UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, et al., Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, et al., Defendants.	Master File No. 09-CV-118 (VM)
This Document Relates To: *Bhatia* v. *Standard Chartered International (USA) Ltd.*, No. 09-CV-2410; *Tradewaves* v. *Standard Chartered International (USA) Ltd.*, No. 09-CV-9423.	

REPLY MEMORANDUM OF LAW OF STANDARD CHARTERED INTERNATIONAL (USA) LTD. AND STANDARD CHARTERED PLC IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINTS

Sharon L. Nelles
Bradley P. Smith
Patrick B. Berarducci
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
nelless@sullcrom.com

Diane L. McGimsey
(Admitted Pro Hac Vice)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067

Attorneys for Defendants Standard Chartered International (USA) Ltd., and Standard Chartered PLC

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Plaintiffs' claims against Standard Chartered International (USA) Ltd. ("SCI") and Standard Chartered PLC (collectively the "Bank") suffer from two fatal defects. *First*, plaintiffs claims should be heard, if anywhere, in the courts of Singapore, not New York. The agreements governing plaintiffs' accounts contain a forum selection clause requiring plaintiffs to file suit in Singapore, and plaintiffs' claims against the Bank share no bona fide connection to this forum in any event. *Second*, plaintiffs' claims lack substantive merit. At bottom, plaintiffs seek to hold the Bank liable for the losses they incurred at the hands of Bernard Madoff, not because the Bank had any knowledge of or involvement in Madoff's fraud, but because the Bank, like so many others, was fooled by the fraud. Plaintiffs' claims are particularly inappropriate considering that the agreements governing their non-discretionary accounts and investments in Fairfield Sentry Ltd. ("Sentry") make clear that plaintiffs took full responsibility for their investment decisions and were fully informed of the risks associated with Sentry prior to investment.

Recognizing these weaknesses, plaintiffs' opposition focuses on creating confusion about the pertinent facts and law, apparently in the hope that the Court will simply throw up its hands and deny the Bank's motion to dismiss. Indeed, plaintiffs go so far as to argue that the Court must disregard their account agreements—and the forum selection and liability limiting provisions therein—on the outrageous suggestion that that the Bank became aware of Bernard Madoff's Ponzi scheme months before Madoff's confession and amended plaintiffs' agreements to protect it from any resulting liability. This goes too far. Moreover, rather than attempting to distinguish the growing body of case law that refuses to hold entities and individuals liable for Bernard Madoff's massive Ponzi scheme absent allegations that the

defendants themselves were part of that scheme, plaintiffs ignore the cases altogether. It is clear that these cases should be dismissed.

ARGUMENT

I. PLAINTIFFS' CASES BELONG IN SINGAPORE, NOT THE UNITED STATES.

A. Plaintiffs Are Contractually Obligated To Bring These Cases in Singapore.

Plaintiffs' accounts are governed by the Standard Chartered Private Bank General Terms and Conditions (the "T&Cs") and are subject to a forum selection clause contained therein. (Singapore Mem. at 7-8, 21-23.)[1] Such a clause is presumptively enforceable if it "was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute." *Phillips* v. *Audio Active, Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007). Plaintiffs' advance two arguments to avoid the clause, both without merit.

Plaintiffs, relying on *Phillips*, first argue that the scope of the forum selection clause does not cover the claims asserted here because the clause covers only claims that originate in the T&Cs, such as breach of contract. Their reliance on *Phillips* is misplaced. In *Phillips*, the forum selection clause pertained only to "legal proceedings that may arise out of [the contract]." 494 F.3d at 382, 390 (interpreting "arise out of" to mean "to originate from a specified source"). Here, the forum selection clause in the T&Cs is not limited to claims that "arise out of" the agreement: "[T]he Client submits to the exclusive jurisdiction of the courts of Singapore to settle any dispute arising out of or in connection with these General Terms and Conditions, any Account, Transaction or any Service . . . ." (Vijayan Decl., Ex. A (T&Cs) at app. 1, ¶ 7.1.) Plaintiffs cannot credibly argue that their claims do not "arise out of" or have any

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[1] "Singapore Mem." refers to the Bank's memorandum of law in support of its motion to dismiss plaintiffs' complaints.

"connection with" their accounts, transactions performed through the Bank or any service the Bank provided.

In any event, plaintiffs' claims do arise out of their agreements with the Bank. The claims depend on the Bank's duties as an alleged "investment adviser" or "investment managers." (*See Bhatia* Am. Compl. ¶¶ 92, 93, 104, 109; *Tradewaves* Compl. ¶¶ 88, 89, 100, 105.) To the extent such duties existed, they originated from agreements with the Bank, which makes their claims subject to the forum selection clauses contained in those agreements. *See Phillips*, 494 F.3d at 391 ("[I]f the duty arises from the contract, the forum selection clause governs the action." (citation omitted).)[2]

Plaintiffs next try to overcome the presumption of enforceability that attaches to the forum selection clause. To do so, plaintiffs must "mak[e] a sufficiently strong showing that 'enforcement would be unreasonable or unjust or that the clause was invalid for such reasons as fraud or overreaching.'" *Phillips*, 494 F.3d at 384 (quoting *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). Plaintiffs argue it would be unreasonable and unjust to enforce the forum selection clause here because the Bank amended the language of the clause after plaintiffs opened their accounts. As discussed *infra* at pp. 23-25, the amendment to the forum selection clause pursuant to an agreed upon change-in-terms provision is valid and enforceable because plaintiffs' original agreements also contained a forum selection provision.[3]

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[2] In addition, the forum selection clause also covers plaintiffs' claims because plaintiffs could not have traded securities through the Bank without entering into the Services Agreements. *See Abbey* v. *Skokos*, 303 F. App'x 911, 913 (2d Cir. 2008).

[3] Even if the T&Cs were unenforceable, plaintiffs would still be subject to the mandatory forum selection clauses found in the original agreements, which provide that "the Customer hereby irrevocably submits to the jurisdiction of the Singapore courts, provided that such jurisdiction, at the sole option of the Bank, shall not be exclusive" (Vijayan Decl. Ex. O (Services Agreement) at 9 & Ex. P (Amended Services Agreement) at 12). *See Wells Fargo Century, Inc.* v. *Brown*, 475 F. Supp. 2d 368, 372 (S.D.N.Y. 2007) (Marrero, J.).

