UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, et al., Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, et al., Defendants. This Document Relates To: *Headway Investment Corp* v. *American Express Bank Ltd.*, No. 09-CV-8500; *Ricardo Lopez* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-919; *Maridom Ltd.* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-920; and *Maria Akriby Valladolid* v. *American Express Bank Ltd.*, No. 10-CV-918.	Master File No. 09-CV-118 (VM)

REPLY OF STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LTD., STANDARD CHARTERED INTERNATIONAL (USA) LTD., STANDARD CHARTERED BANK 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 Bank International (Americas) Ltd., Standard Chartered International (USA) Ltd., Standard Chartered Bank and Standard Chartered PLC

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Plaintiffs' "straw man" opposition, while rhetorically intriguing, fails to address the fundamental and fatal flaws of the complaints in the Florida Cases. Plaintiffs ask the Court to place the Standard Chartered defendants[1] (collectively, the "Bank") in fiduciary duty limbo, a place where the duties owed are ill-defined but greater than the duties that courts historically have held to apply to parties that trade in securities. Plaintiffs also characterize their complaints in a way that would have this Court suspend reality and proceed as if the Bank was intertwined with Madoff's criminal acts, which plaintiffs cannot legitimately dispute were the true cause of their investment losses. In the end, for all of plaintiffs' theatrical flare, their arguments lack merit, and their complaints should be dismissed.

I. FLORIDA'S ECONOMIC LOSS RULE BARS PLAINTIFFS' COMMON-LAW CLAIMS.

Plaintiffs' tort claims are barred by the economic loss rule because (i) they seek only economic losses and (ii) their claims relate solely to the contractual relationship they had with the Bank as private banking customers. *See McCutcheon* v. *Kidder, Peabody & Co.*, 938 F. Supp. 820, 822 (S.D. Fla. 1996). Plaintiffs' strategy for avoiding the application of Florida's economic loss rule is to seize on a handful of lower courts in Florida that have declined to apply the economic loss rule in the context of breach of fiduciary duty claims and argue that the doctrine should be limited to products liability cases and "cases in which the duty allegedly violated arises solely from a contract." (Plaintiffs' Memorandum in Opposition ("Opp.") at 52-57.)[2] For all of plaintiffs' ruminations, however, two key points are not in dispute. *First*, both

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[1] "Standard Chartered defendants" refers to Standard Chartered Bank International (Americas) Ltd. ("SCBI"), Standard Chartered International (USA) Ltd. ("SCI"), Standard Chartered Bank and Standard Chartered PLC.

[2] Plaintiffs improperly attempt to marginalize *McCutcheon* v. *Kidder, Peabody & Co.*, 938 F. Supp. 820 (S.D. Fla. 1996), where Judge Ryskamp applied the economic loss rule in factual circumstances similar to the circumstances here. Contrary to plaintiffs' contention, Judge

the Eleventh Circuit (applying Florida law) and courts in Florida repeatedly have applied the economic loss rule to *any tort claim* "where the parties are in contractual privity and one seeks to recover in tort for matters arising from the contract." *Royal Surplus Lines Inc. Co.* v. *Coachman Indus.*, 184 F. App'x 894, 902 (11th Cir. 2006); *see also Behrman* v. *Allstate Ins. Co.*, 388 F. Supp. 2d 1346, 1349-50 (S.D. Fla. 2005) (dismissing negligence and fraud-based claims under economic loss doctrine), *aff'd*, *Behrman* v. *Allstate Life Ins. Co.*, 178 F. App'x 862, 863 (11th Cir. 2006); *Vesta Constr. & Design, LLC* v. *Lotspeich & Assocs., Inc.*, 974 So. 2d 1176, 1181-82 (Fla. Dist. Ct. App. 2008) (applying economic loss rule to negligent misrepresentation claim).

