Anwar et al v. Fairfield Greenwich Limited et al Doc. 445

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

UNIFIED RESPONSE TO MOTION TO DISMISS[1]

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[1] Although this is a unified response in reference to the common issues raised in the Motion to Dismiss, Plaintiffs stress to the Court that there are individual issues that pertain to only some of the Plaintiffs. These are clearly identified in this Response, and, respectfully, they require separate, individualized consideration by the Court.

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INTRODUCTION

A straw man is a powerful rhetorical device when used properly. Seriously mischaracterize the opponent's position and then refute it. It can work magic if done skillfully enough.[2]

Standard Chartered[3] relies on this rhetorical trick, erecting two basic straw men, in the hope that this Court will accept the false premises that the bank attributes to the Plaintiffs' claims. Standard Chartered's straw men deal first with its role and relationship with the Plaintiffs and then with the nature of the basic allegations against the bank. One of the main objectives of this Brief is to set the record straight, tear down Standard Chartered's straw men, and restore reality to the nature and scope of the Plaintiffs' claims.

Standard Chartered's first straw man is its mischaracterization of its relationship with the Plaintiffs. Standard Chartered would have the Court believe that, although holding itself out as a private banker with expertise in investments, it was nothing but a

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[2] A straw man is "the fallacy of refuting a caricatured or extreme version of somebody's argument, rather than the actual argument they've made. Often this fallacy involves putting words into somebody's mouth by saying they've made arguments they haven't actually made… In debate, strategic use of a straw man can be very effective. A carefully constructed straw man can sometimes entice an unsuspecting opponent into defending a silly argument that he would not have tried to defend otherwise." Glen Whitman, *Logical Fallacies and the Art of Debate, available at* http://www.csun.-edu/~dgw61315/fallacies.html (accessed April 28, 2010). *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 416 (S.D.N.Y. 2003) ("Underwriters have created a "straw man" by rewriting Plaintiffs' allegations and then attacking only their version of the allegations. *See generally* Madsen Pirie, *The Book of the Fallacy: A Training Manual for Intellectual Subversives* 160-61 (1985).")

[3] For purposes of this memorandum, "Standard Chartered" shall refer to Standard Chartered Bank International (Americas) Ltd., Standard Chartered Bank, Standard Chartered PLC and Standard Chartered International (USA) Ltd. and its predecessor, related, or affiliated American Express Bank entities. Where only one entity comprising Standard Chartered is being referred to, that entity shall be named specifically.

mere order-taker, nigh unto an online discount broker, dispensing no investment advice and merely passively executing customer trades. Therefore, it argues, it had no responsibility for the consequences of its ill-fated recommendations that its clients invest in Fairfield Greenwich's Madoff feeder funds. Of course, the Plaintiffs themselves would find this allegation bewildering, given the hands-on, kid-glove treatment they thought they were receiving from their private bankers, and, accordingly, the Complaints are replete with allegations that plainly refute Standard Chartered's caricature of its role. It is plainly alleged that Standard Chartered held itself out and purported to act as a professional investment adviser in whom investors like the Plaintiffs could and should place complete reliance, and, in connection therewith, made recommendations as to purchases of investments, including the Fairfield Greenwich investments. As a result, Standard Chartered owed its clients fiduciary duties, including the duty to make prudent and fitting recommendations on the basis of investigation and inquiry qualifying as "due diligence."

Standard Chartered's second straw man is to mischaracterize what it is being accused of. Actually, this straw man comes in three parts.

Part One is to set an impossibly high bar -- make believe that Standard Chartered is being accused of wrongfully failing to discover and conclude that Bernard Madoff was running a Ponzi Scheme, when that is plainly not what is being alleged. Standard Chartered is being accused, instead, of failing to discover and conclude that there were enough unanswered questions (raised by obvious red flags) surrounding the Madoff operation as to make it imprudent for the bank to recommend to its private banking clients (particularly as a "risk reducer," *i.e.*, an investment with less risk than common

stocks, as Standard Chartered referred to this investment). There is, of course, a major difference between these two accusations, and Standard Chartered is obviously trying to conceal that significant difference.

Part Two of this straw man goes hand-in-hand with Part One -- it would have been unreasonably difficult, if not impossible, for Standard Chartered to have learned enough about the risk of investing with Madoff to have caused them not to recommend it to their private banking clients. Standard Chartered argues principally that Madoff's Ponzi scheme lasted so long that it is unfair to tax Standard Chartered. Even assuming away the bank's rhetorical pretense that that it is being accused of failing to discover that Madoff was running a Ponzi Scheme, and instead properly characterizing the claims as a failure to discover the risks associated with a Madoff investment, the Plaintiffs show in this memorandum that Standard Chartered still plainly and vastly overstates the argument that it cannot possibly be blamed.

The Complaints plainly allege the inconvenient truth that disproves the Bank's false premise about the difficulty of fulfilling its due diligence duties. Harry Markopolos, a Boston-based investment advisor, having reviewed and massaged available public information, was able to conclude that it was very likely that Madoff *was* running a Ponzi Scheme.[4] Nor was Mr. Markopolos alone: many investment banks and advisors -- *in the same shoes worn by Standard Chartered* – decided not to put their clients into the Madoff

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[4] *See* Harry Markopolos, *No One Would Listen: A True Financial Thriller* (2010); *see Headway* Cplt., ¶¶ 63, 70 (Markopolos identified 29 red flags and determined that achieving results claimed by Fairfield Greenwich was mathematically impossible); *Valladolid* Cplt., ¶¶ 63, 67-69 (same).

operation because they smelled a rat, and there was even a newspaper article casting serious doubts on the legitimacy of the Madoff operation.[5]

Standard Chartered readily admits that it had a duty to investigate, determine and disclose the risk of this investment and to decide whether even to make the recommendation. At the motion to dismiss stage, for Standard Chartered to obtain dismissal on the ground that it cannot be held responsible for failing in these basic responsibilities, this Court would need to conclude that reasonable people could not differ that, despite its admitted fiduciary duties and the presence of numerous red flags, Standard Chartered did not fail in those duties. In other words, no reasonable jury could find it imprudent to recommend clients invest millions with a Madoff feeder fund – even to pitch the investment as a "risk reducer," *i.e.*, less risky than investing in common stocks. The plain facts alleged in the Complaints demonstrate that such a finding would be highly unfounded, since, if the factual allegations are true, a jury would plainly be entitled to find that Standard Chartered could and should have reached the same conclusion that was reached by other professional investment advisers similarly situated. In other words, reasonable jurors would be entitled to decide that if Société Génerale, Goldman Sachs, CitiGroup, Morgan Stanley, Merrill Lynch, Credit Suisse, Banque Privee Edmond de Rothschild Europe, Partners Group Holding AG, Gottex Fund Management Holdings Ltd., Salus Alpha Group Services GmbH, Infiniti Solutions Ltd., CMA Global Hedge PCC Ltd., GAM, the hedge fund-of-funds subsidiary of Julius Baer AG, Dexion Capital PLC, Cadogan Management LLC, Berens Capital Management

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[5] *See*, *e.g.*, *Maridom* Am.Cplt., ¶¶ 42, 43; *Valladolid* Cplt., ¶¶ 62, 65, 66; *Lopez* Am.Cplt., ¶ 49; *Headway* Cplt., ¶¶ 61, 62, 63-69, 71.

LLC, Group LLC, Taylor Investment Advisors LP, Cambridge Associates LLC, RogersCasey LLC, Albourne Partners Ltd., Aksia Ltd., and Segal Co. were sufficiently wary of Madoff to stay away,[6] *why not Standard Chartered*?

Part Three of the second straw man is to rely on the fact that the Securities and Exchange Commission did not discover the Madoff fraud – how can *we* be expected to have done so when the SEC did not? The Court is asked to take judicial notice of the SEC Inspector General's Report No. 509, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme*, *available at* http://www.sec.gov/news/studies/2009/oig-509.pdf (August 31, 2009) ("SEC's Madoff Report"). The Plaintiffs, as they discuss *infra*, at 13, oppose the request for judicial notice, but if the Court were to take notice of the OIG findings, one wonders how these findings could possibly benefit Standard Chartered. The Report lays out in mind-numbing detail the appalling incompetence of the SEC, disregarding evidence and failing to ask obvious, elementary questions. Does Standard Chartered want to be judged on the basis of adhering to the standard of conduct – incompetent failure to adhere to the most basic elements of diligence -- displayed by the SEC? The mere suggestion would be laughable if it were not so unreasonable and thoroughly cynical.

Standard Chartered is not being asked to have done what the SEC should have been able to do with a C+ investigation; Standard Chartered is being asked to have done what a well-paid investment advisor should have done. That is a realistic standard to which Standard Chartered should be held, and there is nothing that suggests that, given

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[6] *See Maridom* Am.Cplt., ¶¶ 42-43.

the well-pled allegations in the four complaints in question, Standard Chartered should not be required to litigate these issues.

ARGUMENT

I.

THE COURT SHOULD DISREGARD STANDARD CHARTERED'S IMPROPER ATTEMPTS TO RELY ON DOCUMENTS AND INFORMATION OUTSIDE THE FOUR CORNERS OF THE COMPLAINTS

The first task in assessing a motion to dismiss is to determine the well-pled allegations that the Court must accept as true. *E.g.*, *Pacific Inv. Management Co. LLC v. Mayer Brown LLP,* No. 09-1619-cv, 2010 WL 1659230 at *1 (2d Cir. Apr. 27, 2010) (listing "non-conclusory allegations accepted as true). Before reaching that issue, however, the Court will first have to decide whether to take into consideration the considerable number of documents that Standard Chartered proffers in support of its motion to dismiss and whether to take judicial notice of other documents and the factual assertions therein.

Standard Chartered has no basis under law to ask this Court to take into account the more than two dozen documents it seeks to put before the Court or concerning which it seeks the Court to take judicial notice. Instead, the Court should limit its task to inspecting the Complaints themselves to determine if they satisfy basic pleading standards.

A. Standard on Motion to Dismiss.

The legal standard with regard to a Rule 12(b)(6) application to dismiss for failure to state a claim articulated by the Supreme Court in *Twombley* is by now well-known:

> Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).[7] The Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), later clarified *Twombley*'s plausibility test, recognizing its roots in the idea that for purposes of a 12(b)(6) motion, factual allegations are to be taken as true, while legal conclusions are not: "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

In evaluating claims in the context of a 12(b)(6) motion, the district court is normally required to look only to the allegations on the face of the complaint. *See, e.g., Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). In limited circumstances, the court may consider documents other than the complaint in ruling on a motion under Rule 12(b)(6). *Id.* These limited circumstances definitely do not encompass the situation here.

B. Under Clear Second Circuit Precedent, Standard Chartered's Proffered Documents Do Not Qualify for Consideration at this Stage.

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[7] Even if a court grants a motion to dismiss, the plaintiff may request leave to amend the complaint to correct the deficiencies: "It is the usual practice upon granting a motion to dismiss to allow leave to replead. Although leave to replead is within the discretion of the district court, refusal to grant it without any justifying reason is an abuse of discretion." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (citations omitted), *cert. denied*, 503 U.S. 960 (1992).

Documents attached to the complaint or incorporated in it by reference are part of the pleading and may be considered. *Id.* No documents were attached to any of the Complaints.

"In addition, even if not attached or incorporated by reference, a document 'upon which the complaint *solely* relies and which is *integral to the complaint*' may be considered by the court in ruling on such a motion." *Id*. (emphases in original) (quoting *Sum Holding L.P.,* 949 F.2d at 47 (citations omitted) and citing *Global Network Communications, Inc. v. City of New York,* 458 F.3d 150, 154-55 (2d Cir. 2006)).[8] For a document to be considered "integral" to the complaint requires surmounting a high hurdle that Standard Chartered completely avoids discussing and certainly does not meet. A case cited by Standard Chartered, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d. Cir. 2002), explains that "integral" requires that the plaintiff must have "reli[ed] on the terms and effect of a document in drafting the complaint." *See Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co*., 62 F.3d 69, 72 (2d Cir. 1995) ("relies heavily upon its terms and effect"), quoted in *Chambers*, 282 F.3d at 153. Moreover, "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. It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner v. Beer,* 463 F.3d 130, 134 (2d Cir. 2006) (*citing Kaempe v. Myers,* 367 F.3d 958, 965 (D.C.

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[8] Taking into consideration integral, relevant and authentic documents not referred to or incorporated in the complaint is an exception to Rule 12(d), which states: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *See infra*, at 13 *ff.*, for a discussion of Rule 12(d) as it applies in this case.

Cir. 2004) and *Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co.,* 267 F.3d 30, 33 (1st Cir. 2001)).

The documents on which Standard Chartered places great emphasis are various account agreements and related documents[9] that it suggests are its silver bullets, because they contain purported exculpatory clauses barring all of the claims against the Bank. The Plaintiffs deal later in this *infra*, at 59, with the question of whether, if the Court does not exclude those documents, it should conclude that these agreements do spell victory for Standard Chartered at this early stage. Here, Plaintiffs deal solely with the question of whether the Court should even take these documents into account.

The first question is whether these documents are "integral" to the Complaints and were "solely" relied on in bringing the complaints. *Roth*, 489 F.3d at 509. As to the *Maridom* amended complaint, there is not even any reference to any account documents, so they could not possibly be considered "integral" to that pleading. Neither test is met for the *Headway*, *Lopez*, or *Valledolid* complaints, either, because while each refers to account agreements, there is nothing in these pleadings that indicates that the agreements were the sole bases upon which suit is brought or that the terms and effect of the agreements in question were relied upon in drafting the complaint; further, no allegation is made that Standard Chartered violated any of its terms or that the agreements are in any way "integral" to their claims. At most, the allegations regarding those agreements in

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[9] These documents include Rules and Regulations Governing Accounts ("RRGAs"), dated as of December 2006 and August 1, 2008, respectively, Exhibits I and J to the Declaration of Patrick R. Berarducci; and Nondiscretionary Investment Services Agreements ("NISAs") purportedly signed by Valladolid as Berarducci Exhibits N and O, dated June 29, 2006 and September 21, 2006, respectively. According to Standard Chartered, these documents were referred to in Account Agreements and purported to govern the account relationship.

those complaints are aimed at establishing the propriety of the venue of the jurisdiction where the complaints were filed.

Even if the proffered documents were considered "integral," there are serious questions concerning whether the documents are authentic or relevant. On the first point, there is no evidence submitted by a person with actual knowledge that the documents are authentic: instead, Standard Chartered proffers the Declaration of a Sullivan & Cromwell lawyer, Patrick R. Berarducci, who does not purport to speak with personal knowledge. *See* Berarducci Declaration, ¶ 1 ("I am fully familiar with the matters stated herein based on personal knowledge *or review of files in the possession of my firm*") (emphasis added). Plaintiffs are not attacking Mr. Berarducci's credibility, just his competence as a witness to authenticate these documents. The cases emphasize that only when the authenticity of apparently integral and relevant documents is not disputed or questioned may the trial court consider them on a motion to dismiss. *E.g.*, *Azzolini v. Marriott International, Inc.,* 417 F. Supp. 2d 243 (S.D.N.Y. 2005) (trial court declines to take into account document proffered by defendants on the basis of authenticating affidavit where plaintiff disputed authenticity); *Grogan v. O'Neil*, 292 F.Supp.2d 1282, 1292 (D. Kan. 2003) (court declines to take into account unauthenticated corporate charter). Here, the Plaintiffs do not accept Mr. Berarducci's hearsay belief that the documents are authentic, and insist on proof.