B. Plaintiffs' Actions Should Be Dismissed Based on Forum Non Conveniens.

Irrespective of the forum selection provision, plaintiffs' claims against the Bank have no bona fide connection to the United States or New York. Plaintiffs, all foreign-nationals or foreign corporations, do not allege that the Bank's actions occurred or had an effect in the United States or New York, other than in a single boilerplate venue allegation. Nor do plaintiffs dispute that Singapore has a strong interest in deciding these cases, which involve the alleged breach of duties in connection with bank accounts opened and maintained in Singapore. A forum non conveniens dismissal is warranted based on these circumstances alone. *See Corporacion Tim* v. *Schumacher*, 418 F. Supp. 2d 529, 533-35 (S.D.N.Y. 2006) (Marrero, J.), *aff'd*, 223 F. App'x 37 (2d Cir. 2007).

Plaintiffs' arguments against dismissal do not change this result. *First*, plaintiffs argue that the Bank should be judicially estopped from making a forum non conveniens argument because the Bank sought to have all Madoff-related cases naming Standard Chartered entities as defendants transferred to this Court. (Opp. at 8-10.) There is no factual inconsistency about the Bank's position: all cases against the Bank concerning investments in the Fairfield Funds properly pending in United States courts should be a part of this MDL; that does not mean, however, that all cases should be heard in the United States.

Second, while plaintiffs concede that Singapore "may be an alternative and adequate forum," they suggest that the Bank would fight jurisdiction in Singapore should this Court dismiss their cases on forum non conveniens grounds. (Opp. at 11.) This is demonstrably false. In its motion to dismiss, the Bank expressly stated that Singapore is an adequate alternative forum because "SCI and SC PLC agreed to submit to the jurisdiction of Singapore courts for purposes of plaintiffs' claims. . . ." (Singapore Mem. at 24.)

Third, plaintiffs argue that their choice of a New York forum should be given deference notwithstanding their foreign status because they had a legitimate reason for choosing New York, namely, to join with other Madoff-related cases pending in this Court. (Opp. at 11.) This argument is flatly contradicted by plaintiffs' own representations to this Court. In a November 5, 2009 letter to the Court, counsel for plaintiffs requested that *Bhatia* be severed from *Anwar* because "the *Bhatia* case is materially different from *Anwar*." (Endorsed Letter, Nov. 6, 2009, at 2, Dkt. # 292.) In fact, plaintiffs dropped Fairfield-related defendants from their complaint in an effort to escape pre-trial consolidation, arguing that dropping Fairfield "vitiated any reason to keep *Bhatia* administratively consolidated with *Anwar*, because now each action involves completely different defendants and unrelated statements, acts, and occurrences." (*Id.*)

Finally, plaintiffs' choice of forum should receive no deference because their account agreements all contemplated litigation in Singapore. *See Evolution Online Sys., Inc.* v. *Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 511 (2d Cir. 1998) (remanding with instructions to give no deference to plaintiff's forum choice because parties exchanged proposed drafts of agreement containing a forum selection clause); *cf. LaSala* v. *Bank of Cyprus Pub. Co. Ltd.*, 510 F. Supp. 2d 246, 257 (S.D.N.Y. 2007).

II. PLAINTIFFS CANNOT ASSERT A CLAIM UNDER THE FEDERAL SECURITIES LAWS BECAUSE THEIR CLAIMS LACK SUFFICIENT CONNECTIONS TO THE UNITED STATES.

Plaintiffs argue that the federal securities laws should be applied to their claims because "Madoff's international Ponzi scheme was centered in and run from New York," and "Standard Chartered furthered the effects of that scheme with its own bad acts." (Opp. at 16.) But plaintiffs do not allege that *any* part of *the Bank's* alleged misconduct took place in the United States, or had any effects in the United States. For that reason, plaintiffs cannot assert claims under the federal securities laws.

Plaintiffs' reliance on *Terra Securities ASA Konkursbo* v. *Citigroup, Incorporated*, No. 09-CV-7058, 2010 WL 546970 (S.D.N.Y. Feb. 17, 2010) (Marrero, J.), is misplaced. There, this Court allowed the foreign plaintiffs' claims to go forward, even though their claims involved foreign securities transactions conducted overseas, because the investment presentations that "contain[ed] a majority of the alleged misrepresentations underlying Plaintiffs' securities fraud claims, w[ere] prepared by Defendants in New York." *Id.* at *5. Here, plaintiffs do not allege that the Bank took *any* action in New York, much less any action related to the allegedly fraudulent representations. Plaintiffs' claims thus fall outside the scope of the federal securities laws. *See Morrison* v. *Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008), *cert. granted*, 130 S. Ct. 783 (2009); *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 112 (S.D.N.Y. 2005).[4]

III. PLAINTIFFS CANNOT ASSERT CLAIMS AGAINST SC PLC.

Plaintiffs argue that SC PLC is a proper defendant in this action, notwithstanding their failure to make any factual allegations of wrongdoing against SC PLC, because they may be able to pierce the corporate veil of SC PLC and hold it liable for the alleged wrongdoing of SCI. (Opp. at 17-18.) Plaintiffs' conclusory allegation that SC PLC "influenced, directed and controlled" SCI is insufficient, even at the pleading stage. In *De Jesus* v. *Sears, Roebuck & Co.*, 87 F.3d 65 (2d Cir. 1996), the Second Circuit held that allegations that a subsidiary's fraudulent actions were "caused by, known to and ratified by" the parent are insufficient to "overcome the

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4 Plaintiffs request they be provided "discovery of Standard Chartered's involvement" in Madoff's fraud before their claims are dismissed. (Opp. at 16 (citing *Europe & Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F.3d 118, 121 (2d Cir. 1998).) Plaintiffs' request should be denied. Although *Europe & Overseas* permits limited discovery before ruling on a 12(b)(1) motion where there is a risk the court may rule on "erroneous facts," it does not permit securities fraud plaintiffs to end-run the PSLRA's particularity requirements, as plaintiffs seek to do here.

presumption of separateness afforded to related corporations" because such allegations are "devoid of *any* specific facts or circumstances supporting" the allegation that the parent controlled and directed the subsidiary's wrongdoing. *Id.* at 70 (quotation marks and citations omitted; emphasis in original). Under the reasoning of *De Jesus*, plaintiffs claims against SC PLC should be dismissed.[5]

IV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 10(b).

A. Plaintiffs' Allegations Lack the Requisite Particularity Under Rule 9(b) and the PSLRA.

To state a claim under Section 10(b) and Rule 10b-5 thereunder, a plaintiff 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." *Vogel* v. *Sands Bros. & Co.*, 126 F. Supp. 2d 730, 737 (S.D.N.Y. 2001) (citations omitted). Plaintiffs fall far short of this standard, failing to identify the speaker of all but two misstatements, and likewise failing to identify when any of the alleged misstatements were made. (Singapore Mem. at 33-34.)

