of statute, no enforcement power, it is difficult to see how permitting a common law claim to go forward would interfere with the state legislature's enforcement mechanism.").

150 *Nanopierce Technologies, Inc.*, 2003 WL 22052894, at *6.

were preempted by the Martin Act.[151] But preemption is not a pre-ordained outcome, particularly where, as here, the record is devoid of allegations that securities were sold "within or from" New York.

In *Cromer Finance Ltd. v. Berger*, the District Court was tasked with interpreting the Martin Act's preemptive effect on common law causes of action.[152] When doing so, "it is a federal court's 'job to predict how the forum state's highest court would decide the issues' before it."[153] The District Court in *Cromer Finance Ltd.* first looked to decisions by the New York Court of Appeals and found that "it has not determined whether the Martin Act preempts claims made under common law."[154] Next, the District Court looked to New York's lower courts and found a split among them.[155]

Given the lack of definitive guidance from New York state courts, the District Court in *Cromer Finance Ltd.*, turned to the text of the Martin Act itself, as well as Second Circuit decisions on the issue. As for the statute, the District Court found that "there is nothing … in the text of the Martin Act itself to indicate an intention to abrogate common law causes of action."[156] This is in accord with New York state court decisions. Specifically, in *Baker v. Andover Associates Management Corp.*, the New York Supreme Court expressly rejected the cases relied upon by Defendants, stating that:

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151 Memo, p. 40.

152 2001 WL 1112548 (S.D.N.Y. Sept. 19, 2001).

153 *Cromer Finance Ltd.*, 2001 WL 1112548, at *4 (quoting *Sprint PCS L.P. v. Connecticut Siting Council*, 222 F.3d 113, 115 (2d Cir. 2000)).

154 2001 WL 1112548, at *4 (citing *Castellano*, 257 F.3d at 190; *Suez Equity Partners, L.P*, 250 F.3d at 104). *See also Caboara v. Babylon Cove Development, LLC*, 862 N.Y.S.2d 535, 538 (2d Dep't 2008) ("No case from the Court of Appeals holds that the Martin Act not only failed to provide, expressly or impliedly, for a private right of action, but also, abrogated or supplanted an otherwise viable private cause of action whenever the allegations would support a Martin Act violation.") (citations omitted).

155 *Cromer Finance Ltd.*, 2001 WL 1112548, at *4 (comparing *Horn v. 440 East 57th Co.*, 547 N.Y.S.2d 1, 5 (1st Dep't 1989) (finding preemption) and *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Assocs.*, 595 N.Y.S.2d 492, 494 (2d Dep't 1993) (finding preemption) with *Scalp & Blade, Inc. v. Advest, Inc.*, 722 N.Y.S.2d 639, 640 (4th Dep't 2001) (finding no preemption).

156 *Id*.

> this Court does not agree with this line of authority and believes that based on the current state of New York law (and in particular the law in the Appellate Division, Second Department), a court should not dismiss the otherwise properly pleaded claims of breach of fiduciary duty, negligent misrepresentation and gross negligence simply because the Attorney General could have prosecuted these Defendants for violations of the Martin Act.[157]

Similarly, in *Scalp & Blade, Inc.*, relied upon by the District Court in *Cromer Finance Ltd.*, the court held that the Martin Act did not preempt common law claims.[158] There, the Court found that "[n]othing in the Martin Act, or in the Court of Appeals cases construing it, precludes a plaintiff from maintaining common-law causes of action based on such facts as might give the Attorney-General a basis for proceeding civilly or criminally against a defendant under the Martin Act."[159]

In analyzing Second Circuit decisions interpreting the Martin Act's preemptive effect, the District Court found "[w]hile this Court is, of course, bound by Second Circuit precedent, the *Castellano* court did not address the split among the New York Appellate Divisions on this issue."[160] The Court also noted that, two months prior to *Castellano*, the Second Circuit "observed in *Suez Equity*, 250 F.3d at 104, that it was 'not immediately persuaded that the Court of Appeals would follow the lead' of the *Rego Park* and *Horn* decisions."[161] The Court went on to decide, "[g]iven the skepticism expressed in *Suez Equity* of the *Horn* decision, this Court concludes that the Second Circuit will adopt the analysis in *Scalp & Blade* when next confronted with the issue and the split in authority among the Appellate Divisions."[162]

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157 Index No. 6179/09, slip op. at 22 (N.Y. Sup. Ct. Westchester Co., Nov. 30, 2009). Copy submitted by Standard Chartered in support of the Motion. (*see* Decl. of Patrick B. Berarducci, Ex. C).

