UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al., Plaintiffs v. FAIRFIELD GREENWICH LIMITED, et al., Defendants. This Document Relates To: All Actions	ECF CASE Electronically Filed Master File No.: 08 CV 00118 (VM, THK)

REPLY MEMORANDUM OF LAW IN SUPPORT OF GLOBEOP FINANCIAL SERVICES LLC'S MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED COMPLAINT

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Defendant GlobeOp Financial Services LLC ("GlobeOp") respectfully submits this reply memorandum of law (the "Reply") in support of its motion for an Order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing the Second Consolidated Amended Complaint in this action (the "Complaint" or "Compl.") as against GlobeOp. This Reply is being submitted for the limited purpose of focusing the Court's attention on certain fatal flaws in Plaintiffs' Memorandum In Opposition To GlobeOp's Motion To Dismiss (the "Opposition") regarding (1) whether Plaintiffs have standing to bring the instant action; and (2) whether GlobeOp owed Plaintiffs a duty, without which all of their remaining claims[1] against GlobeOp must fail.[2]

ARGUMENT

I. PLAINTIFFS' ARGUMENT THAT THEY HAVE STANDING TO BRING CLAIMS THEY HAVE ASSERTED AGAINST GLOBEOP IS BASELESS

In their Opposition, Plaintiffs fail to explain how the breach of fiduciary duty, negligence and gross negligence claims asserted against GlobeOp are direct, not derivative. Plaintiffs cast only one of their standing arguments directly against GlobeOp; the remaining arguments are asserted in Plaintiffs' other opposition briefs, and are merely cross referenced in the Opposition, often without any explanation as to how those arguments could apply to GlobeOp.

Specifically, Plaintiffs assert that: (1) GlobeOp's arguments for why Plaintiffs' claims are derivative should be rejected because GlobeOp supposedly relies on the disfavored "special injury" test; (2) an agreement governing investments in Greenwich Sentry L.P. (the "Fund") supposedly recognizes that Plaintiffs may seek direct relief for the claims asserted here; (3) a

[1] The only claims against GlobeOp in this action are breach of fiduciary duty, negligence and gross negligence. Plaintiffs have abandoned their unjust enrichment claim against GlobeOp. (*See* Opposition at n.1.)

[2] GlobeOp's Reply does not address every argument in Plaintiffs' Opposition because: (1) we understand that other defendants will be addressing those arguments in their reply papers and do not want to unduly burden the Court with duplicative briefing, and (2) in any event, those arguments are flawed for the reasons set forth in GlobeOp's Memorandum of Law In Support Of GlobeOp Financial Services LLC's Motion To Dismiss The Second Consolidated Amended Complaint (the "Opening Brief").

"net equity" analysis reveals that Plaintiffs' claims are distinct from any claims held by the Fund; and (4) the "Wagoner Rule" provides Plaintiffs with standing to assert their claims here. For the reasons set forth below, each of Plaintiffs' standing arguments must be rejected.

A. GlobeOp's Direct/Derivative Analysis Is Not Dependent On The Special Injury Test

Plaintiffs characterize GlobeOp's direct/derivative analysis as improperly relying on the now-disfavored "special injury" test. This is not correct. Rather, GlobeOp argued in its Opening Brief that *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) is controlling law and that, under *Tooley*, "[w]hether Plaintiffs have standing to sue turns on … (1) who suffered the harm and (2) who would receive the benefit of any recovery or other remedy." (Opening Brief at 8-9 (citing, *inter alia*, *Tooley*, 845 A.2d at 1033).) As fully argued in the Opening Brief, under the *Tooley* test, Plaintiffs' claims against GlobeOp are derivative, not direct, because it is the Fund that contracted with GlobeOp to provide the services about which Plaintiffs now complain and it was the Fund whose money was stolen by Madoff.[3]

Plaintiffs, however, mischaracterize the *Tooley* Court's explanation of its two-pronged test. For example, Plaintiffs ignore the *Tooley* Court's direction that the first prong of its test (i.e. who suffered the alleged harm) requires a plaintiff to demonstrate "that he or she can prevail ***without showing an injury to the corporation.***" *See Tooley*, 845 A.2d at 1036 (emphasis added). "We believe that this approach [examining whether plaintiff can prevail without showing an injury to the corporation] is helpful in analyzing the first prong of the analysis: what