Unable to plead their claims with the requisite particularity, plaintiffs resort to arguing that such requirements effectively "put[] form over substance." (Opp. at 23.) Plaintiffs argue that the who, what, where and when of their claims can be "inferred" from their allegations, and that the Bank therefore has "fair notice" of the claims. (Opp. at 21, 23-24.) Such arguments are unfounded. "Fair notice" is the standard necessary to satisfy the notice-pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, *Bell Atl. Corp.* v.

[5] Plaintiffs' reliance on this Court's decision in *O'Mahony* v. *Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008), is unavailing because the Court did not discuss the particular allegations against the parent and, therefore, did not hold that conclusory allegations such as those alleged here are sufficient to withstand a motion to dismiss. *Id.* at 515.

Twombly, 550 U.S. 544, 555 (2007), not the particularity requirements of Rule 9(b) and the PSLRA, *e.g.*, *Garber* v. *Legg Mason, Inc.*, 537 F. Supp. 2d 597, 614-16 (S.D.N.Y. 2008). Plaintiffs do not cite any authority that justifies a lack of particularity based on the type of inferences advanced by plaintiffs.[6]

B. The Misrepresentations Plaintiffs Allege Are Not Actionable Because the Statements Were Either Not False or Not Material.

Plaintiffs next argue that they have adequately pleaded four material misrepresentations concerning (1) the safety of investing in Fairfield Sentry, (2) the level of due diligence the Bank conducted on Fairfield Sentry, (3) BLMIS's role as both sub-custodian and executing broker for Fairfield Sentry, and (4) the Bank's supposed agreement to distribute Fairfield Sentry. (Opp. at 24-25.) Plaintiffs fail, however, to adequately plead that the first three alleged misstatements/omissions were false and/or material, and plaintiffs fail to plead the fourth alleged misstatement at all—it appears for the first time in their opposition brief.

Safety of Investing in Fairfield Sentry. Plaintiffs argue that statements concerning the safety of investing in Fairfield Sentry are material, and attempt to distinguish the Bank's authorities, *In re Merrill Lynch Tyco Research Sec. Litig.*, No. 03-CV-4080, 2004 WL 305809 (S.D.N.Y. Feb. 18, 2004) and *Stevelman* v. *Alias Research Inc.*, 174 F.3d 79 (2d Cir. 1999), on the ground that those cases do not deal with the issue of materiality. Plaintiffs' argument misses the point. The alleged statements concerning the safety of investing in Fairfield Sentry fail because plaintiffs have not alleged why these statements were false or misleading, not

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[6] Plaintiffs also attempt to justify their failure to distinguish between SCI and SC PLC as the speakers of the alleged misstatements by arguing that the Bank's authorities, *In re Blech Sec. Litig.*, 928 F. Supp. 1279 (S.D.N.Y. 1996) and *Sofi Classic S.A. de C.V.* v. *Hurowitz*, 444 F. Supp. 2d 231 (S.D.N.Y. 2006), do not apply when the defendants are a parent and its subsidiary. Plaintiffs' fail to cite any authority for their argument, and nothing in *Blech* or *Sofi Classic* suggests that the PSLRA should be watered down when defendants are corporate affiliates.

because they are immaterial. *See In re Merrill Lynch Tyco Research*, 2004 WL 305809, at *5 (dismissing challenge to statements in research reports because plaintiffs failed to allege why statements were false or misleading when made). For example, plaintiffs challenge statements that Fairfield Sentry had a "history of stable and steady returns." (*Bhatia* Am. Comp. ¶ 25; *Tradewaves* Compl. ¶ 38.) But plaintiffs do not allege that such a representation was false when made. Indeed, Fairfield Sentry, at all times prior to December 11, 2008, did have a "history of stable and steady returns."

Due Diligence Representation. Next, plaintiffs argue that the alleged statement regarding the Bank's "extensive due diligence" was not too vague to be material because they do not contend that the Bank misrepresented *the degree* of its due diligence, but rather that the Bank "fraudulently represented that it had conducted due diligence, when, as it later admitted, it knew it had not." (Opp. at 26.) The so-called "admission" alleged in the complaints, however, is that the Bank's due diligence consisted of relying on representations by Fairfield, not that the Bank conducted no due diligence at all. Thus, not only do plaintiffs fail to address the Bank's authorities that a promise of "due diligence" is too vague to be material, but their allegations fail to allege any misstatement concerning the due diligence, material or otherwise.

Dual Roles of BLMIS. Plaintiffs cannot maintain their Section 10(b) claims based on an alleged failure to disclose that BLMIS served as both the sub-custodian and executing broker for Fairfield Sentry.[7] Although the PPM did not specifically describe BLMIS as both the sub-custodian and executing broker of Fairfield Sentry, it did disclose the allegedly material information, *i.e.*, the risk created by such an arrangement—namely, the risk that the executing broker could misappropriate the funds of Fairfield Sentry. Plaintiffs do not dispute

[7] Only *Tradewaves* plaintiffs make any allegation concerning this dual role of BLMIS. (*Tradewaves* Compl. ¶ 46-49.)

this point; they simply argue that the Bank should have informed them that it was BLMIS that could have misappropriated the funds. (*See* Opp. at 26-27.) Plaintiffs offer no argument why this additional piece of information was material, especially in light of the fact that the PPM disclosed that BLMIS had custody of approximately 95% of Fairfield Sentry's assets.

The Bank's Distribution Agreement with Fairfield Sentry. Finally, plaintiffs attempt to survive the Bank's motion to dismiss by making a new allegation that the Bank failed to disclose a distribution agreement with Fairfield. This argument fails as a matter of law because plaintiffs did not plead this allegation in their complaints, and "[p]laintiffs may not amend their complaint through their opposition brief." *Reading Int'l, Inc.* v. *Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 318 n.9 (S.D.N.Y. 2003) (citations omitted).

C. Plaintiffs Could Not Have Reasonably Relied on Alleged Statements That Contradicted Representations in the Sentry Offering Documents.

Plaintiffs do not contest that the Sentry Offering Documents contain disclosures that contradict the alleged statements they purported to rely on.[8] Instead, plaintiffs argue that the disclosures contained in Sentry Offering Documents—and plaintiffs' own representation in signing the Subscription Agreement that they "ha[d] not relied on any representation inconsistent with the information in the Fund Documents"—are irrelevant for three reasons: (1) the disclosures were made by Fairfield, not the Bank; (2) plaintiffs assert they did not receive the Offering Documents; and (3) the bespeaks caution doctrine does not apply here. Each of these arguments fails.