158 722 N.Y.S.2d at 640.

159 *Id*. (citations omitted).

160 *Id*. at *4, n.6.

161 *Id.* at *4.

162 *Id*. at *4, n.6.

Even if the Court decides that the Martin Act applies, the Court should find persuasive the guidance of the District Court in *Cromer Finance Ltd.*, as well as that of the various state courts, and decline to find that Bhatia's and Tradewaves' common law claims are preempted. In addition to such a result being in accord with case law in this state and in this district, such a decision would be in accord with the Martin Act itself. In any event, as Standard Chartered acknowledges, the Martin Act does not preempt common law fraud claims.[163]

2. Bhatia and Tradewaves state a claim for unjust enrichment.

In moving to dismiss Bhatia's and Tradewaves' claims for unjust enrichment, Standard Chartered does not assert that the requisite elements of the claim were not alleged. Instead, Standard Chartered argues that the unjust enrichment claims should be dismissed because a contract governs the legal relationship between the parties.[164]

Standard Chartered's argument is premature and ignores the basic tenet under the Federal Rules of Civil Procedure that a demand for relief "may include relief in the alternative or different types of relief."[165] A plaintiff is not barred from pleading an unjust enrichment claim when also pleading a breach of contract claim, so long as there is a *bona fide* dispute as to the existence or validity of a contract.[166]

Here, Bhatia and Tradewaves do not plead claims for breach of contract, as Standard Chartered acknowledges.[167] Moreover, to the extent there is a contract between the parties that is relevant to the Complaints or Standard Chartered's purported defenses (something that cannot be

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163 Memo, pp. 4, 40. *See also Lehman Bros. Commercial Corp.*, 179 F.Supp.2d at 162 (citations omitted); *Nanopierce Technologies, Inc.*, 2003 WL 22052894, at *4 (citations omitted).

164 Memo, pp. 40-41.

165 Fed. R. Civ. P. 8(a)(3).

166 *See Labajo v. Best Buy Stores, L.P.*, 478 F.Supp.2d 523, 531 (S.D.N.Y. 2007); *Louros v. Cyr*, 175 F.Supp.2d 497, 514 (S.D.N.Y. 2001) (denying motion to dismiss claim for unjust enrichment as alternative to breach of contract claim where existence and validity of contract remained at issue).

167 Memo, p. 48.

established in the context of a motion to dismiss), it is not clear what terms form any such contract. A *bona fide* dispute exists over which contractual terms, if any, govern the relationship between Plaintiffs and Standard Chartered. Standard Chartered identifies one disputed document (the T&Cs), which it asserts governs the parties' relationships.

Nowhere in the Complaints do Bhatia or Tradewaves mention the T&Cs, or allege that any other contract governs their relationships with Standard Chartered. Rather, Bhatia and Tradewaves reference a "Private Banking Services Agreement with AEB, and other agreements" and "the Private Banking Services Agreement with AEB and/or the Client Agreement with the Standard Chartered Defendants, and other agreements."[168]

As discussed in greater detail in Section I, Bhatia and Tradewaves raise several issues disputing whether the T&Cs are part of any "contract" with Standard Chartered. Only after the terms of a "contract" are established and the Court concludes that a breach of contract claim may proceed could the claims for unjust enrichment be dismissed.[169] Accordingly, Standard Chartered's Motion seeking to dismiss the unjust enrichment claims should be denied.

3. Bhatia and Tradewaves sufficiently plead causation.

Standard Chartered argues that claims sounding in negligence and other torts should be dismissed because "Madoff—not the Bank—was the proximate cause of plaintiffs' losses."[170] This argument fails, at least at this early stage of the proceedings.

Although "generally, an intervening intentional or criminal act severs the liability of the original tortfeasor … that doctrine has no application when the intentional or criminal

168 Bhatia Compl. ¶ 93; Tradewaves Compl. ¶ 89.

169 *See NewMarkets Partners LLC v. Oppenheim*, 638 F.Supp.2d 394, 410 (S.D.N.Y. 2009).