[3] Plaintiffs also assert that GlobeOp's reference to *In re Ionosphere Clubs v. Am. Nat'l Bank & Trust Co.*, 17 F.3d 600 (2d Cir. 1994) is misplaced because that case predates the *Tooley* decision. (*See* Opposition at 3.) But Plaintiffs overlook the fact that the thrust of *In re Ionosphere* mirrors the analysis in *Tooley*: namely, that in order for claims of breach of fiduciary duty and other torts against third parties to be direct, not derivative, those claims must allege injuries that were "inflicted directly [on the shareholders] or independently of the corporation … [and not] as an indirect consequence of [the alleged conduct.]" *Halo Tech. Holdings, Inc. v. Cooper*, No. 07 Civ. 489 (AHN), 2008 WL 4080081, at *5 (D. Conn. Aug. 29, 2008) (post-*Tooley* opinion citing *In re Ionosphere* at 606-07).

person or entity has suffered the alleged harm?" *Id.*[4] In other words, the mere allegation that Plaintiffs (as opposed to the Fund itself) suffered the harm is not enough.

With respect to GlobeOp, Plaintiffs provide no argumentation whatsoever regarding why the individual limited partners in the Fund (as opposed to the Fund itself) suffered the alleged harm. Rather, in an apparent attempt to avoid having to deal squarely with this critical issue, Plaintiffs simply cross-reference arguments they make in other briefs.

Some of the arguments Plaintiffs cross-reference in their Opposition, however, make no sense in the context of the claims Plaintiffs have made ***against GlobeOp*** (as opposed to claims made against some of the other defendants). For example, Plaintiffs cross reference several pages of their Consolidated Opposition To The Fairfield Greenwich Defendants' Motions To Dismiss ("FGG Opposition") in which they argue that they have standing to assert their claims because they are "fraudulent inducement" claims (which are direct claims, not derivative). (*See* FGG Opposition at 62-63.) Even assuming, *arguendo*, that Plaintiffs are correct that "fraudulent inducement" claims are direct instead of derivative, that argument does not help them in their case against GlobeOp since, unlike some of the other defendants, there are no allegations in the Complaint that GlobeOp committed fraud.[5]

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[4] *See also Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (post-*Toolely* decision noting that "[w]here all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature. The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*.").

[5] Plaintiffs also incorrectly argue that they have standing because certain courts have found that fund investors hold direct claims against fund service providers in certain limited circumstances. (*See* Opposition at 2-3.) None of the cases cited by Plaintiffs, however, provides any analysis of whether investors' claims are direct or derivative under *Tooley* or otherwise. The bottom line is that Plaintiffs in this case are seeking to convert what is at its core a contract dispute between the Fund and its administrator into various tort claims by the Fund's investors against the Fund's administrator. As noted in GlobeOp's Opening Brief, however, such creative pleading to mask a derivative claim as a direct claim is disfavored by the courts. *See Feldman v. Cutaia*, 956 A.2d 644, 659-60 (Del. Ch. 2007).

B. The Purported Right Of Action Clause In The Fund's Confidential Offering Memorandum Is Inapplicable To GlobeOp

Plaintiffs assert that the Greenwich Sentry L.P. Confidential Offering Memorandum dated August 2006 ("8/06 GS Offering Memo") recognizes that, in the event a fiduciary duty is breached, a limited partner "may seek legal relief … for itself and other similarly situated Limited Partners or on behalf of the Partnership." (*See* FGG Opposition at n.61 (citing 8/06 GS Offering Memo at 21).) In other words, Plaintiffs argue that the 8/06 GS Offering Memo gives them permission to bring a direct action against defendants here.

Even assuming, *arguendo*, that this clause of the 8/06 GS Offering Memo—which appears in the context of a discussion of conflicts investors might have with the General Partner—were sufficient to convert some derivative claims into direct claims, Plaintiffs' argument is meritless as to GlobeOp. Indeed, the 8/06 GS Offering Memo post-dates GlobeOp's involvement as administrator of the Fund. In any event, according to its plain language, this right of action clause is limited to breaches of fiduciary duty ***by the General Partner.*** (*See* 8/06 GS Offering Memo at 21 ("If a Limited Partner believes that the General Partner has violated its fiduciary duty [to the Partnership], it may seek legal relief under applicable law, for itself and other similarly situated Limited Partners or on behalf of the Partnership").) Plaintiffs make no allegation that there are any documents that contain a similar right of action clause as to GlobeOp.