First, plaintiffs offer no pertinent authority to support their claim that a broker (or investment advisor, as plaintiffs allege) cannot point to disclosures in offering documents to

[8] The "Sentry Offering Documents" are the Subscription Agreement and Private Placement Memorandum that each plaintiff received prior to investing in Fairfield Sentry. (*See* Singapore Mem. at 12.)

show that an investor was aware of certain risks. *Second*, plaintiffs cannot argue that they did not receive the disclosures in the Sentry Offering Documents because plaintiffs signed the Subscription Agreement and, by doing so, affirmatively represented that they had received the PPM. *See Hearst Entm't, Inc.* v. *Multichannel Distrib. Servs. A.V.V.*, No. 96-CV-310, 1997 WL 72150, at *2 (S.D.N.Y. Feb. 19, 1997).[9] *Third*, plaintiffs' argument that the Bank cannot rely on the bespeaks caution doctrine is neither here nor there. The Bank's arguments do not turn on the applicability of the bespeaks caution doctrine. The doctrine "only applies to forward-looking statements," *Steinberg* v. *PRT Group, Inc.*, 88 F. Supp. 2d 294, 300-301 (S.D.N.Y. 2000), and even plaintiffs characterize their claims as concerning present or past facts. (Opp. at 19.)[10]

D. Plaintiffs Do Not Adequately Plead Scienter.

Recognizing that their scienter allegations are woefully deficient, plaintiffs misstate the applicable pleading standard by claiming that they need only allege "a minimal factual basis for . . . conclusory allegations of scienter." (Opp. at 27.) Plaintiffs cannot meet even this relaxed standard, and therefore come nowhere close to meeting the PSLRA's requirement that a plaintiff plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).[11]

1. Bank Officials Had No Motive To Defraud Plaintiffs.

Plaintiffs argue that the Bank had two motives to defraud its private banking clients: (1) the collection of quarterly fees; and (2) the Bank's alleged "contractual relationship

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9 *See also Gold* v. *Deutsch Aktiengesellschaft*, 365 F.3d 144, 149 (2nd Cir. 2004).

10 To the extent plaintiffs' allegations are read to contain forward-looking statements, plaintiffs do not offer any persuasive reason why the bespeaks caution doctrine should not apply. The Sentry Offering Documents "precisely address the substance of the statement or omission that is challenged," which triggers application of the doctrine. *Steinberg*, 88 F. Supp. 2d at 301.

11 Plaintiffs' error appears to be based on their mistaken reliance on pre-PSLRA cases. (Opp. at 27 (citing *Cohen* v. *Koenig* 25 F.3d 1168 (2d Cir. 1994).)

with Fairfield, pursuant to which it was presumably compensated . . . ."[12] (Opp. at 28.) To begin, the complaints do not allege any "contractual relationship" between the Bank and Fairfield. Moreover, even if this fact had been alleged, plaintiffs still could not adequately plead scienter because these allegations about fees and compensation, at most, amount to "[g]eneralized allegations of intent to maintain lucrative business relationships and to establish new ones [which] do not set forth a motive for scienter purposes." *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 621 (S.D.N.Y. 2005) (citations omitted). Indeed, to infer that by charging or receiving fees from clients (or even from Fairfield), the Bank had an economic incentive to recommend that its clients place their assets in a fund that fed a Ponzi scheme is far from compelling; it is economically irrational. *See Stephenson* v. *Citco Group Ltd.*, --- F. Supp. 2d ---, 2010 WL 1244007, at *17 (S.D.N.Y. Apr. 1, 2010) (finding no motive to defraud on the part of auditors of Sentry because "it is economically irrational to risk your professional reputation, license, and the possibility of legal liability simply in return for a professional services fee").[13]

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12 Plaintiffs also argue that the alleged fee arrangement with the Bank "may be significant" in light of their allegations that the Bank recommended they hold their investments in the Fairfield Funds. (Opp. at 28.) Whatever the significance plaintiffs attempt to attach to the Bank's recommendation to hold their Sentry investments, these allegations are not actionable under Section 10(b). *See Blue Chip Stamps* v. *Manor Stores*, 421 U.S. 723, 737-38 (1975) (claims brought by shareholders claiming misrepresentations induced them to hold their shares not actionable under Section 10(b)).

13 *See also S. Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 113 (2d Cir. 2009) (rejecting claim that advisor that failed to perform due diligence before recommending hedge fund investment had motive to defraud based on fees advisor received upon clients' investment in the fund); *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d at 621 (rejecting claim bank engaged in fraud based on motive of gaining fees because "[i]t would have been unreasonable to conceal Enron's financial weakness and put billions at risk in furtherance of a fraud that garnered tens of millions in fees.").

2. The Complaints Contain No Facts To Support an Inference That the Speakers of the Alleged Misstatements Acted Recklessly.

Because plaintiffs fail to allege a motive to defraud, in order to establish scienter "the strength of their circumstantial allegations must be correspondingly greater," and they "must allege facts approaching a knowledgeable participation in the fraud or a deliberate and conscious disregard of facts." *In re Bayou Hedge Fund Litig.*, 534 F. Supp. 2d 405, 415 (S.D.N.Y. 2007) (citations omitted), *aff'd*, 573 F.3d 98 (2d Cir. 2009). Notably, plaintiffs do not argue that they have met this standard with respect to the Bank's alleged misrepresentation of the "safety" of the Fairfield Funds or the Bank's alleged omission of the "dual role" that BLMIS played in the Fairfield Funds.[14] (*See* Opp. at 28-30.) Plaintiffs therefore cannot maintain their Section 10(b) claim based on these representations. *Amida Capital Mgmt. II, LLC* v. *Cerberus Capital Mgmt., L.P.*, 669 F. Supp. 2d 430, 435 (S.D.N.Y. 2009) ("complaint must state with particularity facts giving rise to a strong inference of scienter for *each alleged misrepresentation*" (emphasis added; quotation marks and citations omitted)).