Even aside from authenticity, there is a serious issue of relevance of the proffered RRGAs, stemming from their dates -- December 2006 and August 1, 2008. The problem is that the vast majority of the Plaintiffs' investments were made before December

2006,[10] and Standard Chartered has proffered no evidence that there were RRGAs dated before December 2006 or, if so, what they said. Therefore, there is ample reason to doubt the relevance of the RRGAs to most if not all of the claims advanced by the Plaintiffs. In addition, according to the Beraducci Declaration, ¶ 9, there was no operative account agreement governing the Headway investments between April 8, 2003 and July 24, 2008, during which period four of the five transactions alleged by Headway took place: according to Standard Chartered's own lawyer, a 1997 agreement was "canceled" on April 8, 2003, and a new one was not executed until July 24, 2008.

Additionally, Standard Chartered attaches as Exhibits N and O two Nondiscretionary Investment Services Agreements ("NISAs"), dated June 29, 2006 and September 21, 2006, respectively, purportedly signed by Ms. Valladolid. Despite not presenting any NISAs signed by other plaintiffs, Standard Chartered attempts to use these exhibits as a vehicle to label *all* accounts for *all* plaintiffs as non-discretionary accounts – "Finally, the very title of the NISA—the Nondiscretionary Investment Services Agreement—exemplifies the limited nature of plaintiffs' relationship with SCBI. Indeed, the NISA's terms leave no room for doubt on this point." Motion to Dismiss, p. 10. The use of the non-discretionary classification, which is directly contradicted by the allegations in some of the complaints, is central to Standard Chartered's defenses with regard to their duties to plaintiffs. However, these documents do not have the universal application Standard Chartered represents, and therefore they are irrelevant to all of the other plaintiffs besides Ms. Valladolid.

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[10] Headway's investments were all pre-December 2006, Cplt., ¶¶ 39, 42-44. Valladolid's purchase was made pre-December 2006, Cplt., ¶ 23, as was one of Lopez's purchases, AmCplt., ¶31, and Abbot Capital's and one of Maridom's, Am.Cplt., ¶¶ 21, 23.

Finally, Standard Chartered attaches three Private Placement Memoranda ("PPMs") as Exhibits A, W and X. Although Standard Chartered does point out that one set of plaintiffs, the Maridom plaintiffs, alleged receipt of the Private Placement Memoranda, Standard Chartered does not demonstrate that these PPMs were received by *all* of the Plaintiffs. In fact, with regard to Headway's January 2003 investment in Fairfield Sentry, Standard Chartered could not show that the PPMs it attaches were received by Headway, because the earliest PPM for Fairfield Sentry attached by Standard Chartered is dated July 1, 2003, six months after Headway's initial investment.

The inconsistencies and incompleteness of the documents proffered by Standard Chartered are precisely the sorts of issues precluding consideration of extrinsic documents described in the opinion in *Faulkner v. Beer, supra*. In *Faulkner*, investors brought fraud and breach of fiduciary claims against their investment advisor, one of his investment vehicles, and other affiliated persons. The defendants moved to dismiss, raising many of the same defenses raised by Standard Chartered here. Several documents were submitted in connection with the defendants' motion to dismiss, including offering memoranda, annual reports and a prospectus. The appeals court vacated the district court's dismissal of the complaints. The court held that there were too many open questions concerning which documents were seen or relied on by which plaintiffs. 463 F.3d at 134-135. Analogously, there are too many questions here concerning whether the RRGAs were in existence when investments were made, or even whether the RRGAs applied, in the case of Headway, for the Court to refer to these documents at this stage. There is simply not enough information before the Court at such an early stage to make determinations on documents not integral to the complaints, particularly when those

documents appear either internally inconsistent, or inconsistent with the allegations in the complaint.

C. <u>The Court Should Not Take the Requested Judicial Notice.</u>

Standard Chartered seeks judicial notice of a variety of documents: the Trustee's comments in *In re Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (BRL), 2010 WL 694211 (Bankr. S.D.N.Y. Mar. 1, 2010); the Trustee's Second Interim Report ¶ 50, at 17, *In re Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789 (BRL), (Bankr. S.D.N.Y. Nov. 23, 2009); *S.E.C. v. Cohmad Sec. Corp*., No. 09-CV-5680, 2010 WL 363844, at *2 (S.D.N.Y. Feb. 2, 2010); Madoff's allocution; and, of course, the SEC's Madoff Report.

Standard Chartered assuredly is not asking the Court to take notice of these documents for the purpose of showing that the statements therein were made. Clearly, it is asking that the Court consider them for their truth. There is, however, no legal support, and Standard Chartered offers none, for such a request. Instead, it is black letter law that at the motion to dismiss stage, a trial court may take judicial notice of documents "not to prove the truth of their contents but only to determine what the documents stated." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991), cited in *Global Network*, 458 F.3d at 157. Therefore, the Court should not grant Standard Chartered's request for judicial notice.

D. The Court Should Not Convert this Motion <u>to a Summary Judgment Motion.</u>

As noted, under Rule 12(d), the consideration of facts and documents extrinsic to the complaints (and not found to be "integral", and of unquestioned authenticity and relevancy) requires that the court convert the motion to a Rule 56 motion for summary judgment:

> [i]f ... matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Global Network, 458 F.3d at 154-155 (quoting then Fed. R. Civ. P. 12(b) and citing to *Friedl v. City of New York,* 210 F.3d 79, 83-84 (2d Cir. 2000) (conversion required "whenever there is a 'legitimate possibility' that the district court relied on material outside the complaint in ruling on the motion") (citation omitted). *See* Fed.R.Civ.P. 12(f). As indicated by the word "must" in Rule 12(d), the conversion of a Rule 12(b)(6) motion into one for summary judgment under Rule 56 when the court considers matters outside the pleadings is "strictly enforce[d]" and "mandatory." *Global Network*, 458 F.3d at 155 (quoting *Amaker v. Weiner,* 179 F.3d 48, 50 (2d Cir. 1999) and citing *Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985) (all referring to former wording, "shall").

The *Global Network* court further explains the important policies behind the mandatory conversion requirement:

> the requirement expressly addresses and solves the major problem that arises when a court considers matters extraneous to a complaint, namely, the lack of notice to the plaintiff that outside matters would be examined. It deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it.

Global Network, 458 F.3d at 155; *see also Sahu v. Union Carbide Corp.*, 548 F.3d 59 (2d Cir. 2008). In most cases, the policies behind the mandatory conversion rule mean that a district court "must give notice to the parties *before* converting a motion to dismiss pursuant to Rule 12(b)(6) into one for summary judgment and considering matters outside the pleading." *Sahu*, 548 F.3d at 67 (quoting *Gurary v. Winehouse,* 190 F.3d 37,

43 (2d Cir. 1999) and citing *Kopec v. Coughlin,* 922 F.2d 152, 154-55 (2d Cir. 1991)). The importance of providing the plaintiff with opportunity to prepare for a summary judgment motion was emphasized in *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.,* 193 F.3d 109 (2d Cir. 1999):

> [C]are should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law.

Id. at 115 (quoting *Ramsey v. Coughlin,* 94 F.3d 71, 73-74 (2d Cir. 1996)). Once a court decides to consider extrinsic evidence to decide a motion for summary judgment rather than limit itself to the pleadings as it would on a motion to dismiss, therefore, the plaintiffs should be given "a reasonable opportunity to meet facts outside the pleadings." *Sahu*, 548 F.3d at 70 (quoting *In re G. & A. Books, Inc.,* 770 F.2d 288, 295 (2d Cir. 1985)).

The Court has the discretion to exclude the documents. Assuming that the Court does not find these documents to be within the "integral" exception to Rule 12(d), then there is no need to convert if the Court excludes the documents in question. There are several reasons not to convert. First, the meaning of the documents and their application to the Plaintiffs may require depositions of all of the principal witnesses in the case, but on relatively narrow grounds: what do these documents mean, what was their intent? But because Standard Chartered will not have provided the Plaintiffs their documents, it would be impossible to cover the entirety of the subjects that would be covered in the "merits" discovery of such witnesses. Therefore, there would be substantial repetitive discovery of witnesses, at great cost to all parties (with Standard Chartered, a world-wide

banking institution, having the deepest pockets and the greatest incentive to take advantage of that situation). Even then, if the parties had different recollections of their intent, or if other issues were disputed, it might not be possible to determine the issue of the effects of these documents on Plaintiffs' claims on summary judgment – meaning that the entire exercise would turn out to be a waste of time, effort and resources. There would therefore not appear to be anything gained, and a potential of great waste, if the Court were not to exclude these documents.

For the reasons stated above, it is respectfully requested that the Court exercise its discretion not to expand the scope of the Motion and therefore exclude the documents from consideration.

E. The Allegations that the Court Must Accept as True.

Having disposed of the issues raised by Standard Chartered's requests that the Court consider extraneous documents and take notice of extraneous information, the Plaintiffs now turn to the factual allegations that the Court must, under the cases, accept as true.

In broad terms, all of the Complaints allege:

- that the Plaintiffs were offshore private banking clients of Standard Chartered's Miami-based Edge Act bank, now called Standard Chartered Bank International (Americas) Ltd.;
- that they relied on Standard Chartered for investment advice;
- that Standard Chartered recommended that they invest in one or both of two Fairfield Greenwich offshore hedge funds;

- that they followed that advice on the basis of their trust in Standard Chartered's expertise;

- that Standard Chartered charged them a regular annual fee and a special bounty for placing them in the Madoff feeder funds;

- that Standard Chartered failed adequately to investigate the riskiness of these investments;

- that Standard Chartered owed fiduciary duties to the Plaintiffs, including to determine on the basis of a proper investigation whether these investments were suitable for these Plaintiffs;

- that had Standard Chartered performed that duty, it would have discovered, if it did not know, that there was a material risk that this investment was not safe and that Madoff was running a scam of some sort, because of a number of facts – "red flags" – that an alert and careful advisor would have noticed and understood did not bode well;

- that these red flags included the fact that the hedge fund operators, after taking a large fee, simply handed the money, lock, stock and barrel, over to Madoff, a brokerage firm; that Madoff claimed to have realized steady, profitable results, in good markets and bad, over many years; that Madoff did not process trades electronically; that Madoff's financial statements were audited by an unknown one- or two-man accounting firm in Upstate New York; and so on; and

- that the Plaintiffs lost the entirety of their investment because Fairfield Greenwich had handed the money to Madoff, who was running a Ponzi scheme.

More particularized allegations are as follows.

Headway Investment Corp. v. American Express Bank Ltd.

Beginning in 1997, Headway, a Panama foreign private investment corporation, opened accounts at American Express Bank through its offices located in Miami, Florida. *Headway* Cplt., ¶ 35. About December 2002, American Express Bank recommended the Sentry Fund to Headway. Headway had never heard about the Sentry Fund until this meeting. American Express Bank represented to Headway that the Sentry Fund was a self-standing fund of funds with assets in bona fide investment vehicles. *Id.* at ¶ 38. American Express Bank first placed $4 million of Headway's investments into the Sentry Fund in January 2003, and an additional $2.5 million in November 2003. By the end of 2003, American Express Bank had invested for Headway a total of $6.5 million into the Sentry Fund. *Id.* at ¶ 39. In the summer of 2005, consistent with the original recommendation of American Express Bank's Miami office and based on the Sentry Fund's reported "returns," American Express Bank purchased for Headway an additional $2 million in the Sentry Fund, bringing the total investment in the Sentry Fund to approximately $8.5 million. *Id.* at ¶ 42. In late July 2005, American Express Bank made another investment recommendation to Headway. *Id.* at ¶ 43. American Express Bank sold for Headway $6.5 million of its investment in the Sentry Fund to purchase 6.2 million Euros ("€") in shares of the Sigma Fund. *Id.* About August 2005, from its Miami office, American Express Bank purchased for Headway additional shares of the Sigma Fund at a cost of €1.750 million, bringing Headway's total investment in the Sigma Fund to €7.950 million. *Id.* at ¶ 44. Therefore, by August 2005, American Express Bank had invested a total of 7.95 million euros and $2 million into Fairfield funds. *Id.* at ¶ 45.

Headway states claims against the Standard Chartered defendants for (i) breach of fiduciary duty, (ii) negligence, and (iii) unjust enrichment.

Lopez v. Standard Chartered Bank International (Americas) Limited, et. al.

In June 2004, Ricardo Lopez entered into a business relationship for investment purposes as a customer of American Express Bank, Ltd. and its subsidiary American Express Bank International (collectively referred to as "AEB") and opened several accounts. *Lopez* Am.Cplt., ¶ 22, 23. In 2006, AEB's relationship manager and officer, Antonio Garcia-Ardanez, recommended to plaintiff that AEB had conducted extensive due diligence on the Fairfield Funds and that such investments were like a "cash substitute." *Id* at ¶ 25. On or about September 22, 2006, AEB invested Lopez's funds in the Fairfield Sigma Fund by purchasing on his behalf 578.67 shares of Fairfield Sentry at 178.81 euros per share for a total amount of 100,000 euros. *Id.* at ¶ 31. On or about April 23, 2007, AEB invested Lopez's funds in the Fairfield Sigma Fund by purchasing on his behalf 836.86 shares of Fairfield Sentry at 179.24 euros per share for a total amount of 150,000 euros. *Id.* at ¶ 32. From 2006 through the first quarter of 2008, Lopez asked for advice from Standard Chartered as to whether he should remain invested in the Fairfield Funds, and was advised by Standard Chartered that he should remain invested in the Fairfield Funds, and not take profits of year over year returns because there were no other attractive opportunities in the markets to deploy the cash and cash returns that could match the risk-reward ratio of the Fairfield Funds. *Id.* at ¶ 39. On or about August 27, 2008, Standard Chartered invested Lopez's funds in the Sentry fund by purchasing on his behalf 409.25 shares of Fairfield Sentry at $1,343.92 per share for a

total amount of $550,000. *Id.* at ¶ 42. All in all, Lopez invested more than $900,000 with Standard Chartered, in reliance upon Standard Chartered's representations. *Id.* at ¶ 50.

Lopez asserts claims (i) under Section 10(b) of the Exchange Act and Rule 10b-5 against SCBI and Standard Chartered PLC ("Standard Chartered PLC"), (ii) under Section 20(A) of the Exchange Act against Standard Chartered PLC, (iii) for rescission under the Investment Advisers Act against SCBI,[11] (iv) for breach of fiduciary duty against SCBI and SCPLC, (v) for gross negligence against SCBI and Standard Chartered PLC, (vi) for unjust enrichment and constructive trust against SCBI and Standard Chartered PLC, and (vii) for common law fraud against SCBI and Standard Chartered PLC.

Maridom Ltd. v. Standard Chartered Bank Int'l (Americas) Ltd.

The *Maridom* plaintiffs are three affiliated foreign companies – Caribetrans, Maridom, and Abbot Capital – owned and operated by foreign nationals from the Dominican Republic. The *Maridom* plaintiffs' relationship with American Express Bank International dates back to 1991, when Caribetrans opened and thereafter maintained an account relationship with what is now SCBI. *Maridom* Am.Cplt., ¶ 17. By 2005, the account activity in the Caribetrans account included the purchases and sales of securities recommended by SCBI. *Id.* On September 26, 2008, SCBI effected a transaction whereby Caribetrans purchased shares in Fairfield Sentry for $300,000. *Id.* at ¶ 25.