170 Memo, p. 42.

intervention of a third party or parties is reasonably foreseeable."[171] "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent."[172]

Here, as in *Derdiarian*, Standard Chartered's tortious conduct created the very risk that resulted in Bhatia's and Tradewaves' losses. Had Standard Chartered exercised the proper duty of care, Standard Chartered would not have made misrepresentations regarding Fairfield, would have disclosed the actual risks involved, would have conducted the requisite due diligence, and, presumably, would not have advised Bhatia and Tradewaves to invest in a Ponzi scheme.[173]

Standard Chartered should not be excused as a matter of law based on Madoff's fraud. The question of foreseeability is one for the finder of fact to determine.[174] Indeed, Bhatia and Tradewaves make several allegations regarding the foreseeability of such a fraud, including that "reasonable due diligence including typical quantitative analysis would have established that Fairfield Sentry, Ltd., Madoff, and BMIS were involved in a fraudulent scheme and that the investment returns touted by [Standard Chartered, as successor to] AEB were not possible," and that Standard Chartered, as successor to AEB "knew or should have known that Fairfield Sentry, Ltd. acquiesced to an unusual relationship with Madoff and BMIS, whereby BMIS served as both subcustodian of the assets and the executing broker."[175]

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171 *In re September 11 Litig.*, 280 F.Supp.2d 279, 302 (S.D.N.Y. 2003) (citing *Kush v. City of Buffalo*, 462 N.Y.S.2d 831, 59 N.Y.2d 26 (1983)); *Fagan v. AmerisourceBergen Corp.*, 356 F.Supp.2d 198, 211 (E.D.N.Y. 2004) ("When the intervening act was a foreseeable consequence of the defendant's negligence, he will be held liable; failure to take reasonable steps to guard against a foreseeable criminal act is negligent.").

172 *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 316, 434 N.Y.S.2d 166, 170 (1980).

173 Bhatia Compl. ¶¶ 24-46; Tradewaves Compl. ¶¶ 35-72.

174 *In re September 11 Litig.*, 280 F.Supp.2d at 302 ("While the specific acts of the terrorists were certainly horrific, I cannot find that the WTC Defendants should be excused of all liability as a matter of policy and law on the record before me, especially given the plaintiffs' allegations regarding the defendants' knowledge of the possibility of terrorist acts, large-scale fires, and even airplane crashes at the World Trade Center.").

175 Bhatia Compl. ¶ 32; Tradewaves Compl. ¶¶ 45-46.

Moreover, certain of the documents presented by Standard Chartered in support of the Motion acknowledge the possibility of such a fraud. For example, Standard Chartered asserts that the 10/1/04 PPM warns of the risk of misappropriation of Fairfield's assets.[176] Given this warning, Standard Chartered cannot establish as a matter of law that the injury here was caused by an act "of such an extraordinary nature [or one that] so attenuates defendants' negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant."[177]

Nevertheless, Standard Chartered would have the Court decide, without permitting discovery, that the alleged wrongdoing by Standard Chartered was not the proximate cause of Plaintiffs' injuries. Standard Chartered mistakenly relies on *Van Valkenburgh v. Robinson,*[178] for the proposition that Madoff's intervening act "clearly was not probable and, therefore, was not reasonably foreseeable," thus absolving Standard Chartered of liability.[179] But *Van Valkenburgh* is clearly distinguishable from this case.

Van Valkenburgh involved a police officer and his wife, who, during an argument, took her husband's service revolver and shot him and then killed herself.[180] The wife's estate sued the husband, the village, and the village police department for wrongful death.[181] Finding that the wife's suicidal act was so extraordinary in nature that liability cannot be reasonably attributed to defendants, the court granted the motion to dismiss.[182]

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176 Memo, p. 35.

177 *In re September 11 Litig.*, 280 F.Supp.2d at 301 (quoting *Kush*, 462 N.Y.S.2d at 835, 59 N.Y.2d at 33).

178 255 A.D.2d 839, 639 N.Y.S.2d 149 (3d Dep't 1996).

179 Memo, at p. 42.

180 639 N.Y.S.2d at 150.

181 *Id*.

182 *Id*. ("Clearly, it is reasonably foreseeable that if decedent were permitted possession of the semiautomatic handgun in question, she might inadvertently, . . . injure herself or a third party. The discharge that killed decedent, however, was not accidental. And, while it was possible, of course, that she would intentionally take her own life, that situation clearly was not probable, and therefore, was not reasonably foreseeable.")

In short, despite warning of the occurrence of such a fraud, Standard Chartered asks this Court to decide, as a matter of law, that Madoff's fraud is (a) as unlikely to happen as the events in *Van Valkenburgh* and (b) less likely to happen than terrorists flying planes into the World Trade Center.