Plaintiffs' allegations concerning the Bank's representations of due diligence also fail to establish scienter. The Second Circuit already has determined that an allegedly false representation by an investment advisor that it had conducted due diligence on an investment

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[14] This concession is not surprising. Recent case law has overwhelmingly held that scienter is not adequately pleaded against defendants who failed to detect Madoff's fraud, even in light of the existence of "red flags." *E.g.*, *Stephenson*, 2010 WL 1244007; *Meridian Horizon Fund, LP* v. *Tremont Group Holdings, Inc.*, No. 09-CV-3708, 2010 WL 1257567 (S.D.N.Y. Mar. 31, 2010); *In re Tremont Sec. Law, State Law & Ins. Litig.*, --- F. Supp. 2d ---, 2010 WL 1257580 (S.D.N.Y. 2010); *SEC* v. *Cohmad Sec. Corp.*, No. 09-CV-5680, 2010 WL 363844 (S.D.N.Y. Feb. 2, 2010). Plaintiffs' allegations here are more deficient than the allegations in most of the recent Madoff-related cases, because only *Tradewaves* plaintiffs allege the existence of a red flag—BLMIS's role as both sub-custodian and executing broker of Fairfield Sentry (*Tradewaves* Compl. ¶¶ 7, 46, 71)—and courts have refused to find scienter based on this "dual-role" red flag. *E.g.*, *Stephenson*, 2010 WL 1244007, at *20 (BLMIS's dual role "far too mild to support an inference of recklessness").

before recommending it to a customer does not give rise to a strong inference of scienter. *S. Cherry St., LLC* v. *Hennessee Group LLC*, 573 F.3d 98, 113-15 (2d Cir. 2009), *aff'g In re Bayou Hedge Fund Litig.*, 534 F. Supp. 415.

Plaintiffs' efforts to distinguish *In re Bayou Hedge Fund* ("*Bayou*") fail for three reasons. *First*, plaintiffs argue that the plaintiff-investor in *Bayou* did not allege that the defendant-advisor actually recommended the fraudulent hedge fund at issue in that case. (Opp. at 29.) The district court and Second Circuit opinions in *Bayou* say otherwise. *See In re Bayou Hedge Fund Litig.*, 534 F. Supp. at 411 ("Hennessee Group recommended to South Cherry that it invest in Bayou Accredited."); *S. Cherry St.*, 573 F.3d at 101-02 ("In reliance on Hennessee Group's representations and recommendations . . . South Cherry invested in Bayou Accredited.")

Second, plaintiffs argue that the allegations here are stronger than those in *Bayou* because in *Bayou*, the plaintiff did not allege that the defendant "deliberately shut its eyes to the facts or participated in the fraud," but here, "Standard Chartered admitted it lied" about the due diligence it conducted on the Fairfield Funds. (Opp. at 29.) This argument is without merit. The Bank's "admission" that it relied on representations from Fairfield for its due diligence does not demonstrate that any prior representations concerning the Bank's "extensive due diligence" were "lies," (*see supra* at p. 9), nor that the relationship managers who made the alleged misrepresentations (Messrs. Menon and Farzaneh) knew their representations were false when made, as required absent circumstances sufficient to apply "collective" scienter, (*see* Singapore Mem. at 36-37).

Third, even if plaintiffs' allegations could give rise to some inference of scienter on the part of the relationship managers, the allegations give rise to a far more compelling *nonculpable* inference: that the relationship managers, who are not alleged to have had any

direct involvement in due diligence, were simply mistaken about the specific due diligence conducted on the Fairfield Funds and BLMIS. *Cf. Teamsters Local 445 Freight Div. Pension Fund* v. *Dynex Capital, Inc.*, 531 F.3d 190, 197 (2d Cir. 2008).[15]

V. PLAINTIFFS FAIL TO STATE ANY COMMON-LAW CLAIMS.

A. Plaintiffs' Common-Law Claims Are Preempted by the Martin Act.

Plaintiffs argue that the Martin Act does not apply to their cases because they did not purchase securities "within or from" New York. (Opp. at 33-34.) If this Court finds that New York is the appropriate forum for these cases, and that federal securities laws apply to plaintiffs' claims, then the Court likewise should find that these actions are sufficiently related to New York for application of the Martin Act. (*See* Opp. at 15-16 (arguing that the federal securities laws should apply to their claims because "this Court should decide what responsibility Standard Chartered has for its role in . . . [Madoff's] fraud" which was based in New York).)

Moreover, "a transaction is 'within or from' New York for purposes of the Martin Act if a plaintiff alleges that a 'substantial portion of the events' giving rise to a claim occurred in New York." *Heller* v. *Goldin Restructuring Fund, L.P.*, 590 F. Supp. 2d 603, 611 n.9 (S.D.N.Y. 2008) (citation omitted). Plaintiffs allege that "[s]ubstantial acts in furtherance of the alleged conduct and its effects have occurred within this district." (*Bhatia* Am. Compl. ¶ 13; *Tradewaves* Compl. ¶ 14.) If this allegation is enough to keep these cases in this Court, then, although plaintiffs do not address them, the numerous cases in this district that hold that such venue allegations are sufficient to trigger application of Martin Act preemption control. *See In re Bayou Hedge Fund Litig.*, 534 F. Supp. 2d at 422; *Dover Ltd.* v. *A.B. Watley, Inc.*, 423 F.

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[15] Plaintiffs also assert claims under Section 20(a) of the Exchange Act. These claims fail for the same reasons Lopez's Section 20(a) claims fail in the Florida Cases. (*See* Reply in Support of Mot. to Dismiss Florida Cases at pp. 16-17.)

Supp. 2d 303, 331 (S.D.N.Y. 2006); *Sedona Corp.* v. *Ladenburg Thalmann & Co.*, No. 03-CV-3120, 2005 WL 1902780, at *21-22 (S.D.N.Y. Aug. 9, 2005).

Plaintiffs also argue that even if the Martin Act applies, it does not preempt their common-law claims. (*See* Opp. at 35-36.) This argument already has been rejected in Madoff-related litigation and should be rejected here as well. *See Stephenson*, 2010 WL 1244007, at *10-13 (preempting Madoff-related common-law claims under Martin Act); *Meridian Horizon Fund, LP*, 2010 WL 1257567 at *7-8 (same).[16]

B. Plaintiffs Cannot Plead Causation Because Their Losses Were Caused by the Actions of Bernard Madoff, Not the Actions of SCI or SC PLC.