C. Plaintiffs' Reliance On "Net Equity" Analysis Has No Basis In Law

Plaintiffs assert, ***without any supporting case law***, that their claims are different from any claims that could be brought by the Fund, because Plaintiffs suffered losses on a "net equity" basis (i.e. the total amount invested by Plaintiffs minus any amounts they received in redemptions or profit distributions). (*See* FGG Opposition at 64.) Under a "net equity" analysis,

according to Plaintiffs, the Fund's net losses are necessarily much smaller than the sum of the Plaintiffs' losses because many investors were "net winners." (*See id*. at 64-65.)

If taken seriously, Plaintiffs' "net equity" analysis would mean that there is, in effect, a "Ponzi Scheme Exception" to the existing rules distinguishing direct from derivative actions such that anytime a fund loses its investments in a Ponzi scheme, all of that fund's investors would automatically have the right to bring direct claims as long as at least one investor in the fund was a "net winner." Of course, numerous courts have implicitly rejected this "net equity" analysis by finding in the Ponzi scheme context (including, the Madoff Ponzi scheme) that claims by investors are derivative, not direct.[6]

Regardless, the Fund itself is the entity that directly suffered the alleged harm (i.e., it is the entity that had its money stolen by Madoff). (*See* Opening Brief at 7-11.) As a result, Plaintiffs' claims against GlobeOp belong to the Fund (if they belong to anyone), and the answer to the question of how the Fund should distribute any recovery it might receive in a derivative suit must be based on the Fund's own internal governing documents (which all Plaintiffs necessarily signed onto when they decided to invest in the Fund).[7]

D. The "Wagoner Rule" Does Not Provide Plaintiffs With Standing

Plaintiffs argue that under the "Wagoner Rule"—which prevents a bankrupt company, or its trustee, from asserting certain claims against a third party—the Fund might be prevented from

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[6] *See, e.g., Stephenson v. Citco Group Ltd.*, No. 09 Civ. 00716 (RJH), 2010 WL 1244007, at *9 (S.D.N.Y. Apr. 1, 2010) ("If, as alleged, defendants breached a fiduciary duty by not discovering that Greenwich Sentry's accounts were invested in what would become the most infamous Ponzi scheme in recent history, it necessarily injured Greenwich Sentry in so doing. Therefore plaintiff cannot prevail on this claim without showing injury to the partnership Greenwich Sentry itself, and accordingly the claim is derivative"); *Ernst & Young Ltd. v. Quinn*, No. 09 Civ. 1164 (JCH), 2009 WL 3571573, at *8 (D. Conn. Oct. 26, 2009) ("…injuries sustained on account of having investment or ownership stake in a corporation [or Fund] that diminishes in value are not individually suffered harms" where Fund's losses were result of investment in a Ponzi scheme); *Baker v. Andover*, No. 6179/09 (ADS), slip op. at 19 (N.Y. Sup. Nov. 30, 2009) (claims by investors against investment group and auditors for losses resulting from investments in Madoff Ponzi scheme are "entirely derivative in nature").

[7] *See, e.g.*, Greenwich Sentry L.P. Amended and Restated Limited Partnership Agreement dated April 30, 2006 ("GS Partnership Agreement") § 7.02 at 16-17.

asserting claims against defendants here, and thus Plaintiffs should have standing to assert those claims directly. (*See* FGG Opposition at 65-66.)

As a threshold matter, Plaintiffs are wrong that the Wagoner Rule confers standing on shareholders when the corporation or its trustee is barred from asserting the claim itself. Indeed, this Court has rejected the exact argument Plaintiffs attempt to make here. *See ABF Capital Mgmt. v. Askin Capital Mgmt.*, 957 F. Supp. 1308, 1333 (S.D.N.Y. 1997) ("The application of *in pari delicto* to bar the trustee can neither confer constitutional standing upon Plaintiffs nor transform the nature of its alleged injury from a derivative one into a direct and personal one."); *see also Williamson v. Pricewaterhousecoopers LLP*, No. 602106/04 (KM), 2007 WL 5527944, at § I (N.Y. Sup. Ct. Nov. 7, 2007) ("The doctrine of *in pari delicto* does not operate in Delaware to bar relief to the innocent through a derivative claim … and it should not operate that way in New York either") (citing *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 212 (Del. Ch. 2006)).