4. Bhatia and Tradewaves state a claim for breach of fiduciary duty.

a. Plaintiffs properly plead claims for breach of fiduciary duty.

Bhatia and Tradewaves properly plead the claims for breach of fiduciary duty resulting from Standard Chartered's misrepresentations regarding Fairfield and the Lloyds Bonds securities, even though they contain similar allegations to the separate claim for fraud. Standard Chartered incorrectly asserts that Plaintiffs fail to properly plead the claims of breach of fiduciary duty relating to any misrepresentations because they sound in fraud, and thus must meet the requirements of Rule 9(b).[183] Claims for breach of fiduciary duty alleging a breach of a duty of care, disclosure, or loyalty are subject to the general pleading standards set out in Rule 8(a), not the heightened standard of Rule 9(b).[184] In any event, as set forth in Section III.B, Bhatia and Tradewaves have satisfied the heightened pleading requirements for fraud. Pleading alternative claims based on common allegations is permissible under the federal rules.[185]

b. Standard Chartered acted as the Plaintiffs' investment advisor, not just a trade broker for a nondiscretionary account.

Standard Chartered argues that the dispositive question in analyzing the duties owed to Bhatia and Tradewaves is whether their accounts were nondiscretionary or discretionary.[186] In so doing, it ignores a central issue of the case by setting up a false choice.

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183 Memo, p. 43, n. 27.

184 *Rahl v. Bande*, 328 B.R. 387 (S.D.N.Y. 2005) (citing *Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2002 WL 362794, at *8 (S.D.N.Y. Mar. 6, 2002)

185 Fed. R. Civ. P. 8(a)(3).

186 Memo, pp. 43-45.

The Plaintiffs relied upon Standard Chartered as their investment advisor, whom they trusted for sound advice that aligned with their "low-risk, long-term investment strategy."[187] An investment advisor owes its customer a fiduciary duty not to inappropriately invest the customer's funds in speculative, risky and otherwise unsuitable investments.[188] The duty to investigate and determine the suitability of an investment recommendation is basic and fundamental. A broker is required to investigate red flags and determine risks for all investments it recommends.[189] The Second Circuit has found that a securities dealer "occupies a special relationship to a buyer of securities."[190]

Here, Bhatia and Tradewaves plead a breach of fiduciary duty for failure to investigate and determine the suitability of Fairfield as a "cash substitute" with a "mythical status" by alleging, *inter alia*, that Standard Chartered provided false and misleading information, failed to investigate or perform due diligence as to the actual relationship of Madoff and BMIS with Fairfield Sentry Ltd., and failed to disclose material facts to Plaintiffs, including the roles of BMIS and Madoff as sub-custodian and executing broker, as well as the risks involved in such a structure.[191]

c. Bhatia and Tradewaves plead breach of Standard Chartered's transactional duty.

Even if Standard Chartered is deemed to be no more than Plaintiffs' broker for nondiscretionary accounts, it still owed Bhatia and Tradewaves a fiduciary duty, which Plaintiffs

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187 Bhatia Compl. ¶ 23; Tradewaves Compl. ¶ 36.

188 *Scalp & Blade, Inc.*, 722 N.Y.S.2d at 640.

189 *Hanly v. SEC*, 415 F.2d 589, 593 (2d Cir. 1969) (footnotes omitted); *Keenan v. D.H. Blair & Co., Inc.*, 838 F.Supp. 82, 89 (S.D.N.Y. 1993).

190 *Hanly*, 415 F.2d at 593 (a dealer "cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation. Where the salesman lacks essential information about a security, he should disclose this as well as the risks which arise from his lack of information.").

191 Bhatia Compl. ¶¶ 25-26, 105(c)-(d), (g); Tradewaves Compl. ¶¶ 38-39, 48-50, 101(c)-(d), (g).

allege has been breached. At a minimum, as a broker, Standard Chartered owed a fiduciary duty, on a transactional basis, to diligently and competently execute Plaintiffs' trade orders, and to give honest and complete information when recommending a purchase or sale.[192]

To cloud the issue, Standard Chartered selectively quotes *de Kwiatkowski* out of context. A more complete review of the passage from *de Kwiatkowski* proves Plaintiffs' point:

> It is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. The broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice, or warnings concerning the customer's investments. A nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions. ***On a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale.*** The client may enjoy the broker's advice and recommendations with respect to a given trade, but has no legal claim on the broker's ongoing attention.… ***As the district court observed, these cases generally are cast in terms of a fiduciary duty, and reflect that a broker owes no such duty to give ongoing advice to the holder of a nondiscretionary account***.[193]

Bhatia and Tradewaves alleged breach of this transactional fiduciary duty, by alleging that Standard Chartered failed to conduct any due diligence, failed to give accurate advice, and failed to redeem Bhatia's shares in Fairfield as agreed.[194]

E. The Exculpation Provisions in the Account Agreements Do Not Protect Standard Chartered

Standard Chartered presents certain documents (the "Account Agreements") purporting to be agreements between Plaintiffs and AEB, and later SCI, which Standard Chartered asserts are integral to the Complaints because of Plaintiffs' general allegations in the Complaints

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192 *See de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1302 (2d Cir. 2002). *See also In re Enron Corporation Sec., Derivative & "ERISA" Litig.*, 2003 WL 23305555, at *12 (S.D. Tex. Dec. 11, 2003) (acknowledging transactional-based duties and finding plaintiffs sufficiently pled breach of such duties by alleging "that BA and Citigroup/Salomon Smith Barney failed to conduct due diligence in investigating and failed to give complete and accurate information while providing brokerage services relating to Plaintiffs' purchases of the Enron notes during a brief period in October 2001.").

193 *de Kwiatkowski*, 306 F.3d at 1302 (citations omitted) (emphasis added).

194 Bhatia Compl. ¶ 32-35, 51-58, 105; Tradewaves Compl. ¶ 45-52. 1-1.

concerning their business relationship with Standard Chartered.[195] Standard Chartered argues that these Account Agreements contain exculpation provisions that bar Bhatia and Tradewaves from bringing any claims premised on the breach of any duties unless Standard Chartered was at least grossly negligent in performing those duties. These purported exculpatory provisions include paragraphs 42.1 and 42.2 of the T&Cs, and "similar provisions" in the Original Services Agreement and the Amended Services Agreement, at pages 5-6 and 4-5, respectively.[196] As set forth in Section I.A, presentment of such documents is not appropriate in support of the Motion.

1. All materials outside the Complaints, including the T&Cs, should be excluded from consideration.

Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the Complaint itself.[197] As explained in Section I, at this early stage of the proceedings, the Court should exclude the materials presented by Standard Chartered or, in the alternative, convert the Motion to one under Rule 56, and defer ruling on the Motion because Bhatia and Tradewaves are not in a position to present the Court with all the material pertinent to a motion for summary judgment.

Bhatia and Tradewaves dispute that the Account Agreements, as well as any Fairfield documents and the Lloyds Bonds prospectus, are integral to their Complaints. The documents are not specifically referenced in the Complaints. Plaintiffs also have a number of reasons to dispute the validity and/or authenticity of the documents. Moreover, the facts and circumstances surrounding the issuance of the T&Cs shortly before news broke of the Madoff Ponzi scheme and other factual matters are likely to have a bearing on whether any specific terms of the Account Agreements are enforceable. It would be premature to determine whether the purported

195 Memo, p. 20, n. 4.

196 Memo, p. 11.

197 *Kramer*, 937 F.2d at 773.

exculpatory provisions found in the T&Cs, unilaterally imposed by Standard Chartered, bar Plaintiffs' claims. Discovery needs to be taken to determine what documents, if any, were applicable to the Plaintiffs' accounts.

2. Bhatia and Tradewaves sufficiently plead intentional and/or reckless misconduct, which is not covered by any exculpation provisions.

Even if some exculpation provisions are applicable, Plaintiffs' allegations are sufficient to state colorable claims for gross negligence and/or recklessness, which fall outside the scope of any exculpation provisions. Bhatia and Tradewaves allege that Standard Chartered represented that it had "conducted extensive due diligence on the Fairfield entities" and "tout[ed] it as a 'cash substitute,'" when, in fact, Standard Chartered had no basis to make such claims.[198]