Plaintiffs rely on *In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003), and *Derdiarian* v. *Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1980), to argue that the Bank—and not Bernard Madoff—was the proximate cause of their losses. Their reliance on these cases is misplaced. In both cases, the plaintiffs' injuries were caused by a materialization of the foreseen risk that allegedly deficient precautions were designed to prevent. In *In re September 11 Litigation*, fires in the World Trade Center that caused plaintiffs' injuries were precisely the risk against which the defendants' allegedly negligent fire safety precautions were intended to prevent. *See* 280 F. Supp. 2d at 302. Similarly, in *Derdiarian*, a car entering a work area was precisely the risk against which the defendant securing the area was intended to guard. *See* 414 N.E.2d at 671. In both *In re September 11 Litigation* and *Derdiarian*, the less

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16 *See also In re Tremont Secs. Law*, 2010 WL 1257580 (same); *Barron* v. *Igolnikov*, No. 09-CV-4471, 2010 WL 882890 (S.D.N.Y. Mar. 10, 2010) (same); *CRT Invs. Ltd.* v. *J. Ezra Merkin*, No. 601052/09, slip op. at 8-10 (N.Y. Sup. Ct. May 5, 2010). In addition, both *Scalp & Blade, Inc.* v. *Advest, Inc.*, 722 N.Y.S.2d 639 (4th Dep't 2001) and *Suez Equity Investors, L.P.* v. *Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d Cir. 2001), on which plaintiffs rely, were decided before *Castellano* v. *Young & Rubicam, Inc.*, 257 F.3d 171 (2d Cir. 2001), in which the Second Circuit held that the Martin Act preempted a breach of fiduciary duty claim. *Id.* at 190.

foreseeable, or extraordinary, occurrences—terrorists flying planes into buildings and a driver's failure to take his medication—caused the materialization of the foreseeable risk.

In contrast, here, the extraordinary event—Bernard Madoff's theft of funds entrusted to him—caused plaintiffs' harm directly. Unlike the defendants in the cases relied on by plaintiffs, the Bank's liability turns on its failure to prevent or anticipate the extraordinary event itself, not a foreseen risk (such as a fire or careening car) that was created by the extraordinary event. Although the due diligence procedures performed by a bank, investment advisor or broker in connection with recommending an investment to a non-discretionary account holder are obviously designed to prevent them from recommending an easily detectible fraud, they are not intended to detect a fraud as extraordinary and well-concealed as the fraud perpetrated by Madoff. *Cf. Cromer Fin.* v. *Berger*, 137 F. Supp. 2d 452, 472 (S.D.N.Y. 2001) ("While the Ponzi scheme may only have been possible because of Bear Stearns' actions, or inaction, Bear Stearns' conduct was not a proximate cause of the Ponzi scheme.").

C. Plaintiffs' Fiduciary Duty Claim Fails Because Plaintiffs Rely on Duties the Bank Did Not Owe Them.

Plaintiffs argue that the Bank owes the duties of an investment advisor instead of a non-discretionary broker. (Opp. at 41-42.) In doing so, they ignore the parties' agreements, which expressly disclaim such a relationship, as well as the clear law in this Circuit that a non-discretionary broker does not become an investment advisor merely by providing advice, *de Kwiatkowski* v. *Bear, Stearns & Co.*, 306 F.3d 1293, 1307-09 (2d Cir. 2002).[17]

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[17] In another example of plaintiffs attempting to amend their complaints in their Opposition, plaintiffs raise for the first time the claim that the Bank failed to determine the suitability of plaintiffs' investment in Fairfield Sentry. (*See* Opp. at 42 n.188.) Plaintiffs' attempt to reframe their claims in hopes of relying on *Scalp & Blade, Inc.*, 772 N.Y.S.2d 639 does not save their complaints. *Scalp & Blade* merely merely holds that an adviser *can* breach a duty by placing its client in unsuitable investments. The case does not contain any discussion of when such claims are adequately pleaded, nor have plaintiffs included such allegations in their complaints.

In any event, even if the Bank owed the duties argued by plaintiffs, it did not breach them here. Plaintiffs argue that the Bank "cannot recommend a security unless there is an adequate and reasonable basis for such recommendation." (Opp. at 42 n.190 (quotation marks and citation omitted).) But plaintiffs' own allegations, taken as true, demonstrate that the Bank had a reasonable basis for recommending Fairfield Sentry based on the fund's "history of stable and steady returns" and its excellent reputation. (*See Bhatia* Am. Compl. ¶¶ 4, 25, 26; *Tradewaves* Compl. ¶¶ 4, 38, 39.) Plaintiffs do not allege that any of these representations were false or misleading when made, and they provide no support for the conclusion that the purported duties to have a "reasonable basis" and give "honest and complete" information were breached merely because the Bank was unaware of Madoff's scheme. *See Gabriel Capital, L.P.* v. *NatWest Fin., Inc.*, 137 F. Supp. 2d 251, 263 (S.D.N.Y. 2000) (investment advisor retained to suggest appropriate investments for its clients, not to assume the role of private investigator).

There is likewise no basis in law to conclude that the Bank was under a duty to further investigate the purported "red flags" and "determine [all] risks for all investments," including well-concealed and hidden risks such as Bernard Madoff's fraud. (*See* Opp. at 42.) The two cases plaintiffs cite for the proposition that a more robust "investigation" was necessary only require brokers to "disclose facts . . . that are *easily ascertainable*," which Madoff's fraud was not. *Keenan* v. *D.H. Blair & Co.*, 838 F. Supp. 82, 89 (S.D.N.Y. 1993) (emphasis added) (citing *Hanly* v. *SEC*, 415 F.2d 589, 597 (2d Cir. 1969)).[18]

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[18] Plaintiffs also cite language from a Southern District of Texas case, which discusses a broker's requirement to conduct due diligence. (Opp. at 43 n.192 (quoting *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. MDL 1446, 01-CV-3624, 02-CV-3185, 2003 WL 23305555, at *12 (S.D. Tex. Dec. 11, 2003)).) The language quoted by plaintiffs was in the context of a negligent misrepresentation claim, which plaintiffs do not assert here. *In re Enron*, 2003 WL 23305555 at *12.