Maridom opened an account relationship with SCBI in 1993. *Id.* at ¶ 18. Maridom first maintained a demand deposit checking account, and thereafter opened a

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[11] Based on new information presented by the Motion and subsequently confirmed, namely that Standard Chartered Americas is an Edge Act corporation, Lopez stipulates to the dismissal of the Third Claim in his Amended Complaint asserting rescission under the Investment Advisers Act.

money market account at SCBI. *Id.* At the recommendation of SCBI, Maridom eventually transferred several million dollars to a securities account at SCBI and purchases and sold securities on the recommendation of SCBI. *Id.* On April 26, 2006, SCBI effected a transaction in which Maridom purchased shares in Fairfield Sentry for $1,000,005.36. On August 27, 2008, through SCBI, Maridom purchased another $2,600,000 in shares in Fairfield Sentry. *Id.*

In December 2003, Abbot opened an account relationship with SCBI whereby Abbot granted SCBI full discretionary authority to buy securities on Abbot's behalf. *Id.* at ¶ 19. The account activity was primarily if not exclusively limited to purchases and sales of securities on the recommendation of SCBI. *Id.* On March 26, 2004, Abbot, through SCBI, purchased $700,000 in Fairfield Sentry shares. *Id.* at ¶ 21. On April 26, 2006, Abbot purchased another $205,000 worth of Fairfield Sentry shares. *Id.*

As alleged by plaintiffs in *Maridom*, in recommending the purchases of Fairfield Sentry shares, SCBI told plaintiffs that these would be safe investments with a steady return. *Id.* at ¶ 27. SCBI referred to the purchase of Fairfield Sentry shares as a "risk reducer, "in that the Fairfield Sentry shares would have lower volatility and risk than common stocks. *Id.* Although at the time of the Maridom plaintiffs' initial investments in Fairfield Sentry, the Maridom plaintiffs were provided with private placement memoranda, on information and belief, SCBI never read, reviewed, or appraised the information contained in the private placement memorandum to evaluate the veracity of the information provided therein. *Id.* at ¶ 29.

The Maridom plaintiffs have stated claims for breach of duties owed to the Maridom plaintiffs in recommending the Fairfield Sentry investments, negligent misrepresentation, and common law fraud.

Valladolid v. American Express Bank Ltd.

Plaintiff Maria Valladolid, a Mexican national, alleges in her First Amended Complaint that she and her husband were approached by an acquaintance, Carlos Captillo, an employee of the San Diego branch of American Express Bank Ltd. ("AEBL") in early 2006, who induced plaintiff to invest large sums of money with AEBL by relying on the American Express name and reputation for conducting careful due diligence. *Valladolid* Am.Cplt., at ¶¶ 22, 39. At a meeting in the San Diego branch office, Valladolid was introduced to Luisa Serena, who would act as her "relationship manager" on behalf of AEBL. *Id.* at ¶ 23. As a direct and proximate result of representations by AEBL through its agents, including Captillo and Serena, that AEBL had conducted careful due diligence of the proposed investments, in June and September of 2006, Valladolid invested approximately $1,000,000 in the Fairfield Sentry Limited Fund. *Id.* at ¶¶ 23, 42. Valladolid has stated claims for breach of fiduciary duty, negligence, and unjust enrichment.

II.

THE COMPLAINTS PROPERLY STATE CLAIMS FOR BREACH OF FIDUCIARY DUTY

A. The Disputed Issue is Not Whether Standard Chartered Owed the Plaintiffs Fiduciary Duties, but Which Ones.

The Plaintiffs allege that Standard Chartered's duties included having a reasonable basis for recommendations made to its customers (*Lopez* Am.Cplt., at ¶¶ 27,

43-36; *Valladolid* Am.Cplt., at ¶¶ 9, 14, 40, 41, and 43; *Maridom* Am.Cplt., at ¶¶ 4-5, 39, and 46); taking steps necessary to determine and understand the material risks associated with an investment (*Lopez* Am.Cplt., at ¶ 25; *Valladolid* Am.Cplt., at ¶ 12; *Maridom* Am.Cplt., at ¶¶ 5 and 40); monitoring the performance of the funds it recommends to determine whether any investment previously made in such a fund should remain in the fund or be removed (*Headway* Cplt., at ¶¶ 78-79; *Lopez* Am.Cplt., at ¶¶ 39, 80, and 86; *Valladolid* Am.Cplt., at ¶ 25); and disclosing all material facts to the investor and neither making nor communicating any material misrepresentations (*Headway* Am.Cplt., at ¶75; *Lopez* Am.Cplt., at ¶¶ 10, 41-42, and 48; *Maridom* Am.Cplt., at ¶¶ 3-5, 47, and 52).

There is no dispute between the parties as to whether Standard Chartered owed the Plaintiffs fiduciary duties. It did.[12] The only issue raised by the bank is whether it

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[12] The primary case cited by Standard Chartered unequivocally states: "It is well-established that a securities broker owes a fiduciary duty to their investors." *First Union Discount Brokerage Services, Inc. v. Milos*, 744 F.Supp. 1145, 1156 (S.D. Fla. 1990) (relying on *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1046 (11th Cir. 1987). *Gochnauer*, in turn, relied on *Lieb v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 461 F.Supp. 951 (E.D. Mich. 1978), which stated that

> [d]uties [of a broker-dealer] associated with a non-discretionary account include: (1) the duty to recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis; (2) the duty to carry out the customer's orders promptly in a manner best suited to serve the customer's interests; (3) the duty to inform the customer of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-dealing or refusing to disclose any personal interest the broker may have in a particular recommended security; (5) the duty not to misrepresent any fact material to the transaction; and (6) the duty to transact business only after receiving prior authorization from the customer. (citations omitted.)

As discussed below, Standard Chartered admits that the fiduciary duties owed by a bank to a client to whom it is rendering investment advice are at least as broad as those owed by a broker-dealer. While the Plaintiffs do not concede that banks should be treated the same as broker-dealers, it is noteworthy that the cases on which Standard Chartered relies

owed the Plaintiffs *all* of the duties alleged by the Plaintiffs. Standard Chartered argues only that Standard Chartered lacked "continuing oversight duties," as alleged in *Valladolid* and *Lopez*; and that its fiduciary duty to conduct due diligence in order to have a proper basis to recommend these investments, *which it admits it owed*, somehow did not encompass "the type of investigation that would have been necessary to uncover the longest-running and best-concealed Ponzi scheme in history." Motion, at 45. Neither claim holds an ounce of water.

B. The Nature of a Bank's Duties to its Private Banking Clients Is Determined by the Details of their Relationship, Not by an Artificial Bright-Line Discretionary/Non-Discretionary Test Developed for Broker-Dealers.

Standard Chartered tries to limit the nature of the fiduciary duties it owed to the Plaintiffs by stressing that they had non-discretionary accounts with the Bank, *i.e.*, they allegedly did not grant formal discretionary authority to Standard Chartered to effect securities transactions on their behalf without their specific approval or permission. In making this argument, Standard Chartered relies exclusively on broker-dealer cases, but, of course, it is not a broker-dealer: it is a bank. Admittedly, some other courts -- but not all courts and, most significantly, no Florida state court -- have followed the lead of the *Lieb* case, a 1978 district court decision, in defining the nature of the duties owed the customer by a securities broker-dealer on the basis of whether the customer had a discretionary or non-discretionary account. It is inaccurate, in any case, to argue that none

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establish, *at a minimum*, a myriad of fiduciary duties from Standard Chartered to the Plaintiffs, derived from broker-dealer case law.

of the Plaintiffs alleged that they gave Standard Chartered discretion.[13] What is more, the bright-line test that Standard Chartered urges the Court to adopt is not applicable to banks, and, in the event, has not been universally accepted even in the context of broker-dealers.[14] The discretionary/non-discretionary test is not even determinative in the cases that adopt it. In *Milos*, the fact the customer had a non-discretionary account was not

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[13] Abbott, one of the *Maridom* Plaintiffs, alleges that it had a discretionary account with Standard Chartered, Am.Cplt., ¶ 19, as does Lopez. Am.Cplt., ¶ 86. Standard Chartered acknowledges these allegations but alleges that the Court can ignore them because elsewhere in these pleadings the same plaintiffs allege that Standard Chartered recommended the Fairfield Greenwich purchases and they followed or approved the recommendations. Motion at 43 n.20. Standard Chartered's citation to this Court's decision in *Nat'l W. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 175 F. Supp. 2d 489, 493 (S.D.N.Y. 2000) is misplaced. In that case, this Court was faced with an allegation of "fact that [wa]s either clearly at odds with another fact set forth in the Complaint … or otherwise refuted beyond doubt by matters on the record before the Court." Here there are no such irreconcilable differences. A bank advising a client can have complete discretion but can nonetheless inform the client before a particular investment and receive its approval. The two statements are not in such conflict as to require that the Court take the drastic action of striking the allegations that the accounts were discretionary in nature. Standard Chartered can probe any differences in discovery.

[14] *See Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987) (determination of nature of fiduciary duties "depend[s] on the relationship between the broker and the investor" and "is necessarily particularly fact-based"; "courts draw no bright-line distinction between the fiduciary duty owed customers regarding discretionary as opposed to nondiscretionary accounts" but nature of account is "a factor to be considered"); *Baker v. Wheat First Securities*, 643 F. Supp. 1420, 1428 (S.D. W. Va. 1986) (broker-dealer case; "[t]he Court does not believe that the discretionary - nondiscretionary dichotomy is the shibboleth which Wheat attempts to make it out to be. While a few courts have based their holdings on the distinction, the Court does not find that the question will necessarily always be so neatly suitable for resolution"); *Schimke v. New York Life Ins. & Annuity Corp.*, No. 04-cv-3016, 2007 WL 776306 (D. S.D. Mar. 12, 2007) (applying South Dakota law, court states "[f]acts … make a great deal of difference in determining whether there was a fiduciary relationship. It is important to examine the entire broker-customer relationship rather than merely the status of the account"); *Bank of Sw. of Dallas v. Rauscher Pierce Refsnes, Inc.*, 05-96-00991-CV, 1998 WL 514906 at *5 n.4 (Tex. App. Aug. 21, 1998) ("We focus on the substance of the relationship rather than on what labels the parties assigned or might have assigned to it").

dispositive of the of the exact fiduciary duties the broker-dealer owed to the customer; because the broker-dealer "did not manage the [plaintiffs'] account nor advise [them] on investments, … they [sic] only owed the [plaintiffs] the duty not to misrepresent any fact material to transactions." 744 F.Supp. at 1146.

There are substantial reasons that banks do not belong in the same boat as broker-dealers. Broker-dealers, by their nature, can perform two dissimilar functions: they can act as mere order-takers, in which they effect transactions and have a duty essentially limited to accurate and efficient execution; or they can act as advisors, recommending transactions for the customer, in which case their duties expand. *See*, *e.g.*, *Milos*.

Standard Chartered, however, is not a securities broker-dealer and does not function like one. It is not alleged to have been a mere order-taker; for that service customers such as the Plaintiffs can resort to a brokerage firm, even an online discount firm. A private bank provides white-linen investment services, including advice, to its private banking clients. The discretionary/non-discretionary dichotomy, which is, at best, only a partially helpful analytical tool for analyzing brokers' duties, is therefore particularly inapplicable to such banks acting as investment advisers. Thus, while there are similarities between broker-dealers and banks, there is no precise congruity in the law applied to these different institutions. In fact, at least one authority dispenses altogether with analogies to broker-dealers. Guy B. Maseritz, *The Bank as Investment Adviser*, 113 Banking L.J. 116, 119-20 (1996) ("banks offering professional investment advisory services are subject to fiduciary standards under common law comparable to the

standards of conduct that govern investment advisers registered with the SEC.")[15] *See Erlich v. First Nat. Bank*, 505 A.2d 220, 234-35 (N.J. Sup. Ct. 1984) (nature of duties owed by bank determined not by whether the customer's account was non-discretionary but by whether advice was provided; standard of care measured by "degree of care, knowledge and skill expected of professional investment advisers closely examined the nature of a bank's duties to a customer to whom it provided investment advice").

Not only does Standard Chartered suggest that the yardstick for measuring the extent of its duties be inappropriately borrowed from another industry, but totally absent from any of Standard Chartered's discussion of fiduciary duties is any discussion of the relevant state law.[16] Florida law governs the *Maridom*, *Headway*, and *Lopez* complaints. California law governs the *Valladolid* complaint. A brief review of Florida law is therefore in order.[17]

In *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002), the Florida Supreme Court adopted Section 874 of the Restatement (Second) of Torts, Violation of Fiduciary Duty, to which comment a states: "A fiduciary relation exists between two persons when one of

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[15] At present, broker-dealers are held to different, and presumably lower, fiduciary standards than investment advisers. This is one of the key issues in the current debate in Congress over financial industry reform. *See* Securities Industry and Financial Market Association, *SIFMA Unveils New Pro-Consumer Reforms*, July 17, 2009, *available at* http://www.sifma.org/news/news.aspx?id=12442 ("Under this new, federal fiduciary standard, it won't matter who is giving the advice – broker or adviser – investors will be protected by the exact same federal fiduciary standard when receiving the same services."

[16] The principal case relied on by Standard Chartered, *First Union Discount Brokerage Services, Inc v. Milos*, 744 F.Supp. 1145 (S.D. Fla. 1990), does not advert to the issue of the choice of law and, in its discussion of fiduciary duties, refers to no cases purporting to interpret Florida law.

[17] Because *Valladolid* alone is governed by California law, the Plaintiffs have included as Section X of this Opposition a discussion of the reason that California law governs and of the features of California law on which the Court should focus.

them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation." *Id.* at cmt. a.[18] Florida law plainly imposes fiduciary duties on a bank providing investment advice to its customer, as well as advice on other business matters. *Ward v. Atlantic Security Bank*, 777 So.2d 1144 (Fla. 3d DCA 2001) (investment advice); *Capital Bank v. MVB, Inc.,* 644 So.2d 515, 518(Fla. 3d DCA 1994) (bank giving business advice to a bank customer from which the bank derived benefit owed the customer fiduciary duties); *Atlantic Nat'l Bank v. Vest*, 480 So.2d 1328, 1333 (Fla. 4th DCA 1985) (bank officer's answering customer's question a legal question created jury question of whether doing so imposed fiduciary duty on bank).

But no Florida case holds that the contours of a bank's fiduciary relationship with clients it is providing investment advice are determined by whether the account is discretionary or non-discretionary, or that those duties are to be borrowed from duties ascribed to broker-dealers. Most significantly, Standard Chartered can cite no Florida case holding that the nature of the duties owed to a customer by a bank -- *or broker-dealer*, for that matter -- turns on whether the account is discretionary or non-discretionary. Rather, every indication is that Florida law looks to the nature of the relationship between the bank and its customer/client. Therefore, the Court, in deciding this case under Florida law, would have no basis to conclude that the Florida Supreme Court, if faced with this issue, would hold that the discretionary/nondiscretionary dichotomy is controlling or even significant. *See Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.3d 363 (2d Cir.1999) ("it is our job to predict how the forum state's highest

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[18] Comment "a" has been relied upon for the proposition that an accountant giving investment advice to a customer has a fiduciary relationship with the customer. *Schuster v. Anderson,* 378 F.Supp.2d 1070, 1108 (N.D. Iowa 2005) (Iowa law).

court would decide the issues before us") (citation and internal quotation marks omitted). Since the question is whether, *as a matter of law*, Standard Chartered did not owe two of the duties the Plaintiffs allege to have existed, Standard Chartered's argument comes down to a preposterous one: no matter what was discussed between Standard Chartered's representatives and the individual Plaintiffs and how the relationship developed, the duties of Standard Chartered were circumscribed by whether the account was discretionary or non-discretionary. Standard Chartered has made no such showing that this is the law in Florida, and it could not do so.

Therefore, the Court must examine the allegations of the Complaints, not pursuant to some artificial and inapposite test, to determine whether the alleged duties could be found by the jury to attach to Standard Chartered.