Further, even if the Wagoner Rule were applicable to some of the causes of action alleged in the Complaint, Plaintiffs' negligence, gross negligence, and breach of fiduciary duty claims against GlobeOp do not implicate the Wagoner Rule because GlobeOp is not alleged to have aided and abetted the purported fraud against Plaintiffs. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1094 (2d Cir. 1995) (holding that the Wagoner Rule "appears to have been applied to bar standing only in cases where the third party is alleged to have *aided and abetted* the debtors in defrauding creditors") (citing *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991)). As such, even under Plaintiffs' interpretation of the Wagoner Rule, the claims against GlobeOp should be brought derivatively.

II. PLAINTIFFS' ARGUMENT THAT GLOBEOP OWED THEM A DUTY IS BASELESS

Plaintiffs attempt to rely on the holding in *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec., LLC*, 446 F. Supp. 2d 163 (S.D.N.Y. 2006), which provides that a hedge fund investor may, in limited circumstances, be owed a fiduciary duty by the fund's administrators. Specifically, the Court in *Pension Committee* found a duty where (1) the administrators held themselves out to investors as having certain specialized policies and procedures to protect investors; (2) the investors reasonably relied on those representations; ***and*** (3) the administrator had discretionary responsibilities such as to independently value the fund's portfolio (the "*Pension Committee* test"). *See id* at 196-97. The problem for Plaintiffs, however, is that the allegations in their complaint do not satisfy ***any*** of the prongs of the *Pension Committee* test.

Indeed, as noted in GlobeOp's Opening Brief, Plaintiffs fail to set forth any allegations that GlobeOp "held itself out" as having specialized policies and procedures to protect investors ***during the relevant time period.*** Rather, the complaint references only marketing materials that appeared on GlobeOp's web site several years ***after the relevant time period***. In its Opposition, Plaintiffs' ***only*** response to this argument is an assertion, without citation to authority, that "the reasonable inference" is that GlobeOp held itself out in a similar fashion years earlier.

As an initial matter (and notwithstanding Plaintiffs' conclusory assertion to the contrary), there is no basis to infer that marketing materials on a website in 2009 would be at all similar to marketing materials in 2004-2006 (the relevant time period as to GlobeOp). Further, even assuming, *arguendo,* that this was a "reasonable inference", the very fact that Plaintiffs have to ask this Court to draw it illustrates why they cannot satisfy the second prong of the *Pension Committee* test—i.e., that Plaintiffs ***relied*** on the marketing materials. In other words, given that

Plaintiffs do not identify in their complaint any representation by GlobeOp in which it actually "held itself out" during the relevant time period as having specialized policies and procedures to protect investors, there is necessarily nothing in the Complaint to support an inference that Plaintiffs actually relied on those representations at the time. Surely, if Plaintiffs did actually rely on something GlobeOp said at the time regarding its special policies and procedures, they would be able to allege what it was GlobeOp said that they relied upon (as opposed to simply pointing to what a website said in 2009 and asking a court to draw an inference about what the website must have said years ago). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325-26 (2007) (determining that court can draw negative inference from failure to make an allegation).[8]

Plaintiffs' arguments for why the third prong of the *Pension Committee* test is satisfied are also without merit. Plaintiffs refer to the statement in the Greenwich Sentry L.P. Confidential Offering Memorandum dated May 2006 ("5/06 GS Offering Memo") that GlobeOp was obligated to prepare monthly NAV reports as evidence of GlobeOp's purported "discretionary" duties. (*See* Opposition at 5-6 (citing 5/06 GS Offering Memo at 10).) But the 5/06 GS Offering Memo does not say that GlobeOp is charged with providing "discretionary" duties. Rather, it states that GlobeOp was "responsible for performing certain day-to-day