D. The Exculpation Provisions in Plaintiffs' Account Agreements Bar Their Claims.

Plaintiffs do not dispute that the exculpatory clauses, if applicable, preclude liability for ordinary negligence. (Opp. at 43-46.) Plaintiffs instead maintain that their allegations rise to the level of gross negligence.[19] (*Id.* at 45-46.) Plaintiffs' argument, however, fails to meaningfully address the building body of case law holding that a plaintiff does not adequately plead reckless conduct by alleging that a defendant failed to conduct adequate due diligence on Madoff-related investments. *See*, *e.g.*, *Baker* v. *Andover Assocs. Mgmt. Corp.*, No. 6179/09, slip. op. at 3-4, 27 (N.Y. Sup. Ct. Nov. 30, 2009) (Berarducci Decl., Ex. Y) (dismissing gross negligence claim based on defendants' alleged failure, despite red flags, to conduct adequate due diligence into Madoff and BLMIS); *see also Cohmad Sec. Corp.*, 2010 WL 363844, at *2 (broker-dealer not reckless under federal securities laws in failing to appreciate red flags and detect Madoff's fraud).[20]

Instead, plaintiffs cite a single case to support their allegations of gross negligence, *Cromer Finance Ltd.* v. *Berger*, No. 00-CV-2498, 2001 WL 1112548 (S.D.N.Y. Sept. 19, 2001). (Opp. at 46 n.203.) But *Cromer* is easily distinguishable. *Cromer* involved a gross negligence claim against the auditor of a fund that operated as a Ponzi scheme. *See id.* at *2. *Cromer* may be pertinent to a gross negligence claim against the auditor of BLMIS, Friehling & Horowitz. *See Meridian Horizon Fund, LP*, 2010 WL 1257567, at *4-5. The fact

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[19] Plaintiffs also argue that the documents containing the exculpatory provisions may not be considered on a motion to dismiss (Opp. at 44-45). For the reasons discussed *infra* at pp. 23-25, the Court may consider the documents containing the exculpatory provisions.

[20] *See also Meridian Horizon Fund, LP*, 2010 WL 1257567, at *5-6 (auditor of feeder fund into Madoff Ponzi scheme not reckless in failing to appreciate red flags and uncover Madoff's fraud); *Stephenson*, 2010 U.S. Dist. LEXIS 32321 (same); *In re Tremont Sec. Law*, 2010 WL 1257580 (same); *In re Bayou Hedge Fund Litig.*, 534 F. Supp. 2d at 418 (investment advisor not reckless in recommending that its client invest in a Ponzi scheme without conducting promised due diligence and despite the existence of red flags).

that Madoff's fraud was not uncovered by the Bank, however, does not give rise to the same inference of gross negligence as the failure of the auditor charged with auditing the Ponzi scheme at BLMIS.

E. Plaintiffs Concede That Their Relationship with Standard Chartered Was Governed by a Contractual Relationship, Thereby Precluding a Quasi-Contract Claim for Unjust Enrichment.

Plaintiffs argue that they should be permitted to maintain an unjust enrichment claim because there is a dispute over which contractual terms govern their relationship with the Bank. (Opp. at 37-38.) Plaintiffs' concession that a contract did, in fact, govern their relationship with the Bank dooms their claims for unjust enrichment. *Clark-Fitzpatrick, Inc.* v. *Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987) ("existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter").

F. There Is No Basis for Specific Performance.

The *Bhatia* plaintiffs' claim for specific performance is nonsensical.[21] To maintain a claim for specific performance, plaintiffs must plead the lack of an adequate remedy at law. *La Mirada Prods. Co.* v. *Wassall PLC*, 823 F. Supp. 138, 140 (S.D.N.Y. 1993). Here, money damages are the only possible remedy. Redeeming plaintiffs' shares of Sentry now, with both BLMIS and Fairfield Sentry in liquidation, is impossible.[22]

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[21] *Tradewaves* plaintiffs dropped their claim for specific performance. (Opp. at 3 n.7.)

[22] In addition, the Subscription Agreements provide that the fund would "redeem Shares as of the last day of each month (the 'Redemption Date'); provided that the redemption request is received . . . no later than . . . at least 15 business days prior to the Redemption Date." (*E.g.*, Vijayan Decl., Ex. BB (Subscription Agreement) ¶ 9.) To participate in the October redemption cycle, *Bhatia* plaintiffs would have had to request a redemption by October 16, 2008. Plaintiffs alleged that they sought to redeem their shares on October 28, 2008 (*Bhatia* Am. Compl. ¶ 57). Accordingly, plaintiffs were not permitted to redeem their shares until the November redemption cycle. The Bank placed their redemption request in the November cycle. (*Id.* ¶ 56.)

VI. *BHATIA* PLAINTIFFS FAIL TO STATE A CLAIM ARISING FROM THEIR INVESTMENTS IN THE LLOYDS BONDS.

Bhatia plaintiffs do not state any claims in relation to the Lloyds Bonds. *First*, although *Bhatia* plaintiffs claim they were unaware of the fact that the Lloyds Bonds were convertible instruments, this fact was expressly disclosed in the bonds' prospectus. (Vijayan Decl., Ex. GG (Lloyds Bonds Prospectus) at 13.) Their only argument is that the Court should not consider the prospectus. (Opp. at 48-49) This is without merit. (*See infra* at pp. 22-23 & n.26.) *Second*, *Bhatia* plaintiffs do not adequately plead an injury from the conversion of the Lloyd Bonds. In fact, the value of the bonds was higher on October 31, 2009, after plaintiffs filed their complaint, than it had been before the conversion. (Singapore Mem. at 18.)[23] *Bhatia* plaintiffs' deficiency is not their failure to allege "a specific dollar amount," (Opp. at 49), but rather their failure to allege *how* they were injured. The value of the Lloyds Bonds has recovered, and *Bhatia* plaintiffs do not allege that they sold the shares prior to that recovery.

VII. PLAINTIFFS CANNOT ESCAPE THE TERMS AND CONDITIONS OF THEIR ACCOUNTS OR THE LEGAL EFFECT OF THE DISCLOSURES THEY WERE GIVEN CONCERNING THE FAIRFIELD FUNDS.

Plaintiffs attempt to avoid the terms of their account agreements and the risk disclosures contained in the Sentry Offering Documents by arguing that the Court should not consider these documents on a motion to dismiss. Plaintiffs do not dispute that these documents are of the type properly considered on a motion to dismiss and are both integral to and relied on in their complaints. Instead, plaintiffs argue that the documents are not properly considered at this time because the documents are "disputed." (Opp. at 4-5.) Plaintiffs' objections to the

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[23] Plaintiffs' argument that the prices of the Lloyds Bonds may not be considered on a motion to dismiss fails. The Court also may take judicial notice of publicized prices for securities, such as the Lloyds Bonds. *See Ganino* v. *Citizens Utilities Co.*, 228 F.3d 154, 166 n.8 (2d Cir. 2000).

contracts are a red herring. At most, the Bank asks the Court to interpret and enforce the contracts according to their terms—as courts regularly do on a motion to dismiss.[24]

A. The Court Should Consider the Sentry Offering Documents That Plaintiffs Do Not Dispute They Signed and Acknowledged Receiving.