C. The Court Cannot Find as a Matter of Law that Standard Chartered Had No Duty to Monitor the Accounts.

Standard Chartered challenges the existence of a duty to monitor the account, as alleged in *Lopez*, *Valladolid*, and *Headway*. Standard Chartered cites *Lieb* and *de Kwiatkowski v. Bear Stearns & Co.*, 306 F.3d 1293 (2d Cir. 2002) for that proposition. Neither case is on all fours, but *dictum* in *de Kwiatkowski* actually favors the position of Lopez and Valladolid. The Plaintiffs examine each case in turn. As a preliminary matter, however, the Court should not that both decisions came after a full bench trial, not on a motion to dismiss, and both defendants were broker-dealers, not banks.

The customer in *Lieb* was a businessman in his early 30s with experience in business and accounting. He bought stocks on margin, and his stated investment objectives were "growth" and "speculative." Each time he bought a stock, he and the stockbroker "would discuss the price of the suggested stock, the nature of the corporation

involved, the type of product or service produced by the corporation and the prognosis of the stock in terms of long or short term profitability." *Lieb,* 461 F. Supp. at 955. The account was aggressively traded and, eventually, the customer lost his entire equity in the account. *Id.* at 956. The customer claimed that the stockbroker "breached his fiduciary duty (1) by not informing [the customer] that the course of trading was unprofitable and (2) by excessively trading in the account for the sole purpose of generating commissions for himself." *Id.* The second claim was for churning: excessive trading in a customer's account for the benefit of a broker who is in actual control of the account. *Id.* at 952.

The *Lieb* court held in favor of the broker-dealer:

> [The stockbroker] was not obligated to inform [the customer] that his pattern of trading heavily, taking profits, and holding losses was almost too risky to be profitable. Nor was he obligated to point out the disparate amount paid in commissions as compared with the amount realized in profits. In addition [he] had no duty to restrain [the customer] from trading heavily. Since [the customer] controlled the account, the pattern of trading, even if excessive, was [the customer's] sole responsibility. That this pattern generated substantial commissions for his broker is irrelevant under the circumstances of this case.

Lieb is not controlling because the factual circumstances involved in that case are vastly different from those in these actions. Lieb was a sophisticated U.S.-based businessman with experience in securities and accounting. He had a retail brokerage account with a securities broker-dealer. He argued that the broker-dealer churned his account but did not prove that his stockbroker controlled the account, an essential element in a churning case.[19] Here, the investors are foreign nationals looking to a bank

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[19] The *Lieb* court also found that the broker's lack of control over the account disposed of the alleged duty to protect the customer against pursuing his own voluntarily-assumed investment objectives, the so-called "dram shop" theory. Importantly, this is not the kind of duty that is alleged to have been violated in either *Lopez* or *Valladolid*. Further, no case of which we are aware has ever established that a broker-dealer owes a

specializing in "private banking" to advise them on their investment decisions. The jury could easily find that the services of Standard Chartered could include the duty to monitor the accounts for signs of weaknesses. Certainly that outcome cannot be foreclosed on a motion to dismiss.

de Kwiatkowski is also inapposite, but, if anything, stands as a formidable obstacle to Standard Chartered's position, not the Plaintiffs'. A customer engaged in massive speculative currency transactions through a non-discretionary account. The customer claimed that the broker failed to warn him of the risk of the transactions and to urge him to curtail his speculations because of its alleged belief that his strategies were overly optimistic about the value of certain currencies. The issue was whether the broker had any ongoing non-fiduciary[20] duty of care, between transactions, to "to offer unsolicited information, advice, or warnings concerning the customer's investments." *Id.* at 1302. The Second Circuit held that, on the facts, there was no such duty.

After first noting that a broker's duty of due care encompasses a duty not to make unsuitable securities recommendations, *id.* at 1307, *citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F.Supp. 1224, 1227 (D.D.C.1988) (recognizing state law

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customer in control of his own account a duty to protect himself against his own mistakes. While such a duty may arise in an options account because of duties imposed (long after the *Lieb* case was decided) by self-regulatory organizations, *Lieb* is unexceptionable in this holding, which is, in any event, irrelevant to the issue before this Court.

[20] The jury had found that the broker was not liable for breach of fiduciary duty, *id*. at 1296, so the issue in the court of appeals was whether the broker-dealer was negligent, a lower standard of conduct than that created by a fiduciary relationship. Although not expressly stated in *de Kwiatkowski*, the law in New York, as contrasted with Florida, is that "a broker does not, in the ordinary course of business, owe a fiduciary duty to a purchaser of securities." *Perl v. Smith Barney Inc.*, 230 A.D.2d 664 (N. Y. App. Div. 1996).

claim of negligence for making unsuitable recommendation), the court stated that "[the plaintiff's "monitoring"] claim [would be] viable … if there [were] evidence to support his theory that Bear, notwithstanding its limited contractual duties, undertook a substantial and comprehensive advisory role giving rise to a duty on Bear's part to display the care and skill that a reasonable broker would exercise under the circumstances." *de Kwiatkowski* 306 F.3d at 1307 (internal quotation marks and citation omitted). Here, without the benefits of factual development through discovery, the Court would have no basis for concluding that, in fact, the relationship between the Plaintiffs and their private bank was (or was not) such that they would reasonably expect that their private bankers would monitor their investments. *de Kwiatkowski* expressly leaves open this possibility if the proof is there. The Plaintiffs should have the opportunity, through discovery, to adduce that proof.

D. Standard Chartered's Argument that Its Duty to Conduct Due Diligence to Make Sure it Had a Proper Factual Basis for Recommending these Investments, did not Encompass a Duty to "Uncover" Madoff's Fraud is a Pure Straw Man and is Contrary to Law.

Standard Chartered also argues, Motion at 44-45, that the Plaintiffs' claim for breach of fiduciary duty for failure to conduct sufficient due diligence is barred because "this was not "the type of investigation that would have been necessary to uncover the longest-running and best-concealed Ponzi scheme in history," Motion, at 45. This is a straw man argument at its purest. Preliminarily, of course, the Plaintiffs have not alleged that Standard Chartered was at fault for not discovering that Madoff was conducting a Ponzi Scheme: the allegations are that the bank was at fault for not recognizing from the numerous red flags that flew all around Madoff that an investment with Madoff was

overly risky. Standard Chartered's argument that it should be excused because of the nature of Madoff's fraud is to no avail.

Not surprisingly, Standard Chartered cites no authority for its argument that the nature of the investigation required is determined *as a matter of law* by the nature of the fraud. This is a truly breathtaking proposition. There is neither logic nor law behind that the view that because Madoff was running a Ponzi Scheme that went undetected, Standard Chartered, by definition, did all that it could to learn, disclose and advise concerning the risks associated with investing with Madoff. As *In re Old Naples Securities, Inc.*, 343 B.R. 310 (Bankr. M.D. Fla. 2006), shows, courts are and should be willing to impose duties on broker-dealers to investigate a recommended securities purchase even where the investment turns out to be a Ponzi Scheme; at least the same duty is imposed on a private bank recommending that its clients invest in what turned out to be a Ponzi.

Indeed, the most direct answer to this argument is found in the Plaintiffs' pleadings: others figured out from numerous red flags[21] that something was rotten in the

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[21] Representative of the allegations concerning red flags are the allegations in Paragraphs 40 and 41 of the Amended Complaint in *Maridom* that "there were numerous indications that investing with [the Fairfield Greenwich fund] was anything but a "risk reducer" and, in fact, was highly risky, if not a vehicle investing in an outright fraud[, including]:

> a. that [Madoff's]' independent auditor was a tiny accounting "firm" in Rockland, New York;
>
> b. that [the fund] was supposedly receiving returns from [Madoff] that, over time, were substantially out of line with prevailing market trends in the types of securities in which [the fund] was supposedly investing (stocks included in the S&P 100 index and out-of-the-money puts and calls related to those stocks);
>
> c. that the supposed amount of some of [Madoff]'s supposed trading of certain options on the Chicago Board Options Exchange was approximately equal

State of Madoff;[22] who says that Standard Chartered could not have done the same? In other words, if Harry Markopolos could scope out this fraud as early as 1999, if scores of investment advisors, banks and brokerage firms steered their clients free of Madoff and his feeder funds, and if widely-read industry publications painted a dark cloud over the legitimacy of Madoff's extraordinary performance, Standard Chartered cannot prevail on an argument that reasonable minds could not disagree that it could not draw the same conclusions from the same publicly available information.

Whether or not a proper investigation would have led Standard Chartered not to recommend millions of dollars of investments in Madoff feeder funds is a fact question that cannot be decided on a motion to dismiss. "Obviously, the facts of each case must be

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> to, if not in excess of, the amount of such options available on the CBOE, thus making the "split strike conversion" technique essentially impossible to effect;
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> d. that [Madoff] did not charge an administrative fee for its services or a share of supposed profits;
>
> e. that [Madoff] did not allow any real-time electronic access to trading, which is customarily provided in the industry to significant, sophisticated hedge fund investors like [the fund];
>
> f. that [the fund] was forbidden by [Madoff] to disclose in its offering materials to its investors that essentially all of the trading supposedly being conducted with FSF investors' funds was to be conducted by [Madoff];
>
> g. that [Madoff] utilized outmoded technology, including paper trading confirmations which were sent daily via U.S. mail to feeder funds;
>
> h. that some persons in the hedge fund and investment communities had publicly expressed skepticism that [Madoff] and Madoff could achieve the steady returns that were being promoted; and
>
> i. that a major portion of [the fund]'s invested funds were in the custody of [Madoff].

22 *See* William Shakespeare, *Hamlet*, Act I, scene 4, *l.* 90 (Marcellus: "Something is rotten in the state of Denmark.")

examined to determine what satisfies the 'reasonable basis' requirement for a recommendation, what suffices as a 'reasonable investigation,' and what are 'material facts' which must be disclosed. The resolution of such issues will turn on the particular facts of each case." Carol Goforth, *Stockbrokers' Duties to Their Customers*, 33 St. Louis U. L.J. 407, 415 (1989). *See Siemers v. Wells Fargo & Co.*, 05-cv-04518, 2006 WL 2355411 (N.D. Cal. Aug. 14, 2006) (mutual fund managers alleged to have charged fund excessive fees; "[w]hether the underperformance in this particular action was serious enough to suggest a breach of fiduciary duty is a question to be resolved on the evidentiary record"). *See also Keenan v. D.H. Blair & Co.,* 838 F.Supp. 82, 90 (S.D.N.Y.1993) (extent of investigation required depends on the specific circumstances).

Finally, as noted above, Standard Chartered gets no free pass, as Standard Chartered argues, Motion at 45, on the basis that the Staff of the Securities and Exchange Commission did not discover the Madoff fraud. While the failure of the SEC to uncover the Madoff fraud should not be considered on this Motion, Standard Chartered cannot have it both ways -- ask the Court to look at the SEC's Madoff Report *and* avoid the effects of the contents of that document, castigating the SEC Staff as it does. As the Inspector General of the SEC found, despite numerous warnings meriting a thorough investigation, the Staff of the SEC "never performed … a thorough and competent investigation or examination" of Madoff. SEC's Madoff Report, at 21. That *incompetent* investigations failed to uncover the Madoff fraud is completely irrelevant to the issue of what a *competent* investment adviser's investigation of known red flags would have discovered had it conducted proper "due diligence." Standard Chartered's attempt to hide behind the SEC Staff's ineptitude affords it no cover.

III.

FLORIDA LAW PERMITS THE UNJUST ENRICHMENT CLAIMS

All of the Plaintiffs save the *Maridom* Plaintiffs have sued for unjust enrichment. Standard Chartered, misapprehending Florida law regarding the pleading of unjust enrichment claims, incorrectly argues that these claims must be dismissed.

Under Florida law, a plaintiff is not barred for pleading an unjust enrichment claim, *even in cases where a breach of contract claim has been pled*. "Until an express contract is proven, a Motion to Dismiss a claim for . . . unjust enrichment on these grounds is premature." *Sierra Equity Group, Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp.2d 1213, 1229 (S.D. Fla. 2009) *quoting Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (Fla. 5th DCA 1998). This rule is plain and the cases are legion. *E.g.*, *Manicini Enters v. Am. Express Co.*, 236 F.R.D. 695, 699 (S.D. Fla. 2006) ("[T]he court finds that the plaintiff should be permitted to plead alternative equitable claims for relief as the existence of the express contracts between the parties has yet to be proven.") This rule is especially important where, as here, the existence of, or reliance upon, an express contract is not part of the complaints, but rather has been injected as an issue by Standard Chartered in its motion to dismiss. The applicability of the proffered documents to the claims before this Court is at issue (particularly given Standard Chartered's admissions that certain contracts were "cancelled" and not in effect during relevant periods in the various complaints). Only if those express agreements are ultimately proven up and the court concludes that they govern the transactions that form the basis for the unjust enrichment claims, could the claims for unjust enrichment be dismissed. *E.g.*, *In re: Checking Account Overdraft Litigation*, No. 09-MD-02036, 2010 WL 841305, at *16

(S.D. Fla. Mar. 11, 2010) ("while the law does not permit a party to simultaneously prevail on an unjust enrichment theory and a contractual theory, it does not require dismissal (at the Motion to Dismiss stage) of an unjust enrichment claim merely because an express contract exists that arguably governs the conduct complained of").

Nor is Standard Chartered's technical criticism of the specifics of the pleadings well-taken. Given the wide latitude afforded plaintiffs in the interpretation of their pleadings under Rule 12, causes of action do not have to be explicitly pled in the alternative when claims such a breach of contract and unjust enrichment theories are clearly alternative theories. *See Tracfone Wireless, Inc. v. Access Telecom, Inc.*, 642 F.Supp.2d 1354, 1365 (S.D. Fla. 2009) (reasonable inferences drawn from complaint obviate any requirement to explicitly plead lack of legal remedy); *Grillasca v. Amerada Hess Corp.*, No. 05-cv-1736, 2006 WL 3313719, at * 6 (M.D. Fla. Nov. 14, 2006) (general prayer for relief in complaint sufficient to fashion claim for equitable or legal damages). Further, Standard Chartered's claim that it is "black letter law" that the theory of unjust enrichment is not available "where there is an adequate legal remedy" is incorrect, for, indeed, it is not black letter law at all, as this rule does not apply to unjust enrichment claims under Florida law. *Williams*, 725 So.2d at 400 ("Although Appellees argue that Appellant has adequate legal remedies and therefore no equitable relief can be granted, this notion does not apply to unjust enrichment claims."); *Mobil Oil Corp. v. Dade County Esoil Management Co., Inc.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) (this doctrine does not apply to unjust enrichment claims). Rather, when disallowing quasi-contractual recovery, Florida law looks not to the existence of legal remedies, but rather the existence of an express contract that governs the actions under the complaint. *Id.* The

Plaintiffs' unjust enrichment claims are sufficiently pled and do not require an explicit notation that they are in the alternative, nor that a legal remedy would be insufficient. They cannot be dismissed at this juncture because the existence of express contracts covering the acts complained of is in dispute, and Standard Chartered has not admitted that plaintiffs have an adequate legal remedy.

IV.

LOPEZ STATES A CAUSE OF ACTION FOR GROSS NEGLIGENCE

Lopez' claim for gross negligence as Count Five of his First Amended Complaint should not be dismissed. Standard Chartered asserts, Motion at 47-50, that this claim cannot stand because Standard Chartered "did not consciously disregard a known clear and present danger." This argument is misplaced.