[8] Further, Plaintiffs' Opposition appears to confuse the type of reliance that is required under *Pension Committee* to establish a fiduciary duty with the type of reliance generally required to allege fraud (which GlobeOp is ***not*** accused of in this lawsuit). Plaintiffs argue that "each Plaintiff that made an investment in the Fund during the two-year period of 2004-06, or that remained invested in the Fund during that period, ***relied on GlobeOp's NAV calculations*** and other representations in making and retaining those investments … If GlobeOp had performed its duties properly in this two-year period, Plaintiffs would not have invested or held their Fund shares." (*See* Opposition at 7 (emphasis added).**)** This is completely beside the point. The relevant reliance inquiry here is not whether Plaintiffs relied on GlobeOp's NAV calculations. Rather, the relevant reliance inquiry is whether Plaintiffs reasonably relied on statements GlobeOp made ***holding itself out*** as having special policies and procedures to protect investors. *See Pension Committee*, 446 F.Supp.2d at 196-197 (finding fiduciary duty may exist where plaintiffs "allege that [the administrator] held itself out to investors as having policies and procedures to ensure that the Funds' valuations would be accurate and fair, and that they relied on ***these*** representations.") (emphasis added). As noted above, the complaint is devoid of any such allegations.

administrative services for the Partnership."[9] (*See* 5/06 GS Offering Memo at 10.) These types of duties are flatly different from the types of duties that the Court found to be "discretionary" in *Pension Committee.* *See Pension Committee*, 446 F. Supp. 2d at 197 (administrator had discretionary duties where it had obligation to "independently pric[e] the fund" and "independently review the Funds' NAVs under the PPMs"). Plaintiffs do not (because they cannot) cite to any contractual provisions implying that GlobeOp was obligated to perform "discretionary" work for the Fund.[10]

Further, allegations that an administrator merely calculated a fund's NAV are insufficient to survive a motion to dismiss. (*See* Opening Brief at 20 (citing *Fraternity Fund v. Beacon Hill Asset Mgmt., LLC*, 376 F. Supp. 2d 443 (S.D.N.Y. 2005)).) Plaintiffs here mistakenly conflate the administrative task of calculating the NAV (which was done by the administrator) with the discretionary task of valuing the fund's securities (which was done by the general partner). *See Fraternity Fund*, 376 F. Supp. 2d at 447. The instant action, in which administrator GlobeOp allegedly calculated the NAV and the general partner valued the securities, is indistinguishable.

In addition, Plaintiffs assert that, as a general matter, fiduciary duties can arise from discretionary contractual duties. (*See* Plaintiffs' Memorandum In Opposition To Motions To Dismiss By The Citco Defendants Pilgrim And Francoeur (the "Citco Opposition") at 4.) Plaintiffs do not make any specific arguments against GlobeOp but merely cross reference

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[9] The 5/06 GS Offering Memo outlines those responsibilities as including: "prepar[ing] and distribut[ing] monthly reports that will contain the amount of the Partnership's net assets, the amount of any distributions from the Partnership and Incentive Allocation … accounting and legal fees and all other fees and expenses of the Partnership." (5/06 GS Offering Memo at 10.)

[10] As noted in GlobeOp's Opening Brief, the GS Partnership Agreement confirms the non-discretionary nature of GlobeOp's duties. That document provides that the General Partner is responsible for valuing the Fund's securities and that "[a]ll values assigned to Securities and other assets by the General Partner to this Article III shall be final and conclusive as to all of the Partners." (*See* GS Partnership Agreement § 3.07 at 11.) Without any support, Plaintiffs read this provision as providing only that in a dispute between the General Partner and the Limited Partners, the General Partner has the final say. (*See* Opposition at 6.) This reading of the GS Partnership Agreement ignores the plain language of the document and should be rejected.

Plaintiffs' arguments in the Citco Opposition. However, Citco and GlobeOp are not alleged to have been similarly situated.[11] As such, Plaintiffs' arguments as to Citco are inapposite.

CONCLUSION

For the foregoing reasons, GlobeOp respectfully requests that the Court dismiss, with prejudice, the claims against GlobeOp.

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Respectfully submitted,

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[11] Indeed, Citco is alleged to have provided more extensive services, including custodial services. For example, Plaintiffs allege that Citco "utterly failed to take reasonable, industry-standard steps" as both administrator and "custodian, bank, and depositary" to the Fund. (*See* Compl. at ¶ 336.) It is also alleged that Citco was responsible for holding securities purchased for the funds; supervising sub-custodians, ***including BMIS*** (emphasis added); providing brokerage services; and selecting third parties to deal with in providing brokerage and sub-custodial services. (*See* Compl. at ¶¶ 159-160, 330.) Citco is also alleged to have had the discretion to refuse to execute instructions by the Funds and to act on the Funds' behalf absent specific directions from the Funds. (*Id.* at ¶¶ 160, 330.)