Second, in 2004, the Florida Supreme Court expressly declined to create an exception to the rule for claims of breach of fiduciary duty. *Indem. Ins. Co. of N. Am.* v. *Am. Aviation, Inc.*, 891 So. 2d 532, 542 (Fla. 2004) (recognizing that "some courts" have extended the exception to breach of fiduciary duty claims). Since then, Florida courts have continued to apply the rule to breach of fiduciary duty claims arising out of banking or broker relationships. *See*, *Lin* v. *Metrobank of Dade County*, No. 09-CV-22357, 2010 WL 431871, at *1 (S.D. Fla. Feb. 2, 2010) (dismissing fiduciary duty and gross negligence claims brought by a customer against bank, finding relationship governed by contract); *PNC Bank N.A.* v. *Colonial Bank, N.A.*, No. 08-CV-611, 2008 WL 2917639, at *4 (M.D. Fla. July 24, 2008) (dismissing fiduciary duty claim where relationship governed by loan agreement); *Lehman Bros. Holdings, Inc.* v. *Hirota*, No. 06-CV-2030, 2007 WL 1471690, at *4-5 (M.D. Fla. May 21, 2007) (dismissing fiduciary

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Ryskamp did not disclaim his *McCutcheon* opinion in *Crowell* v. *Morgan, Stanley, Dean Witter Servs. Co.*, 87 F. Supp. 2d 1287 (S.D. Fla. 2000). In *Crowell*, the court declined to apply a *per se* rule that the economic loss rule bars all breach of fiduciary duty claims against a securities broker, but the court was not presented with, and did not consider, the contract between the broker and plaintiff. *Id.* at 1293. Moreover, since his decision in *Crowell*, Judge Ryskamp has applied the economic loss rule to dismiss a negligence claim brought by a customer against an Edge Act corporation for alleged misconduct in effectuating securities transactions. *Warter* v. *Boston Sec., S.A.*, No. 03-CV-81026, 2004 WL 691787, at *12-13 (S.D. Fla. Mar. 22, 2004).

duty claim while noting "[a]lthough the Florida Supreme Court discussed breach of fiduciary duty in *Indemnity Insurance Co.*, it declined to list that tort as an exception to the economic loss rule").[3]

Even if plaintiffs were correct that the economic loss rule does not apply to breach of fiduciary duty claims (they are not), they do not dispute that their other common-law claims are barred. The law is clear that, at a minimum, plaintiffs cannot maintain their claims for negligence, gross negligence or fraudulent misrepresentations. (Florida Mem. at 39-41.)[4] *E.g.*, *Topp, Inc.* v. *Uniden Am. Corp.*, 513 F. Supp. 2d. 1345, 1348-49 (S.D. Fla. 2007) (barring misrepresentation claims relating to performance arising from contractual relationship); *Warter*, 2004 WL 691787, at *12-13 (barring negligence claims asserted against Edge Act bank and securities broker).

II. PLAINTIFFS DO NOT ADEQUATELY ALLEGE THAT THE BANK BREACHED ANY DUTIES OWED TO PLAINTIFFS.

A. SCBI Did Not Owe Plaintiffs the Fiduciary Duties Plaintiffs Allege.

1. The Non-Discretionary Nature of Plaintiffs' Accounts with the Bank Limit the Bank's Duties.

Under Florida law, securities brokers for non-discretionary accounts normally owe only limited duties to their customers. *See First Union Discount Brokerage Servs., Inc.* v. *Milos* ("*Milos II*"), 744 F. Supp. 1145, 1156 (S.D. Fla. 1990), *aff'd*, 997 F.2d 835 (11th Cir. 1993); (Florida Mem. at 43-45.) Perhaps recognizing that these limited duties do not encompass

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[3] *See also SFM Holdings, Ltd.* v. *Banc of Am. Sec., LLC*, No. 06-CV-80652, 2007 WL 7124464, at *8 (S.D. Fla. Feb. 12, 2007) (dismissing constructive fraud and fiduciary duty claims brought by customer against broker where "parties' relationship was governed by Prime Brokerage Agreement, and SFM's alleged grievances stem from Banc of America's alleged oversight as to an account created pursuant to that agreement").