The idea of degrees of negligence is an old one, dating back, as the Florida Supreme Court noted in *Faircloth v. Hill*, 85 So.2d 870, 872 (1956), to the Middle Ages. Despite several hundred years of consideration, however, the law has not been able to definitely draw a line separating one degree of negligence from another. This likely has very much to do with the fact that what conduct constitutes gross negligence is very much dependent on the circumstances of a particular case:

> [W]hile each separate act involved in the drama might not in and of itself establish gross negligence, nevertheless, the entire course of conduct of [a person] under all of the circumstances and in the light of all of the related factors taken collectively might well establish the existence of gross negligence by pointing to the conclusion that the [person] knew or should have known that his conduct placed others in danger of grave injury and that under all of the circumstances he could be found guilty of a conscious indifference for the safety of others.

Faircloth, 85 So.2d at 872 (citing *Dexter v. Green*, 55 So.2d 548 (Fla. 1951)). The Faircloth court offered an alternative way of viewing the degrees of negligence, in order

to clarify the fuzzy lines between slight, ordinary, and gross negligence:

> It might be helpful to realize that the term ‘degrees of negligence’ is actually a negative expression, the positive counterpart of which is ‘degrees of care’. By examining the presence or absence of various degrees of care, we oftentimes can come to a clearer understanding of the several degrees of negligence. For example, ‘slight negligence’ involves a failure to exercise great care. ‘Ordinary negligence’ is the failure to exercise ordinary care. By this same rule ‘gross negligence’ is the absence of the exercise of ‘slight care’. It is the omission or commission of an act with a conscious indifference to consequences so far as other persons are concerned.

Faircloth, 85 So. 2d at 872.

The idea that gross negligence is equivalent to the failure to exercise slight care was further explored by the Southern District of Florida in *F.D.I.C. v. Gonzalez-Gorrondona*, 833 F. Supp. 1545, 1549 (S.D.Fla. 1993), which stated that “[a] claim sounding in “gross negligence” asserts the lack of even slight care, citing *Leite v. City of Providence,* 463 F.Supp. 585, 591 (D. R.I. 1978) (distinguishing ordinary and gross negligence in that “one requires only a showing of unreasonableness while the other demands evidence of near recklessness or shockingly unjustified and unreasonable action”). The *Gonzalez-Gorrondona* court continued:

> [Gross negligence] has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of care as will be evidence thereof-sometimes on the ground that this must necessarily have been the intent of the legislature.

Gonzalez-Gorrondona, 833 F.Supp. at 1549 (quoting W. Page Keeton et al., Prosser and Keeton on Torts 212 (5th ed. 1984)(footnotes omitted) and citing *Smith v. Van Gorkom,* 488 A.2d 858 (Del.1985) (finding directors “grossly negligent in approving the ‘sale’ of

the Company upon two hours' consideration, without prior notice, and without exigency of a crisis or an emergency")).

Whatever the legal definitions attached to a claim for gross negligence, the issue on Lopez's claim is whether the red flags surrounding Madoff's operation were sufficiently serious as to merit the conclusion by a rational fact-finder that that a private bank entrusted with the duties discussed above, such as Standard Chartered, either never looked for them, or, if it did, simply ignored them. Lopez alleges that Standard Chartered "assured Plaintiff that they had conducted extensive due diligence on the Fairfield Funds." His allegation that the bank's failures constituted gross negligence, in light of the red flags, are legally sufficient. *Cf. In re Cascade Intern. Sec. Lit.*, 840 F. Supp 1558 (S.D. Fla. 1993) (broker's representation to this effect held sufficient to satisfy stricter standard, under Rule 10b-5, of "severe recklessness"). For all of the reasons set forth in this memorandum and in the *Bhatia* and *Tradewinds* brief on Rule 10b-5 liability,[23] there are ample allegations to justify this conclusion.

For example, Lopez alleges that:

- In 2009, the Standard Chartered Defendants admitted to various investor clients that they recommended investment in the Fairfield Funds without having conducted any of their own due diligence or investigations. Lopez First Amended Complaint, ¶ 9;

- In 2006, AEB's relationship manager and officer, Antonio Garcia-Ardanez ("Garcia-Ardanez") recommended to Lopez that AEB had conducted extensive due diligence on the Fairfield Funds and that such investments were like a "cash substitute." *Id.* at ¶ 25;

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[23] Lopez does not concede that the scienter element of a 10b-5 claim is applicable to his gross negligence claim, but it stands to reason that if scienter is found, the mental state akin to gross negligence, which is less heightened than scienter, is necessarily found. Standard Chartered's reliance on *In re Bayou Fund Hedge Litig.*, 534 F. Supp. 2d 405 (S.D.N.Y. 2007), is misplaced for precisely that reason.

- AEB also touted to Lopez…that the Fairfield Entities had achieved "mythical status" for the ability of the Fairfield Funds to generate steady and consistent returns with low volatility. *Id.* at ¶ 26;

- From 2006 through the first quarter 2008, when [Lopez] asked the Standard Chartered Defendants, on several occasions, whether they should remain invested in the Fairfield Funds, the Standard Chartered Defendants advised [Lopez] to remain in such investments, refrain from taking profits of year over year returns, all because there were no attractive opportunities in the markets to deploy the resulting cash and cash returns that would match the risk-reward ration of the Fairfield Funds. *Id.* at ¶ 39;

- [The August 27, 2008] transaction was strongly recommended by defendant Standard Chartered as a way for Plaintiff Lopez to protect himself from the financial storm that was going on in the markets. In fact, Standard Chartered's Garcia-Ardanez advised Lopez that defendant Standard Chartered had directly contacted the managers of the Fairfield Funds, and those managers had told the Standard Chartered Defendants that the Fairfield Funds were protected from risk due to investment of the Fairfield Funds' assets in United States Treasury bonds. *Id.* at ¶ 43;

- At all relevant times, Lopez relied on representations made by AEB and the Standard Chartered Defendants that they had conducted extensive due diligence on the Fairfield Entities, that an investment with the Fairfield Funds would generate consistent returns with low volatility and that the expected profitability of an investment in the Fairfield Funds would be slightly above the LIBOR rate due to their high security and low volatility. *Id.* at ¶ 46;

- Reasonable due diligence, including typical quantitative analysis, would have established that the Fairfield Funds, Madoff and BMIS were involved in a fraudulent scheme and that the investment returns touted by AEB and the Standard Chartered Defendants were not possible. *Id.* at ¶ 49;

- [Lopez] invested more than $900,000 with AEB and the Standard Chartered Defendants based upon the misrepresentations of AEB and the Standard Chartered Defendants that they had specially chosen, following AEB and the Standard Chartered Defendants' own extensive

> due diligence, the safest investments for its customers, which constituted a "cash substitute." *Id.* at ¶50.[24]

The allegations above, taken as a whole, plausibly state a claim that Standard Chartered acted with gross negligence. For this reason, Standard Chartered's motion to dismiss his claim for gross negligence should be denied.

V.

LOPEZ'S SECTION 20(A) CLAIM SHOULD NOT BE DISMISSED[25]

Standard Chartered additionally moves to dismiss Lopez' Count II against Standard Chartered PLC under Section 20(A) of the Exchange Act on two bases – (1) that without a viable primary violation under Section 10(b) and Rule 10b-5, this claim requires dismissal and (2) that Lopez does not allege with requisite particularity that Standard Chartered PLC was a culpable participant in the primary violation. For all the reasons set forth in the *Bhatia* and *Tradewinds* brief, Lopez plausibly pled a primary violation under Section 10(b) and Rule 10b-5. This Court must therefore determine

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24 As noted *infra*, 59 - 66, Standard Chartered is incorrect in arguing that as a result of the exculpatory clauses, the Plaintiffs can state a viable cause of action for breach of duty only if that breach rises to the level of gross negligence. For this reason, Standard Chartered's arguments with regard to a gross negligence are only being addressed in the context of Lopez' factual allegations. However, the Plaintiffs would proffer that in each of their complaints, factual allegations are made which parallel those in the *In re Cascade* case – namely, that Standard Chartered had a duty to conduct an adequate investigation of the Fairfield funds prior to recommending investment in those funds, that Standard Chartered represented continuous reassessment of the Fairfield Funds, and that Standard Chartered continued to recommend the Fairfield Funds despite "red flags" about their financial condition.

25 Lopez has sued under section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder (Count One). As to his response to Standard Chartered's motion to dismiss his 10b-5 claim, Lopez adopts the argument of *Bhatia* and *Headway* in their brief in opposition to Standard Chartered's motion to dismiss their 10b-5 claims.

whether Lopez has sufficiently alleged that Standard Chartered PLC was a "culpable participant".

This Court has held that, with regard to specificity of pleading, the allegations of a control person claim need only meet Rule 8's notice pleading requirements. *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758, 2010 WL 537593, at *8 (S.D.N.Y. Feb. 11, 2010); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, No. 08 Civ. 7422, 2009 WL 4668579, at *11 (S.D.N.Y. Dec. 9, 2009). Therefore, in order to state a viable claim under Section 20(A) of the Exchange Act, Lopez need only make, "a short, plain statement that gives the defendant fair notice of the claim that defendant was a control person and the ground on which that claim rests … is all that is required." *In re Philip Services Corp. Sec. Litig.*, 383 F.Supp.2d 463, 485 (S.D.N.Y. 2004), quoting *Schnall v. Annuity and Life Re (Holdings), Ltd.*, 3:02 Civ 2133 (GLG), 2004 WL 231439, at *9 (D. Conn. Feb. 4, 2004). What is more, "[w]hether a person is a 'controlling person' is a fact-intensive inquiry, and generally should not be resolved on a motion to dismiss." *Katz v. Image Innovations Holdings, Inc.*, 542 F.Supp.2d 269, 276 (S.D.N.Y. 2008) (citing *CompuDyne Corp. v. Shane,* 453 F.Supp.2d 807, 829 (S.D.N.Y.2006)).

In the Second Circuit, "the 'control person' provisions are broadly construed as they 'were meant to expand the scope of liability under the securities laws.'" *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). Therefore, in this Circuit, for purposes of Section 20(a) liability, "actual control requires only the ability to direct the actions of the controlled person, and not the active exercise thereof." *Dietrich*, 126 F.Supp.2d at 764-65 (citing *Sanders v. Gardner,* 7 F.Supp.2d 151, 163 (E.D.N.Y.1998); *In re Bausch & Lomb,*

Inc. Sec. Litig., 941 F.Supp. 1352, 1368 (W.D.N.Y.1996) (in determining control status "courts have given heavy consideration to the power or potential power of influence and control the activities of a person, as opposed to the actual exercise thereof"); and *Epstein v. Haas Sec. Corp.,* 731 F.Supp. 1166, 1175 n. 5 (S.D.N.Y.1990) (plaintiff need not show that defendants actually exercised practical ability to control violative conduct)).

Standard Chartered challenges both that it is a control person and that Standard Chartered PLC was a "culpable participant" in the primary violation(s) alleged by Lopez. With regard to Standard Chartered's challenge of whether SC PLC "controls" SCBI, Standard Chartered argues that Lopez has not sufficiently alleged control because of his allegation in Paragraph 20 of the Amended Complaint that SCBI "is a wholly owned subsidiary of Standard Chartered Bank PLC which is a wholly owned subsidiary of Standard Chartered Holdings Ltd., which in turn is a wholly owned subsidiary of" SC PLC. Standard Chartered argues that such "indirect" ownership is insufficient to establish control.

In order to survive a motion to dismiss a claim under Section 20(A), a plaintiff ""need only plead facts supporting a reasonable inference of control" to survive a motion to dismiss. *Cromer Finance Ltd. v. Berger*, 137 F.Supp.2d 452, 484 (S.D.N.Y 2001)(citing *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 122 F.Supp.2d 407, 426-27 (S.D.N.Y.2000)). *See also Kalin v. Xanboo, Inc.* 526 F.Supp.2d 392, 405 (S.D.N.Y. 2007) (collecting cases standing for same proposition). "In cases involving parent-subsidiary relationships, courts have regularly based findings of control person liability on allegations of substantial stock ownership and common principals." *Kalin*, 526 F.Supp.2d at 405 (citing *In re Indep. Energy Holdings, PLC Sec. Litig.,* 154 F.Supp.2d

741, 770 (S.D.N.Y.2001) (finding control based on ownership and common management); *Pollack v. Laidlaw Holdings, Inc.,* No. 90 Civ. 5788, 1995 WL 261518, at *18 (S.D.N.Y. May 3, 1995) (finding control where defendant "controlled both [companies] through one hundred percent stock ownership and through common officers and directors"); *Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.,* 735 F.Supp. 587, 591 (S.D.N.Y.1990) (allegation that "defendants were [plaintiff's] sole shareholders" meets standard of alleged control by strongly suggesting defendants "had the potential power to influence and direct [plaintiff's] activities"). Here, although Lopez alleges that SC PLC's ownership runs through other companies, he alleges that each of these companies is a wholly owned subsidiary of the other. He additionally alleges that, "by virtue of [SC PLC's] 100% ownership and control" of SCBI, SC PLC acted as a control person within the meaning of Section 20(A). Lopez Amended Complaint, ¶ 63. Drawing all reasonable inferences in favor of Lopez, his allegations of control are sufficient to survive dismissal of this claim.

With regard to whether Lopez has sufficiently pled that SC PLC was a "culpable person", as the court in *Dietrich* recognized "[t]he meaning of this element has not yet been addressed at any length by the Second Circuit." *Dietrich*, 126 F.Supp.2d at 765 (citing *Boguslavsky v. Kaplan,* 159 F.3d 715, 720 (2d Cir.1998)). The Dietrich court recognized, however, that with regard to the "culpable person" element of a claim under Section 20(A), "[t]here is persuasive authority for the proposition that a willful blindness standard applies, that is, that where the control person 'knew or should have known that primary violator, over whom the person had control, was engaged in fraudulent conduct, but ... did not take steps to prevent the primary violation,' there is culpability in the sense

required by" *SEC v. First Jersey Sec., Inc.,* 101 F.3d 1450, 1472 (2d Cir.1996). *Dietrich*, 126 F.Supp.2d at 765-66 (citing *Gabriel Capital, L.P. v. Natwest Fin., Inc.,* No. 99 Civ. 10488, 2000 WL 1538612, at *20, (S.D.N.Y. Oct. 13, 2000) (applying willful blindness standard and discussing development of case law supporting such a standard since *First Jersey*)).

Here, Lopez has alleged that because of SC PLC's 100% control over SCBI, SC PLC "had the ability to prevent the actions, misrepresentations, and omissions committed" by SCBI. Lopez Amended Complaint, ¶ 65. What's more, Lopez alleges that [t]he Fairfield Funds communicated with shareholders in Florida either directly or indirectly through SC PLC "who continued the direct communications with shareholders through its subsidiaries, including" SCBI. *Id.* at ¶ 14. These allegations, taken together with other factual allegations in the complaint regarding the actions of all Standard Chartered defendants, are sufficient to create a reasonable inference that Standard Chartered was a culpable person. For these reasons, Lopez has plausibly stated a claim under Section 20(A) of the Exchange Act, and Standard Chartered's motion to dismiss this claim should be denied.

VI.

LOPEZ'S AND THE MARIDOM PLAINTIFFS' FRAUD AND MISREPRESENTATION CLAIMS STATE CAUSES OF ACTION

Lopez alleges that Standard Chartered engaged in common law fraud by misrepresenting to him that it had conducted extensive due diligence on the Fairfield Greenwich funds and that investments in these funds would generate consistent returns with low volatility. Am.Cplt., ¶¶ 41, 43 and 81. The *Maridom* Plaintiffs allege that

Standard Chartered engaged in common law fraud and negligent misrepresentation by failing to explain to them the significance of the fact that Madoff held custody to virtually all of the assets invested by the Fairfield Greenwich funds. Am.Cplt., ¶¶ 41, 53, 59.