Standard Chartered failed to disclose that it did not investigate the Fairfield entities whatsoever and instead relied solely on the materials it received from the Fairfield entities.[199] Moreover, Standard Chartered knew and failed to disclose that Fairfield acquiesced to an unusual relationship with BMIS whereby BMIS served as both sub-custodian and executing broker – a structure that no other Fairfield fund shared.[200] Indeed, Standard Chartered failed to take reasonable steps to ensure that Plaintiffs' funds were invested in a prudent manner.[201] Despite claiming superior expertise and a stellar reputation in the private banking field, Standard Chartered blindly and recklessly relied on information provided by the Fairfield entities, even though because the roles of sub-custodian and executing broker were consolidated in BMIS, there was a heightened risk of fraud, and the need for independent verification and scrutiny was especially necessary.[202]

198 Bhatia Compl. ¶¶ 25-34; Tradewaves Compl. ¶¶ 38-43.

199 Bhatia Compl. ¶ 46; Tradewaves Compl. ¶ 63.

200 Tradewaves Compl. ¶¶ 46-48.

201 Bhatia Compl. ¶ 110; Tradewaves Compl. ¶ 106.

202 Tradewaves Compl. ¶¶ 70-72.

Plaintiffs' allegations are sufficient to establish recklessness and gross negligence.[203] To cloud the issue, however, Standard Chartered attempts to equate the standard for gross negligence with a requirement that it uncover Madoff's Ponzi scheme. Standard Chartered sets the bar far too high. Bhatia and Tradewaves do not allege that Standard Chartered had a duty to discover that Madoff's operations were a giant Ponzi scheme. Instead, they allege only that Standard Chartered had a duty to investigate, which it failed to do. As happened with other banks and potential investors, such investigation would have discovered and disclosed the risks associated with Madoff's operation.[204]

Standard Chartered argues that the gross negligence claims must be pled with particularity because they sound in fraud.[205] Although the heightened Rule 9(b) standard is applied when a cause of action sounds in fraud, the Rule 8(a) standard applies to all other causes of action, even when pled alongside a fraud claim in the same complaint.[206] Although the claims may have common allegations, Plaintiffs alleged separate causes of action implicating Standard Chartered's gross and reckless disregard of Plaintiffs' rights. In any event, Plaintiffs satisfy the heightened pleading requirements for fraud.

F. Bhatia States Claims for Specific Performance

Standard Chartered argues that the specific performance claims should be dismissed because Bhatia and Tradewaves do not assert a separate cause of action for breach of contract,

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203 *See, e.g., Cromer Fin. Ltd.*, 2001 WL 1112548, at *2-3 (upholding gross negligence claim where defendant "issues materially false and misleading audit reports" and "knew or recklessly disregarded" that the reports were "the principal means by which investors were induced to purchase shares…, to increase their shares… and/or to retain their existing shares" and "there was no other purportedly independently-verified information available to investors on which they could rely").

204 *See, e.g., Valladolid* First Amended Complaint ¶¶ 65, 66 (alleging that a private equity group and Goldman saw red flags and did not invest in Madoff's funds).

205 Memo, pp. 45-47.

206 *Rahl*, 328 B.R. 387.

because they are seeking money damages, and because Standard Chartered alleges that it performed its obligations.[207] Each of these arguments fails.

First, there is no prerequisite to a specific performance claim requiring a plaintiff to assert a separate cause of action for breach of contract. Rather, to state a claim for specific performance, a plaintiff must allege: (1) that there is a valid contract; (2) plaintiff has substantially performed under the contract and is willing and able to perform its remaining obligations; (3) defendant is able to perform its obligations; and (4) plaintiff has no adequate remedy at law.[208] Here, Plaintiffs plead each element of the claim for specific performance, a point that Standard Chartered does not dispute.[209]

Next, Bhatia seeks specific performance of their redemption rights – an issue entirely separate from any claim for money damages arising from Standard Chartered's failure to redeem the funds as agreed. Moreover, alternative pleading is permitted under the federal rules.[210] And claims for specific performance should not be dismissed where, as here, it may be difficult to determine what money damages would be available for a breach of redemption rights.[211]

Standard Chartered also argues that it "fully performed its obligations with respect to any redemption requests."[212] This assertion ignores Bhatia's allegations that Standard Chartered did not perform its obligations.[213] At most, Standard Chartered's argument disputes the allegations

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207 Memo, p. 48.

208 *La Mirada Products Co., Inc. v. Wassall PLC*, 823 F.Supp. 138, 140 (S.D.N.Y. 1993).