Plaintiffs "dispute" the Sentry Offering Documents by arguing that (1) one of the Subscriptions Agreements was not properly executed, and (2) the Bank does not identify which version of the PPM it provided to plaintiffs. Plaintiffs' first argument makes no sense; each and every one of the Subscription Agreements was signed by the respective plaintiffs (*see* Vijayan Decl., Exs. S-DD), including the agreement that plaintiffs claim was "not properly executed." (*see id.* Ex. T at 10.) The agreements properly may be, and should be, considered. *See Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991) (offering documents properly considered on motion to dismiss where plaintiff "did not lack notice" of the documents and "should not so easily be allowed to escape the consequences" of the documents). Plaintiffs' second argument is equally unavailing. Plaintiffs give no reason to doubt that they were given the PPM effective October 1, 2004, as none of plaintiffs invested in Fairfield Sentry until

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[24] Plaintiffs also argue that the Bank failed to properly authenticate the documents. Plaintiffs do not dispute the documents' authenticity, but argue that they must be offered by someone with "personal knowledge" of the documents. (Opp. at 3-4.) However, persons authenticating documents need not have "personal knowledge of the underlying events described in the document, the substance or accuracy of the document, [or] the methods of calculation." *In re WorldCom, Inc.*, 357 B.R. 223, 228 (S.D.N.Y. 2006). "'The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claim.'" *Id.* at 228-29 (quoting Fed. R. Evid. 901).

November of 2004. In any event, *both* versions of the PPM contain disclosures more than sufficient to defeat plaintiffs' claims, and plaintiffs do not argue otherwise.[25]

B. The T&Cs Are Enforceable and Properly Considered.

Plaintiffs also dispute the applicability of the T&Cs, which the Bank put in place after the acquisition of American Express Bank in early 2008. Plaintiffs complain that they did not accept or sign the T&Cs. (Opp. at 5.) But plaintiffs undeniably agreed to be bound by the Private Banking Services Agreement (the "Services Agreement"), which contained a change-in-terms provision allowing the Bank to subsequently change the terms of plaintiffs' account agreements.[26] (Vijayan Decl., Ex. O (Services Agreement) at 1; Vijayan Decl., Ex. P (Amended Services Agreement) at 1) (such changes would "come into effect on the date specified by the Bank" and "[f]ailure to receive any notifications of [such changes] . . . shall not invalidate [them]").)

Plaintiffs next contend that the T&Cs are unenforceable because the exculpatory and forum selection clauses contained therein are materially different from those contained in the Services Agreement. (Opp. at 6.) Plaintiffs' only authority for this argument, *Stone* v. *Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189 (E.D.N.Y. 2004), does not help them. In *Stone*, the

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[25] Plaintiffs raise a similarly unavailing argument concerning the prospectus for the Lloyds Bonds. (Opp. at 48-49.) *Bhatia* plaintiffs argue the prospectus cannot be considered because "Bhatia alleges never having received the prospectus." (*Id*. at 49.) The *Bhatia* complaint makes no such allegation. Thus *Bhatia* plaintiffs' reliance on *Faulkner* v. *Beer*, 463 F.3d 130 (2d Cir. 2006) is misplaced. *Faulkner* involved allegations that the plaintiff never received the offering memoranda, and that the plaintiff purchased the investment *before* the offering memoranda was issued. 463 F.3d at 134-35. Here, there is no dispute that the Lloyds Bonds prospectus, dated May 9, 2008, preceded the *Bhatia* plaintiffs' investments of May 15 and 19, 2008. (Vijayan Decl. Ex. GG (Lloyds Bonds Prospectus) at 2; *Bhatia* Am. Compl. ¶ 65-66.)

[26] Plaintiffs' argument regarding the Uttamchandani plaintiffs makes no sense. (Opp. At 5.) The Uttamchandanis opened their accounts in April 2008, after Standard Chartered Bank had acquired American Express Bank, and they received and agreed to be bound by the T&Cs directly. (Vijayan Decl., Ex. B at 3.)

court declined to enforce an arbitration clause added to a credit card agreement because the original agreement had no terms related to "dispute resolution mechanisms." *Id.* at 198. Here, far from adding new, unanticipated provisions to plaintiffs' account agreements, the T&Cs make minimal revisions to the exculpatory and forum selection clauses already governing plaintiffs' accounts. (*See* Singapore Mem. 8-9, 11.) Where, as here, the original contract puts a plaintiff on notice that certain subjects (e.g., forum selection provisions or limits on liability) are within the ambit of the agreement, modifications on those subjects through a change-in-terms provision are valid. *In re Am. Express Merchants' Litig.* ("*American Express*"), No. 03-CV-9592, 2006 WL 662341, at *8 (S.D.N.Y. Mar. 15, 2006), *rev'd on other grounds*, 554 F.3d 300, 321 (2d Cir. 2009) *and vacated* 78 U.S.L.W. 3642 (U.S. 2010).

Plaintiffs' other arguments fare no better. First, relying on New York state law, plaintiffs argue that the size of the font in the T&Cs renders the forum selection clause unenforceable. (*See* Opp. at 5 n.20.) The Second Circuit has made clear "that federal law should be used to determine whether an otherwise mandatory and applicable forum clause is enforceable," *Phillips*, 494 F.3d at 384, and under federal law, the forum selection clause, which is no smaller than the rest of the T&Cs and placed under a bold heading "Enforcement and Jurisdiction of Singapore Courts," is plainly enforceable, *see Effron* v. *Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995) (enforcing forum selection clause in "fine print").[27] Finally, plaintiffs' suggestion that the Bank amended their account agreements because the Bank knew Madoff's fraud would be exposed crosses the line. (*See* Opp. at 6.) Plaintiffs allege no facts to support

[27] Plaintiffs also argue that the Bank is seeking to "retroactively" change the terms and conditions governing plaintiffs' accounts. (Opp. at 6.) Plaintiffs are incorrect. By seeking to enforce the T&Cs here, the Bank is merely seeking to enforce the terms and conditions governing plaintiffs accounts at the time plaintiffs filed their lawsuits.

any inference that the Bank was aware of Madoff's fraud. The T&Cs were applied to plaintiffs' accounts because their accounts were acquired from American Express Bank in 2008.

CONCLUSION

SCI and SC PLC respectfully request that the Court dismiss with prejudice the *Bhatia* Amended Complaint and the *Tradewaves* Complaint in their entirety.

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/s/ Sharon L. Nelles

Sharon L. Nelles (SN-3144)
Bradley P. Smith (BS-1383)
Patrick B. Berarducci (PB-2222)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
nelless@sullcrom.com

Diane L. McGimsey
(Admitted Pro Hac Vice)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067

Attorneys for Defendants Standard Chartered International (USA) Ltd. and Standard Chartered PLC