Standard Chartered argues that the common law fraud claims alleged by Lopez and the *Maridom* plaintiffs and the negligent misrepresentation claim raised by the *Maridom* plaintiffs should be dismissed because (1) scienter and actionable misstatements or omissions have not been adequately pled and (2) Fairfield's Offering Documents adequately disclose the facts that Lopez and the Maridom plaintiffs allege were misstated or omitted. Neither position is well taken.

A. <u>Common Law Fraud</u>

In order to adequately plead common law fraud under Florida law, a plaintiff must allege "(1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party." *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984). "Fraud also includes the intentional omission of a material fact." *Ward v. Atlantic Sec. Bank*, 777 So.2d 1144, 1146 (Fla. 3d DCA 2001)(citing *Nessim v. DeLoache,* 384 So.2d 1341, 1344 (Fla. 3d DCA 1980)).

Factual allegations that would lend support to Lopez' common law fraud claim are listed above, in connection with his claim under a gross negligence theory. These allegations, together with his allegations within his claim for breach of fiduciary duty, plead with sufficient particularity for the dismissal phase that Standard Chartered knowingly made false statements to Lopez with the intent of having him invest or

maintain his investment in the Fairfield funds, that Lopez relied on these statements, and that he was damaged as a result of his reliance.

The *Maridom* plaintiffs similarly make detailed factual allegations in their Amended Complaint that are sufficient to support their common law fraud claim through the dismissal phase. They allege that Standard Chartered knew or was reckless in not knowing (in the negligent misrepresentation claim, should have known) that Madoff had custody of virtually all of the assets invested by the Fairfield Greenwich funds, and understood that this fact posed special risk to investors in those funds, but failed to inform the *Maridom* plaintiffs of that risk.[26]

Standard Chartered argues that the voluminous factual allegations made by Lopez and the Maridom plaintiffs and recounted in large part above, despite going to all the elements of a common law fraud claim, fail to state a cause of action because they do not meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). In so arguing, they cite to *In re Blech Sec. Litig*., 928 F. Supp. 1279, 1294 (S.D.N.Y. 1996) (for the proposition that "Rule 9(b) is not satisfied by a complaint in which, defendants are clumped together in vague allegations") and to *Garcia v. Santa Maria Resort, Inc.*, 528 F. Supp. 2d 1283 (S.D. Fla. 2007) (for the proposition that "Rule 9(b) requires, among other things, that a plaintiff set forth 'the time and place of each [alleged misstatement or

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[26] Notably, Standard makes no claim that this information was immaterial, nor could it make such a showing. The fact that the Fairfield Greenwich funds were mere portals to Madoff would be of obvious importance to the putative reasonable investor, because it shows the importance of the risk of wrongdoing by Madoff. *See People ex rel. Cuomo v. Merkin*, No. 450870/09, 26 Misc.3d 1237(A), 2010 N.Y. Slip Op. 50430(U), *available on Westlaw* (N.Y. Sup.Ct. Feb. 8, 2010) (holding fact that feeder fund deposited all funds with Madoff to be material).

omission] and the person responsible for making (or in the case of omissions, not making) [the alleged misstatement or omission]").

Neither *Lopez* nor *Maridom* suffers from the vice of lumping together different defendants without adequate distinctions among them. *Maridom* involves one defendant only, Standard Chartered Bank International (Americas) Ltd.; *Lopez* names that entity and its parent, and sues the parent under the control provision of the Securities Exchange Act. Both allege that one defendant, Standard (Americas), recommended that they invest their funds in the Fairfield Greenwich funds. Both allege that this entity misrepresented material facts. There can be no confusion.

This Court has stated that "to comply with the requirements of Rule 9(b), an allegation of fraud must '(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.' *Rombach v. Chang,* 355 F.3d 164, 170 (2d Cir.2004) (quoting *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993))." *SEC v. Pimco Advisors Fund Mgmt. LLC,* 341 F.Supp.2d 454, 462-43 (S.D.N.Y. 2004). Here, that standard was met. The specific misrepresentations, the dates of the investments, the makers of the misrepresentations and the significance of the misrepresentations were alleged. This is all that Rule 9(b) requires.

Standard Chartered additionally argues that Fairfield's Offering Documents adequately disclose the facts that Lopez and the *Maridom* plaintiffs allege were misstated or omitted, and that, therefore, neither Lopez nor the *Maridom* plaintiffs could have justifiably relied on Standard Chartered's false statements and omissions. This argument is unavailing for several reasons. First, *Maridom* alleges that even though the PPM

disclosed that a majority of the assets of the fund were in the custody of Madoff, the PPM did not disclose that Madoff, not the funds' management, was purportedly performing the transactions in the "split strike conversion" strategy, and that Standard Chartered did not explain, and the *Maridom* Plaintiffs did not understand its significance.

Lopez, meanwhile, has alleged that Standard Chartered misrepresented that it conducted extensive, ongoing due diligence on the Fairfield funds, knowing that, in fact, it had conducted none of its own due diligence. It is impossible that the PPM could have alerted Lopez in any way to this misrepresentation. Also, as argued above, the private placement memoranda proffered by Standard Chartered are not properly before this Court with respect to Lopez, because there is no indication that he was ever provided the PPM prior to his investment in the Fairfield funds. Therefore, it is clear that the PPM is not relevant to his case at this stage. *See* discussion of *Faulkner*, 463 F.3d at 134-135, *supra*.

B. <u>Negligent Misrepresentation</u>

The *Maridom* Plaintiffs make the same claim as a negligent misrepresentation claim, the only difference being that in that claim the Plaintiffs allege that Standard Chartered should have known (as opposed to knew or was reckless in not knowing) that Madoff had custody of the vast majority of the funds' assets. Under Florida law, to state a cause of action for negligent misrepresentation, a plaintiff must allege that:

> (1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely ... on the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.

Romo v. Amedex Ins. Co., 930 So.2d 643, 653 (Fla. 3d DCA 2006)(internal citations omitted). The *Maridom* plaintiffs' factual allegations, which meet the heightened

pleading standards for fraud claims and additionally allege actual knowledge, or at least a reckless disregard for the truth, more than plausibly state a cause of action for negligent misrepresentation. The Court should either disregard as hyper-technical Standard Chartered's suggestion that, because the negligent misrepresentation claim incorporates allegations of actual knowledge from previous counts, the negligent misrepresentation claim is covered by Rule 9(b), should deem such other allegations not essential to the claim, or should permit the Maridom Plaintiffs to amend the negligent misrepresentation count by omitting the incorporation of the knowledge allegations. The last course would be the most time-consuming, which would presumably serve Standard Chartered's agenda, but unnecessary. In any event, the fraud claim complies with Rule 9(b); perforce, the negligent misrepresentation claim, were it bound by Rule 9(b), would do so as well.

For these reasons, Standard Chartered's motion to dismiss Lopez and the Maridom plaintiffs' common law fraud and negligent misrepresentation claims should be denied.

VII.

THE FLORIDA ECONOMIC LOSS DOCTRINE DOES NOT BAR THE PLAINTIFFS' TORT CLAIMS

Standard Chartered is simply wrong that the economic loss doctrine bars all of the Plaintiffs' tort claims. Its recitation of the law surrounding this doctrine is woefully inadequate. The economic loss doctrine does not bar the Florida law tort claims advanced by the Plaintiffs.

This Court would have no basis to find that there is a persuasive indication that, were the Florida Supreme Court to rule on Standard Chartered's motion, it would hold

that the Plaintiffs' tort claims are barred under the Florida economic loss doctrine. To the contrary, an analysis of the case law and the underlying purposes of that doctrine shows that the tort claims in these actions are not barred by that doctrine and should be permitted to stand.

The doctrine is narrowly construed and has no application where, as here, the duties alleged to have been breached arise by operation of law and not solely, if at all, from any agreement between plaintiff and defendant. The duties breached in the torts alleged – breach of fiduciary, fraud and negligent misrepresentation – arise by operation of law because of the special relationship between a bank and a foreign-based client to which it provides, for a fee, investment advice. They also arise from the fact of Standard Chartered's agreeing to provide that service. *Cf. See People ex rel. Cuomo v. Merkin* (relationship between promoter and investors "imposed on [promoter] a duty to act with care and loyalty *independent of the terms of ... agreements*") (emphasis added). Standard Chartered need not have had a written contract with its clients in order to incur the duties to the Plaintiffs alleged to have been breached. The economic loss doctrine, despite its tangled and controversial history, has never been construed by the Florida Supreme Court to bar claims against a bank (or broker-dealer) for breach of such duties, and there is no indication -- and certainly not a persuasive one – that it would do so in this case.

A. <u>Florida's Economic Loss Doctrine</u>

The economic loss doctrine is judge-made. Its purpose is to prevent tort claims where the parties, through a contract, "have allocated the economic risks of nonperformance through the bargaining process." *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, 536 (2004). In that decision, the Florida

Supreme Court clarified that the rule applies in two different circumstances: "when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract," and "when there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property." *Id.* at 536. In the contractual privity context, it has long been clear that it has no application where the duty giving rise to the tort claim arises from a source other than a contract.

The history of the doctrine in the Florida courts has been tortuous. Standard Chartered's misinterpretation of the doctrine is best illustrated by its reliance on a fourteen-year old decision, *McCutcheon v. Kidder, Peabody & Co.*, 938 F. Supp. 820, 822 (S.D. Fla. 1996) (fiduciary duty claim against broker-dealer barred by economic loss doctrine). Unfortunately, Standard Chartered fails to bring to the Court's attention that in *Crowell v. Morgan Stanley Dean Witter Services Co. Inc.*, 87 F.Supp.2d 1287, 1293 (S.D.Fla. 2000), the author of the earlier decision in *McCutcheon*, District Judge Ryskamp, expressly receded from the holding in the earlier case, in recognition of changes in the doctrine in the intervening four years.

In one of the decisions that caused Judge Ryskamp to abandon *McCutcheon*, *Moransais v. Heathman*, 744 So.2d 973, 979-80 (Fla. 1999), the Florida Supreme Court frankly stated: "The exact origin of the economic loss rule is subject to some debate and its application and parameters are somewhat ill-defined… We must acknowledge that our pronouncements on the rule have not always been clear and, accordingly, have been the subject of legitimate criticism and commentary." Changes in the case law have been frequent and often radical. Therefore, it is dangerous to rely on cases that predate important changes in the law. To illustrate the point, even *Crowell* does not reflect

Florida's more recent efforts to align itself with the majority of jurisdictions that limit application of the economic loss rule to products liability cases and cases in which the duty allegedly violated arises solely from a contract. These efforts culminated in the Florida Supreme Court's decision in *American Aviation*, *supra*.

As *American Aviation* noted, "courts have held that a tort action is barred *where a defendant has not committed a breach of duty apart from a breach of contract*." *Id.* at 537 (emphasis added). A tort action is not barred, however, when the tort is "committed independently of the contract breach." *Id.*

The court in *American Aviation* admitted "there has been much confusion about the scope of this doctrine." *Id.* at 536. The court noted that *Moransais* "recognized the danger in an 'unprincipled extension of the rule.'" *Id*. at 542. In that case, a homeowner brought a negligence action against engineers who made a pre-purchase inspection of his house pursuant to their employer's contract with the homeowner, alleging they failed to detect and disclose certain defects in the condition of the house. Although the inspection was done pursuant to contract, the court held that the economic loss doctrine did not bar the claim. The *Moransais* court "emphasize[d] that by recognizing that the economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action, such as those for neglect in providing professional services." *Moransais,* 744 So.2d at 983. Importantly, the court noted that the duty of due care owed to the homeowner arose by operation of law. *Id.* at 975-76.

As the court noted in *American Aviation*, "[a]lthough we limited our holding in *Moransais* to situations involving professional malpractice, we note that some courts have extended the exception to the application of the economic loss rule created in

Moransais to causes of action for breach of fiduciary duty, even if there was an underlying oral or written contract." *Am. Aviation,* 891 So. 2d at 542. The *American Aviation* court specifically cited *Invo Florida, Inc. v. Somerset Venturer, Inc.,* 751 So.2d 1263, 1266 (Fla. 3d DCA 2000) and *Performance Paint Yacht Refinishing, Inc. v. Haines,* 190 F.R.D. 699, 701 (S.D.Fla.1999). In *Invo*, the court held that, under *Moransais*, a claim for breach of fiduciary duty by creditors of a dissolved corporation is not barred by the economic loss doctrine "even if there is an underlying oral or written contract." *Invo,* 751 So.2d at 1267. *Performance Paint* held that a claim by an employer against former employees for breach of fiduciary duty arising from breach of a non-compete provision in their employment agreement with the employer is not barred by the economic loss doctrine. *Performance Pain,* 190 F.R.D. at 701. The *Performance Paint* court itself relied on *First Equity Corp. of Florida., Inc. v. Watkins*, No. 98-589, 1999 WL 542639 (Fla. 3d DCA, July 28, 1999). In that case, the court, relying on *Moransais*, held that the economic loss doctrine does not bar a claim by a customer of a broker-dealer for breach of fiduciary duty, "even if there is an underlying oral or written contract," for having misrepresented the terms of an investment to which the firm had "introduced" the customer. *First Equity Corp.,* 1999 WL 542639 at *1.

Standard Chartered fails to cite *Crowell,* where Judge Ryskamp abandoned his earlier decision in *McCutcheon*. *Crowell* was based on the court's finding, "'no *persuasive* indication' that the Florida Supreme Court would not follow *First Equity*, and thus the economic loss doctrine does not bar claims against a stockbroker for breach of fiduciary duty." 87 F.Supp.2d at 1293 (emphasis in original.) A similar decision was

reached in *Hilliard v. Black*, 125 F.Supp.2d 1071, 1079 (N.D. Fla. 2000) (no persuasive indication that Florida Supreme Court would disagree with *First Equity*).

Standard Chartered ignores not only *Crowell* and *Hilliard* but also several cases decided after the Florida Supreme Court's decision in *American Aviation*. In *Florida. Automobile Joint Underwriting Association v. Milliman, Inc.*, No. 06-cv-546, 2007 WL 1341127 (N.D. Fla., May 3, 2007), the court, after comprehensively surveying the case law, including some contrary decisions, found that "*American Aviation* provides even stronger reason to believe that the Florida Supreme Court will not disagree with the decisions of the Third District Court of Appeals [in *First Equity* and *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc .,* 842 So.2d 204, 209 (Fla. 3d DCA 2003), *rev. denied,* 939 So.2d 1061 (Fla. 2006)]"). Neither *First Equity*, discussed above, nor *Fixel* are discussed by Standard Chartered. The *Fixel* court, in reliance on, among other decisions, *Invo* and *Moransais*, held that the economic loss doctrine does not bar a claim for breach of fiduciary duty by a manufacturer against its factoring company for steering its customer to enter into a business venture with a third party, to the benefit of the factoring company. *Fixel,* 842 So.2d at 209. Standard Chartered also ignores *Mitchell Co., Inc. v. Campus*, 672 F. Supp. 2d 1217 (S.D. Ala. 2009) (economic loss doctrine did not bar breach of fiduciary claim arising out of vice president's Florida common law status as an officer and director of developer, not any particular contract, employment agreement, or obligations arising thereunder); *Kraft Co., Inc. v. J & H Marsh & McLennan of Florida, Inc.,* No. 04-cv-2359, 2006 WL 1876995 at *3 (M.D.Fla.2006) (holding, in reliance upon *Invo* and *Fixel*, that claims for fiduciary duty are not barred by the economic loss doctrine); and *Stateline Power Corp. v. Kremer*, 424 F.Supp. 2d 1373, 1379-80 (S.D. Fla.