209 Bhatia Compl. ¶¶ 51-59, 119-121; Tradewaves Compl. ¶¶ 50-54, 115-117.

210 Fed. R. Civ. P. 8(a)(3).

211 *See, e.g., Rosen v. Mega Bloks Inc.*, 2008 WL 2810208 (S.D.N.Y. July 21, 2008) (denying motion to dismiss specific performance under a stock purchase agreement where "a determination of money damages for a breach of this sort is entirely speculative, and large incalculable").

212 Memo, p 48.

213 Bhatia Compl. ¶ 58 ("Despite several demands by Plaintiffs after October 28, 2008, the STANDARD CHARTERED Defendants failed to secure or seek redemption of the funds invested in Fairfield Sentry, Ltd.").

in the Bhatia Complaint, a dispute that cannot be decided at this stage of the proceedings. Accordingly, Bhatia's claim for specific performance should not be dismissed.

G. Bhatia States Claims Relating to the Lloyds Bonds

As with several of its arguments, Standard Chartered argues for dismissal of the claims relating to the Lloyds Bonds based on a document that may not be considered on a motion to dismiss. Specifically, annexed to the Vijayan Decl. as Exhibit GG is a prospectus apparently issued by Lloyds TSB Bank plc, dated May 9, 2008 (the "Prospectus"). Notably, Mr. Vijayan does not state that this Prospectus was ever provided to Bhatia and Bhatia did not receive it.[214] Standard Chartered concedes that the "*Bhatia* plaintiffs' complaint does not address the prospectus for the Lloyds Bonds." [215] Yet, in a prior footnote, Standard Chartered argues that the Court should consider the Prospectus because it is purportedly referenced in the Bhatia Complaint.[216]

As discussed above, materials outside of the Complaints may only become a basis for a dismissal where certain conditions are met: the document is integral to the complaint; it is clear on the record that no dispute exists regarding the authenticity or accuracy of the document; and it is clear that there are no material disputed issues of fact regarding the relevance of the document.[217] In *Faulkner*, the plaintiffs' complaint mentioned, but did not attach, offering memoranda in connection with one plaintiff, and did not mention any other plaintiff receiving it

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214 Bhatia Decl., ¶ 8.

215 Memo, p. 18.

216 Memo, p. 7, n. 4.

217 *Faulkner*, 463 F.3d at 134.

or having relied on it.[218] After the defendants moved to dismiss, attaching the offering memoranda to their motion, the Court denied the defendants' motion.[219]

Like the plaintiffs in *Faulkner*, Bhatia did not attach the Prospectus to the Complaint, did not mention receiving the Prospectus, and did not rely on the Prospectus. Rather, Bhatia alleges never having received the Prospectus.[220] The claims relating to the Lloyds Bank Bonds should not be dismissed because, if Bhatia did not receive the Lloyds Prospectus, a factual issue that can only be determined in discovery, their "claims could not be dismissed based on warnings of risk in those documents."[221]

In addition, Standard Chartered asserts that Bhatia failed to plead any injury in connection with the Lloyds Bonds investments. Specifically, Standard Chartered argues that "as of the time *Bhatia* plaintiffs filed their amended complaint, the price of the preference shares had already risen back to the $65-70 price range at which the bonds were valued before their conversion."[222] Standard Chartered improperly relies upon an affidavit from its attorney and documents outside the Complaints to show a price range for the bonds.[223] Moreover, Bhatia alleged an injury caused by Standard Chartered relating to the Lloyds Bonds.[224] The fact that the Bhatia did not allege a specific dollar number for damages is not grounds to dismiss the claims for damages, especially where, as here, the claims are based upon multiple breaches by Standard Chartered.

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218 *Id*.

219 *Id*. ("It is not clear whether the other plaintiffs had or had not relied on either of the Offering Memoranda in making or maintaining their investments. Dismissal under Rule 12(b)(6) critically depends on whether specific plaintiffs had invested before the issuance of the Offering Memoranda, Annual Reports and Prospectus. For example, if a plaintiff had not received a copy of either Offering Memorandum, then that plaintiff's claims could not be dismissed based on warnings of risk in those documents.").

220 Bhatia Compl. ¶¶ 68-76.

221 *Faulkner*, 463 F.3d at 134.

222 Memo, p. 18.

223 *See supra*, Section I.A (Standard Chartered's extraneous documents are improper).

224 Bhatia Compl. ¶¶ 101, 106, 111.

CONCLUSION

Standard Chartered's Motion should be denied. This Court may properly exercise jurisdiction over Plaintiffs' adequately pled claims.

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Respectfully submitted,
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