2005) (citing *Moransais*, claim for breach of fiduciary duty not arising solely from employment contract held not barred by economic loss doctrine).

Standard Chartered attempts to bolster its flawed interpretation of *Moransais* by relying on the unpublished Eleventh Circuit opinion in *Royal Surplus Lines Ins. Co. v. Coachman Industries, Inc.*, 184 Fed. App'x 894 (11th Cir. 2006). Even if this opinion were binding precedent, which it is not, it would be inapposite here as it is distinguishable on its facts. The *Royal Surplus* court upheld the lower court's grant of summary judgment on the plaintiff's tort claims after finding that there was no breach of duty alleged other than the breach alleged as part of the plaintiff's breach of contract claim. *Royal Surplus*, 184 Fed. App'x at 902. This is completely consistent with cases, such as *Am. Aviation*, holding the economic loss rule to be inapplicable to claims arising from duties not based solely on a contract. The other cases cited by Standard Chartered in support of its economic loss doctrine argument *Moransais* are equally unconvincing, either because they were decided before important cases decided in the Florida courts or because they are plainly distinguishable.[27]

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[27] *McCutcheon*, as noted, was abandoned by Judge Ryskamp in his later decision in *Crowell*. *Behrman v. Allstate Life Ins. Co.*, 388 F. Supp 2d. 1346 (S.D. Fla. 2005), is distinguishable on its facts. The court held that because the plaintiff, an annuitant, was suing over the decline in value to a contracted-for annuity, its tort claims against the issuers of the annuity were barred by the economic loss doctrine. Moreover, the court took no account of the Florida Supreme Court's decision in *Am. Aviation*. *Interstate Sec. Corp. v. Hayes Corp.*, 920 F.2d 769, 777 (11th Cir. 1991) (holding economic loss doctrine bars breach of fiduciary duty claim), has been understood by a number of courts to have been superseded by changes in the case law. *See Mitchell Co., supra*; *Stateline Power*, *supra; Hilliard*, *supra*; and *Crowell*, *supra*. *White Const. Co., Inc. v. Martin Marietta Materials, Inc.*, 633 F. Supp. 2d 1302, 1325 (M.D. Fla. 2009) is inapposite since the court simply held that the complaint failed to state a claim that the defendant owed the plaintiff any fiduciary duties; the economic loss doctrine was not even mentioned. In *Excess Risk Underwriters, Inc. v. Lafayette Life Ins. Co.*, 208 F.Supp. 2d 1310, (S.D. Fla. 2002), the court held the economic loss doctrine to apply because the duties involved arose solely

The Plaintiffs have not alleged, and there would be no way for Standard Chartered to prove, that the duties to them breached by Standard Chartered arose solely from contracts between the Plaintiffs and Standard Chartered. The duties arose from the relationship between them and the duties imposed by law on the bank in the context of those relationships. These were not bare-bones, arm's-length contract-based duties because this was not the nature of the relationships. Instead, Standard Chartered,

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from the contract and the alleged breaches relate to specific elements of the contract, and specifically distinguished the facts of the case from *Invo Florida, Inc. v. Somerset Venturer, Inc.,* 751 So.2d 1263 (Fla. 3d DCA 2000), a case relied on by the Plaintiffs and cited by the Florida Supreme Court in *Am. Aviation* as coming within an exception to the economic loss doctrine, "because [*Invo*] arose in the securities context and involved the well-established tort of breach of fiduciary duty against directors of dissolved corporations. In contrast, the instant case involves neither securities matters nor a shareholder's claim against a director." 208 F.Supp.2d at 1317-18. *Lehman Bros. Holdings, Inc. v. Herota*, No. 06-cv-2030, 2007 WL 1471690 (M.D. Fla., May 21, 2007) is inapposite because the duties alleged to have been breached arose solely out of contracts. The court in *Florida Automobile Joint Underwriting.*, discussed above, 2007 WL 11341127, at *6, distinguished two other cases cited by SC, *Detwiler v. Bank of Cent. Fl.*, 736 So.2d 757, 759 (Fla. 5th DCA 1999), and *Clayton v. State Farm Mut. Ins. Co.*, 729 So.2d 1012, 1014 (Fla. 3d DCA 1999), on the basis that they were decided one day after *Moransais* was decided, and six weeks before the *Moransais* decision, and that *Clayton* "appears to have been implicitly abrogated by *Invo. Fla.* and *Susan Fixel, Inc.*" SC, while citing *Detwiler* and *Clayton*, does not justify their continued validity after *Moransais*, *Invo* and *Fixel*. *Granat v. Axa Equit. Life Ins. Co.*, No. 06-cv-21197, 2006 WL 3826785 (S.D. Fla., Dec. 27, 2006), is plainly inapposite. Beneficiaries of a life insurance company sued the insurer under for both breach of contract and breach of fiduciary duty on account of the insurer's failure to pay death benefits on an insurance policy that, by its express terms, had lapsed. Not surprisingly, given the exact congruity between the tort claim and the contract claim and the lack of any duty other than that arising under the contract, the court dismissed the tort claims under the economic loss doctrine. The final case cited by Standard Chartered, also decided before *American Aviation, Florida State Board of Administration v. Law Eng'g & Envtl. Servs*., Inc., 262 F.Supp.2d 1004 (D. Minn. 2003), is distinguishable on the same bases as *Excess Risk*, discussed *supra*. The State hired the defendant to inspect a building it was considering buying. Alleging that the inspection failed to detect numerous defects, the State sued the inspector for breach of contract, negligence, negligent misrepresentation and breach of fiduciary duty. Relying on *Excess Risk*, the court held that the breach of fiduciary duty claim was barred by the economic loss doctrine.

consistent with its position as a private bank offering personalized investment advice, occupied a position viz-a-viz the Plaintiffs where their failure to fulfill their duties subjects them to liability in tort.

VIII.

PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE SO-CALLED EXCULPATORY CLAUSES IN DOCUMENTS THIS COURT SHOULD NOT EVEN CONSIDER

The Plaintiffs have previously shown, *supra*, at 7-22, that the documents that Standard Chartered seeks the Court to consider should be excluded by the Court. Nevertheless, if the Court were to consider these documents, the so-called exculpatory clauses in the RGAs and the NISA accomplish no such exculpation. They are ambiguous and they plainly do not state what Standard Chartered claims they state. The Court can and should ignore them.[28]

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[28] Importantly, only *some* agreements are attached, and only between *some* (but not all) of the Plaintiffs and American Express Bank International ("AEBI"), later known as Standard Chartered Bank (International) Ltd. ("SCBI"). The attached documents are:

(1) an Account Application and Agreement for Corporation and Other Organizations ("Account Application"), *with respect to each Plaintiff*;

(2) Rules and Regulations Governing Accounts ("RRGA") (which were purportedly accepted in advance by Plaintiffs by way of the Account Application), also *with respect to each Plaintiff* (but the Court is reminded of the confusion as to whether the RRGAs were applicable to Headway during the vast period of time when the first account agreement was "canceled");

(3) an Addendum to Account Application relating to securities transactions (the "Securities Transactions' Addendum"), *with respect only to Plaintiffs Lopez, Headway, and Abbot, and therefore not applicable to Plaintiffs Maridom and Caribetrans (affiliates of Abbot) and Valledolid*; and

(4) Nondiscretionary Investment Services Agreement ("NISA"), *with respect only to Plaintiff Valledolid, and therefore not applicable to Plaintiffs Lopez, Headway, Maridom, Caribetrans and Abbot.*

At pages 45-47 of its Motion, Standard Chartered argues that what it construes as exculpatory clauses in the RRGA and the NISA bar some or all of the Plaintiffs' claims. Frankly, it is difficult to follow Standard Chartered's argument, and it provides very little explanation of exactly what it is arguing and why its arguments should be followed. Nevertheless, Standard Chartered does boldly state that the agreements demonstrate "a clear and unambiguous desire by the parties to exculpate the Bank from tort liability in providing private banking services to plaintiffs, except where the Bank was, at minimum, grossly negligent." Motion, at 46. Even a cursory review shows that this assertion and Standard Chartered's argument are full of holes.

First, only the NISA contains any reference to "gross negligence."[29] While a plain reading of the RRGAs shows that they do not, in fact, bar *any* liability in this case, even assuming, *arguendo*, that they do bar any liability, they must be read to bar *all* claims and protect against *all* liability, not just claims and liability based on conduct less severe than gross negligence.[30] But that would make these clauses unenforceable, because Florida law is clear that an exculpatory clause is unenforceable to the extent that

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See Declaration of Patrick B. Berarducci ("Berarducci Decl.") Exs. B-H (Account Applications); Exs. I-J (RRGAs); Exs. K-M (Securities Transactions' Addendums); and Exs. N-O (NISA).

[29] As noted, the NISA purports to apply only to one of the Complaints, *Valladolid*, and not to *Headway*, *Lopez* or *Maridom*.

[30] See RRGA Paragraph 41 ("*any* act, omission, error, misconduct, negligence…); Paragraph 42 ("*any* failure, omission, delay, interruption or error in the performance of any of the terms, covenants and conditions of these Rules or of the Account Application and Agreement" caused by events beyond AEBI/SCBI's control); Paragraph 46 ("*any and all* claims and causes of action" arising from claims against AEBI/SCBI from its operations under the accounts).

it attempts to relieve a defendant of liability for an intentional tort, *Lowe v. Seagate Homes, Inc.,* 987 So. 2d 758, 760 (Fla. 5th DCA 2008), and such a clause that purports to eliminate all liability in the event of a breach of contract is void for lack of mutuality of obligation and remedy, *Golden v. Mobil Oil Corp*., 882 F.2d 490, 494 (11th Cir. 1989) (applying Florida law). The Plaintiffs assume that Standard Chartered's reason for mischaracterizing the RRGAs by importing into them a reference only to sub-gross-negligence claims is to avoid these effects of Florida law. As shown, however, , however, there is no such limitation, thus dooming Standard Chartered's attempted ploy.

In fact, however, the three referenced Paragraphs of the RRGAs do not unambiguously bar *any* of the Plaintiffs' claims, of whatever nature. Therefore, they cannot be used to bar any claims on a Motion to Dismiss.

Paragraph 41 of the RRGA states:

> Correspondents and Affiliates
>
> AEBI/SCBI will not be liable to Customer for any act, omission, error, misconduct, negligence, default or insolvency of any of its representative offices, correspondents, intermediaries, affiliates or subsidiaries, and each correspondent, affiliate, intermediary, or subsidiary shall be liable for its own acts, omissions, misconduct and/or negligence.

It is plain on its face that this provision bars no claims against American Express Bank International, now known as Standard Chartered Bank International (Americas) Ltd. ("AEBI/SCBI"), the entity with which the Plaintiffs dealt directly. At most, it purports to state that AEBI/SCBI will not be vicariously liable for certain acts of any other entities classified as "representative offices, correspondents, intermediaries, affiliates or subsidiaries." These categories do not describe the offices, employees or representatives of AEBI/SCBI, but only other entities in the American Express complex

of companies. If Standard Chartered ascribes a meaning to these terms other than that, such meaning is not evident from a plain reading, and therefore cannot, without affording the Plaintiffs a full opportunity for discovery on this issue, be construed to mean what Standard Chartered says they mean.

In its entirety,[31] Paragraph 42 states:

Force Majeure

Without limiting the generality of other provisions of these Rules, AEBI/SCBI shall not be liable to Customer *or any third party* for any failure, omission, delay, interruption or error in the performance of any of the terms, covenants and conditions of these Rules or of the Account Application and Agreement that is due to causes beyond the control of AEBI/SCBI, including*, without limitation, bank moratoriums or holidays, currency restrictions, trading suspensions, payment suspensions by other institutions, labor disputes, acts of God, acts of a public enemy, acts of a governmental, supervisory or monetary authority, war, civil commotion, legal compulsion, or* insolvency or negligence of other institutions. *Furthermore, AEBI/SCBI shall have no responsibility or liability to Customer or any third party for any blockage or reduction in the availability of funds in any account due to restrictions imposed or actions taken by any governmental supervisory or monetary authority or by any other third party.*

Standard Chartered reads this provision to mean that "SCBI shall not be liable to Customer . . . for any failure, omission . . . or error in the performance of [the RRGA] . . . that is due to causes beyond the control of SCBI, including . . . negligence of other institutions." Motion, at 36. If that is what this provision means, it does not bar any claims brought in these cases. First, none of the Complaints alleges a violation of the RRGA. Second, the RRGA does not promulgate the duties applicable to the performance of Standard Chartered's investment advisory services. Third, assuming, *arguendo*, that all

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[31] The Standard Chartered Defendants offer a truncated version of this Paragraph. Motion, at 11. In the text, the Plaintiffs quote the entire Paragraph, italicizing those words *omitted* by Standard Chartered.

other obstacles to its effectiveness as an exculpatory clause were ignored, this provision is not enforceable under Florida law, because the "negligence of other institutions" that conceivably could be referred to is not an enforceable bar to a claim under Florida law. Standard Chartered leaves to the Court's and the Plaintiffs' collective imaginations whose negligence -- and, for that matter, what acts of negligence – it might be referring to. Standard Chartered is simply rifling through the RRGA to come up with *some* argument, no matter how outlandish, to throw against the wall.

This is, as the heading indicates, a force majeure clause. The court in *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008), *aff'd,* 306 Fed. App'x. 471 (11th Cir. 2009), recently explained the law in Florida regarding such clauses: "Under Florida contract law, the defense of 'impossibility' may be asserted in situations 'where purposes for which the contract was made, have, on one side become impossible to perform.' *Bland v. Freightliner, LLC,* 206 F.Supp.2d 1202, 1208 (M.D.Fla.2002) (citing *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.,* 174 So.2d 614, 617 (Fla.1965))." It is fundamental that "exculpatory clauses are not favored in the law, and Florida law requires that such clauses be strictly construed against the party claiming to be relieved of liability." *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. Dist. Ct. App. 1991). Standard Chartered argues instead for a broad reach of this language. Moreover, if, *arguendo*, this provision has any applicability to the specific claims brought in this case, the Court cannot find that, on its face, it has the meaning advanced by Standard Chartered. As stated in a case cited by the SC Defendants, MTD at 45, exculpatory clauses, to be valid, must be "clear and unequivocal" and understandable to "an ordinary and knowledgeable party." MTD, at 45,

quoting Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc., 705 So.2d 120, 122 (Fla. 5th DCA 1998). *Accord*, *Cooper v. Meridian Yachts, Ltd.,* 575 F. 3d 1151, 1167 (11th Cir. 2009) ("clear and understandable").

Finally, if forced to guess what Standard Chartered is referring to, the Plaintiffs would assume (although they are not required to assume anything, nor is the Court, in an effort to understand a motion to dismiss) that Standard Chartered is referring to the Fairfield Greenwich entities' failure to discover that Madoff, to whom they sent billions, was running a Ponzi scheme. Whether or not such a fact or condition may or may not give rise to a claim for contribution, the language on which Standard Chartered relies is hardly "clear and unequivocal" in purporting to exculpate Standard Chartered for having dropped the ball for *its* clients. Impossibility means not only that performance of one's duties *could* not be done because of the acts or omissions of another, but that the other's malfeasance was completely unforeseeable. It cannot be said that as a matter of law a sophisticated player like Standard Chartered could not foresee the possibility that a group of hedge funds could be negligent in assessing the risks of their investment. *In re SFD @ Hollywood, LLC*, 411 B.R. 788, 800 (Bankr. S.D. Fla. 2009)

To phrase it in the simplest terms, if Fairfield Greenwich acted irresponsibly, this might or might not have made Standard Chartered's job harder, but it did not make it *impossible*. This is a pure question of fact and simply cannot be resolved in the defendant's favor on a motion to dismiss.

Finally, Paragraph 46 of the RRGA states (Indemnification and Exculpation) is a lengthy provision, only a few words of which Standard Chartered quotes to the Court. In light of its length, the Plaintiffs respectfully refer the Court to Berarducci Exhibits I and

J, assuming, of course, that the Court has not otherwise decided to exclude these documents.

Paragraph 46 accomplishes nothing but purportedly require the bank's customers purportedly (a) to indemnify and hold AEBI/SCBI harmless against certain enumerated claims arising from the operation of the accounts and (b) not to bring claims in connection with the enumerated claims. By selectively and misleadingly quoting from this language, the SC Defendants have tried to transmogrify it into a general release against any future misconduct by AEBI/SCBI. This is a serious misreading of the words of Paragraph 46 made possible only by the SC Defendants' selective quotation. These provisions plainly refer, at most, to insulating AEBI/SCBI from liability to the Plaintiffs arising from third party claims. The Court should reject the request by the SC Defendants to read Paragraph 46 to bar all claims arising from the account relationship.

IX.

CAUSATION IS A QUESTION FOR THE FINDER OF FACT NOT TO BE DETERMINED ON A MOTION TO DISMISS

As part of its straw man strategy, Standard Chartered seeks dismissal on the ground that the Madoff fraud was so unforeseeable as to amount to a legally sufficient break in the chain in causation leading from Standard Chartered's failures to the Plaintiffs' losses. Like the rest of Standard Chartered's formulations, it pays scant attention to Florida law and cannot support dismissal.

An intervening cause is one that is not foreseeable by the wrongdoer seeking to escape responsibility because something else was the legal cause of the plaintiff's loss. Determining whether another causative factor "was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's

negligent conduct." *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 522 (Fla. 1980). "The question of whether an intervening cause is foreseeable is for the trier of fact." *Id.* Therefore, it is "not appropriately disposed of by Motion to Dismiss unless the allegations themselves are deficient in stating a cause of action." *Lopez v. Life Ins. Co. of America*, 406 So. 2d 1155, 1159 (Fla. 4th DCA 1981), *approved sub nom. Life Ins. Co. of Ga. v. Lopez*, 443 So.2d 947 (Fla. 1983). *Accord*, I*n re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 513, *opinion corrected in other respects on denial of reconsideration*, 612 F. Supp. 2d 397 (S.D.N.Y. 2009) (defendant rating agency's argument that market crash was intervening cause rejected because "[i]n cases of an intervening event, the question of causation is reserved for trial and is not subject to analysis in a Rule 12(b)(6) motion to dismiss*"). See Conder v. Union Planters Bank, N.A.*, IP 01-0086-C-T/K, 2002 WL 31431566 (S.D. Ind. Sept. 27, 2002) (bank sued for deposing checks with improper endorsement by the perpetrators of a Ponzi scheme; court denied motion to dismiss on basis of intervening cause because the court has no benefit of evidence as to what circumstances actually occurred. And, when reviewing UPB's motion, the court is confined to determine whether there is any set of facts consistent with the allegations of the Amended Complaint which would entitle Plaintiff to relief. The court cannot rule out that possibility.").

Even in the case of an intervening criminal act, the issue remains one of foreseeability, a fact question. In *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. Unit B 1981), the court reversed the district court's dismissal of a negligence claim against a sheriff for having negligently allowed a convicted felon to escape from custody and murder the

plaintiff's husband. The district court ruled that the murder was an intervening cause not foreseeable to the sheriff. The court stated:

> It is clear from Florida jurisprudence that proximate cause is a factual question one to be determined by the jury. Proximate cause is not a question of science or legal knowledge it is a fact to be determined in consideration of all the circumstances. It is only when the facts are susceptible of only one inference that the question is one of law for the court. Otherwise it should be submitted to the jury. Further, even where the evidence is not in dispute, when conflicting reasonable inferences may be drawn from the admitted facts, questions of negligence and negligence causation are peculiarly questions of fact which [sic] should be determined by the jury.

646 F.2d at 995 (internal citations and quotation marks omitted).

Another example of the application of this rule is the decision in *Coral Gables Federal Sav. & Loan Ass'n v. City of Opa-Locka*, 516 So.2d 989 (Fla. 3d DCA 1987). in which a bank was held liable for honoring and cashing city checks that were not properly endorsed (having been diverted to personal use by a city employee). The bank argued that its negligence was excused by the city's employee's criminal act of embezzlement. The court

> disagree[d] with CGS & L's contention that embezzlement is an unforeseeable result of a bank's negligent banking procedures. In order to hold an original tort-feasor liable for the actions of an intervening criminal third party, it is not necessary that the original tort-feasor foresee the precise injury the negligent action causes or the precise manner in which the injury occurs. It is sufficient that the resulting injury is within the scope of the danger or risk created by the original tort-feasor's negligence.

516 So.2d at 992 (citations omitted).

The court noted that "the precise reason that banks employ sophisticated safeguards is to detect and prevent losses caused by criminal acts such as embezzlement. Thus the threat of embezzlement is clearly within the zone of risk created by a bank's negligent security procedures," and the trial court properly found the city employee's criminal act was not a

"superseding cause breaking the causal chain between CGS & L's negligence and the city's loss." *Id.* at 993.

Standard Chartered relies on *Roberts v. Shop & Go, Inc.,* 502 So. 2d 915, 917 (Fla. 2d DCA 1986) for the proposition that even if could be said that the Bank in some way made it possible for Madoff to defraud plaintiffs, proximate cause is still lacking because even if Madoff's "intervening act [was] . . . possible,'" it was hardly "'probable.'" Standard Chartered omits to inform the Court that the portion of the *Roberts* decision from which it quotes is *dictum* concerning the law of proximate causation.[32] The more pertinent portion of *Roberts* is its citation to another Florida intermediate appellate court decision:

> We find the Third District's most recent expression of the doctrine we followed in *Eppard* particularly supportive of our result in the matter at hand:
>
> It is said that [foreseeability] will be decided as a matter of law only in cases where reasonable men could not differ. As a guide to what is a case 'where reasonable men could not differ,' our courts have employed notions of fairness and policy considerations so as to appropriately relieve a defendant of liability only *in highly unusual, extraordinary cases or those with bizarre consequences. Bennett M. Lifter, Inc. v. Varnado,* 480 So.2d 1336, 1339 (Fla. 3d DCA 1985) (Citations omitted). (Emphasis added).

Roberts, 502 So.2d at 917. *Roberts* dealt with an individual, who after filling up a pail with gasoline at defendant convenience store, walked into a local supermarket, doused its patrons and employees with gasoline, and set the gasoline on fire, killing and injuring several people. *Id.* at 916. The court found that the killer's actions were not foreseeable.

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[32] Under Florida law, the determination of whether an intervening or superceding cause is the legal cause of injury, thereby relieving the defendant of responsibility, is whether the intervening cause is "foreseeable." *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 522 (Fla. 1980).

Should the Court dismiss the Plaintiffs' claims based on the alleged unforeseeability of Madoff's Ponzi Scheme, it would be implicitly agreeing that a securities fraud -- even one as big as Madoff's -- is as unlikely to happen as the truly unpredictable events in *Roberts.* But, sadly, fraud and Ponzi Schemes occur often enough -- no citation is needed to document the long history of Ponzi Schemes in this country -- that it is fundamentally wrong to state that the possibility of Madoff's being engaged in a massive fraud is so unquestionably unforeseeable as to excuse Standard Chartered's failure to ascertain and advise their clients of the risks inherent in dealing with the Fairfield Greenwich funds. *Part and parcel of its due diligence responsibilities was the duty to be alert to and to assess risks evidenced by the investment.*

The Plaintiffs have stressed throughout this memorandum importance of treating as a fact question the issue of whether the red flags surrounding Madoff signaled a reason not to recommend an investment in a Madoff feeder fund. Those arguments are relevant here, as well. To put this concept in the context of foreseeability, the issue is whether Madoff's fraud was "a freakish and improbable chain of events … utterly unpredictable in light of common human experience." *McCain v. Florida Power Corp.,* 593 So. 2d 500, 503 (Fla. 1992) (contact by electrical trencher with underground cable foreseeable to electric utility). Plainly it was not.

This conclusion is reinforced by the fact that Standard Chartered argues that the Fairfield Funds Private Placement Memoranda, documents attached in support of the Motion to Dismiss, acknowledge the possibility of the very fraud committed by Madoff. Standard Chartered point out that the PPMs warn of the risk of misappropriation of the

Fairfield Funds' assets.[33] *See* Memo in Support at 15; *see also* Berraducci Decl. Ex A. at 20, Ex. X at 19, and Ex. W at 21. *See Federal Sav. & Loan Ass'n v. City of Opa-Locka*, 516 So.2d 989, 993 (Fla. 3d DCA 1987) ("precise reason that banks employ sophisticated safeguards is to detect and prevent losses caused by criminal acts such as embezzlement").[34]

Therefore, because Madoff's fraud is not one that would be unforeseeable as a matter of law, reaching the question of causation is premature at this stage of the proceedings. Standard Chartered's causation argument should be rejected.

X.

CALIFORNIA LAW GOVERNS VALLADOLID

Standard Chartered misstates the facts in support of their motion to dismiss as to Plaintiff Valladolid. Contrary to its representation, Ms. Valladolid was not a customer of Standard Chartered's Miami branch at the time her investment was made. Valladolid Am.Cplt., ¶¶ 2, 282-24, 26, 37. Plaintiff lives in the San Diego region in Tijuana, Mexico. Plaintiff purchased her interest in Fairfield through Standard Chartered's San Diego office. Standard Chartered's sales agent and Plaintiff's investment advisor Luisa

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[33] The SC Defendants in fact quote part of the October 4, 2004 PPM for the Fairfield Sigma Fund , which states: When [Sentry] . . . invests with Bernard L. Madoff Investment Securities or in a [non-split strike conversion strategy] . . . Investment vehicle, 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 missapropriate the securities or funds (or both) of the Fund.*" Memo in Support at 15; Berarducci Decl. at Ex. A at 20. (emphasis added)

[34] In other words, the very risk that eventuated was so foreseeable that the authors of the PPM for the Madoff feeder fund chose to highlight it. This fact removes any possibility that a jury would be required to find that risk unforeseeable; if anything, the opposite result would be required: the risk of the Madoff fraud was, as a matter of law, foreseeable. The Court need not face that issue at this point.

Serena worked out of Standard Chartered's San Diego office, and recommended the Fairfield investment. Plaintiff relied on defendant Serena's judgment in making the investment. California has a vital interest in protecting investors who live in the San Diego region and invest through businesses operating out of California cities.

The interpretation of the transaction documents are hotly disputed between Plaintiff and Standard Chartered. Plaintiff read the documents to mean she was establishing a trust relationship with American Express International Bank. The subscription agreement (Beraducci Declaration, Exhibit T) expressly provided that Defendant's sales agent Serena acted as Plaintiff's investment advisor in connection with Plaintiff's subscription to her investment in Fairfield.

Moreover, the transaction and relationship documents are in conflict with respect to choice of law. The subscription agreement provides that New York is the governinglaw; the relationship documents refer to Florida law. (Beraducci Decl. Exhibits T and E, N, O) However, the case was filed in California and alleged claims based on defendants' violation of California laws designed to guard against the kind of unlawful breaches of fiduciary and other duties alleged in the operative complaint. Under the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), a transferee court applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed.

Defendant acknowledges that *Nedlloyd Lines B.V. v. Superior Court,* 834 P.2d 1148, 1152 (Cal. 1992) provides the principles by which the choice of law issue is to be resolved where a contract between the parties contains a choice of law clause:

> Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the

> parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue ….' (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy. (footnotes omitted)

The states cited in the choice of law clauses, New York and Florida, do not have a substantial relationship to Plaintiff or the transaction by which Plaintiff invested in Fairfield. No other reasonable basis exists for applying either Florida law or New York law to the transaction by which Plaintiff was induced to invest by sales agent Serena in Fairfield in San Diego.

Further, to the extent[35] that New York law (and Florida law as argued by Standard Chartered) are fundamentally in conflict with California law, that militates in favor of applying California law to *Valladolid*. For example, California has a strong public policy of protecting parties to contracts of adhesion from unfair one-sided provisions like those in the action. *Neal v. State Farm Ins. Cos.* (1961) 188 Cal. App. 2d 690, 694; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113. Moreover, exculpatory clauses like those cited by Standard Chartered in this action that purport to relieve fiduciary investment advisors of their duties of due care [*Twomey v. Mitchum, Jones, & Templeton, Inc.* (1968) 262 Cal.App. 2d 690] would be unenforceable

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[35] Standard Chartered's extravagant characterizations of Florida law are sufficiently flawed that it is not clear whether Valladolid should be comparing California to Florida law as portrayed by Standard Chartered or Florida law as it actually is. Accordingly, Plaintiff Valladolid highlights the key elements of California law that, if it differs from Florida law, require denial of the Motion to Dismiss.

under California law if so read because they violate public policy. *Tunkl v. Regents of University of Cal* (1963) 60 Cal. 2d 92.

Moreover, economic damages are clearly recoverable under California law based upon a breach of fiduciary duty by an investment advisor. *Twomey v. Mitchum, Jones, & Templeton, Inc.* (1968) 262 Cal. App. 2d 690. Defendant's argument that economic damages cannot be recovered under Florida law based on breaches of fiduciary duty (Defendant Motion pp. 39-42) are wholly out of place under any discussion of California law. *Twomey v. Mitchum, Jones, & Templeton, Inc.* (1968) 262 Cal. App. 2d 690.

In this action, the Fairfield subscription agreement through which Plaintiff invested in Fairfield clearly identifies Luisa Serena as Plaintiff's investment advisor. (Beraducci Decl. Exhibit T, p. 3 ¶ 6) Plaintiff, under California law, can recover against Ms. Serena and her principal if Plaintiff can show Ms. Serena failed to exercise due care in recommending Plaintiff purchase an interest in Fairfield. *Twomey v. Mitchum, Jones, & Templeton, Inc.* (1968) 262 Cal. App. 2d 690, 708-709 (Duties of broker are fiduciary in character and must be exercised with the utmost good faith and integrity); *Duffy v. Cavalier* (1989) 215 Cal. App. 3d 1517, 1535-1536 (Scope of fiduciary duty of investment broker depends on facts and circumstances of each case).

CONCLUSION

The Standard Chartered Motion to Dismiss is based on a series of related straw men, designed to create the illusion that the bank's relationship with the Plaintiffs was something that it was not and that the Plaintiffs' allegations against the bank are also different from what they are.

As the Plaintiffs have demonstrated in this Opposition, the Plaintiffs' Complaints are straightforward, relatively simple pleadings that, under a variety of legal theories, seek to hold Standard Chartered responsible, principally, for having failed to do its duty not to steer them into overly risky investments. The issue of whether Standard Chartered should have done its job as well as the numerous institutions that, taking account of obvious red flags, avoided Madoff and the Madoff feeder funds will be a question for the juries. Standard Chartered can argue to the juries that it did its job and that, in the event, the Madoff fraud was so unpredictable that it was beyond Standard Chartered's power to guard against. The Court should deny Standard Chartered's Motion to Dismiss and allow the evidence-gathering process to begin.

Dated: May 3, 2010

Respectfully submitted,

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