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

the broad duties on which their claims rely, plaintiffs argue that that the Bank somehow owed broader duties because the Bank provided securities services for its customers as a private bank, rather than an independent broker. (Opp. at 24-29.) Without any legal authority to support this private bank/broker distinction, plaintiffs rely on a law review article instead. (*See* Opp. at 26.) This article is insufficient to override the consistent judgment of Florida courts that hold that the question of who makes the investment decisions, the broker or the client, is a defining characteristic of a broker-client relationship that Florida courts have recognized in analyzing fiduciary duty claims.[5] *See Hines* v. *Fiserv, Inc.*, No. 08-CV-2569, 2010 WL 1249838, at *2-3 (M.D. Fla. Mar. 25, 2010) (dismissing breach of fiduciary duty claim brought by victims of Ponzi scheme against financial firm because plaintiffs' accounts were non-discretionary and parties' contract disclaimed fiduciary duties).[6]

Stopping at nothing to avoid the limited duties owed by a non-discretionary broker, plaintiffs also argue, again without supporting authority, that "the contours of a bank's relationship with clients it is providing investment advice are [not] determined by whether the account is discretionary or non-discretionary." (Opp. at 28.) In fact, the only case plaintiffs cite as on point actually invokes the reasoning offered by the Bank—namely, the court defines the

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[5] Plaintiffs' argument that the non-discretionary nature of the plaintiffs' account in *Milos II* was not determinative in that case is simply wrong. The court in *Milos II* specifically defined the duties owed as those "associated with non-discretionary accounts." 744 F. Supp. at 1156. Further, the court found that the plaintiffs' accounts were in fact non-discretionary because, among other things, the broker did not manage the account. *Id.* In any event, plaintiffs here surely cannot claim benefit from the fact that the *Milos II* court allowed the parties to limit the broker's fiduciary duties pursuant to contract.

[6] Notably, the Second Circuit has addressed and rejected head-on plaintiffs' argument that the "white-linen investment services, including advice" provided by the Bank gives rise to duties beyond those supported by plaintiffs' non-discretionary account agreements. *See de Kwiatkowski* v. *Bear, Stearns & Co.*, 306 F.3d 1293, 1297 (2d Cir. 2002) (broker owed limited duties of a non-discretionary broker despite fact that plaintiff's account "was handled by . . . [the] 'Private Client Services Group,' which provides large private investors with enhanced services, including access if requested to the firm's executives and financial experts").

scope of duties by reference to the discretionary or non-discretionary nature of a plaintiff's account and defines the limited duties owed to a non-discretionary account holder in exactly the manner set forth by the Bank in its opening memorandum. *See Ward* v. *Atl. Sec. Bank*, 777 So. 2d 1144, 1147 (Fla. Dist. Ct. App. 2001) (quoting *Leib* v. *Merrill Lynch, Pierce, Fenner & Smith*, 461 F. Supp. 951 (E.D. Mich. 1978)).[7]

2. The Bank Had No Ongoing Duty To Monitor After Plaintiffs Invested in the Fairfield Funds.

Plaintiffs propose that, notwithstanding the non-discretionary nature of their accounts, the Bank owed them an ongoing duty to monitor their investments. Once again, plaintiffs fail to offer any legal support. Instead they try, but fail, to distinguish *Lieb* and *de Kwiatkowski*, the two key cases where courts expressly rejected the existence of such a duty where, as here, an investor makes his or her own investment decisions.

Faced with the court's conclusion in *Lieb* that "[a] broker has no continuing duty to keep abreast of financial information which may affect his customer's portfolio or to inform his customer of developments which could influence his investments," *Leib*, 461 F. Supp. at 956, plaintiffs argue that *Lieb* is inapposite because the plaintiff in *Lieb* was an experienced investor trading in a non-discretionary brokerage account. (Opp. at 29-31.) Like the plaintiff in *Lieb*, however, plaintiffs here had sufficient knowledge and investment experience to evaluate the risks of their investments, and attested to being a "professional investors" under the laws of the British Virgin Islands. (Berarducci Decl. Exs. P-V (Subscription Agreements) ¶¶ 5(d), 8.) *Lieb* is thus on all fours.

[7] The other Florida cases plaintiffs cite deal not with securities transactions, but with creditor-debtor relationships between banks and their customers. *See Capital Bank* v. *MVB, Inc.*, 644 So. 2d 515 (Fla. Dist. Ct. App. 1994); *Atl. Nat'l Bank of Fla.* v. *Vest*, 480 So. 2d 1328 (Fla. Dist. Ct. App. 1985).

Plaintiffs argue that *de Kwiatkowski* does not apply because the Second Circuit in that case was opining only on the limits of negligence, not whether a broker has duties to monitor a customer's investment. (Opp. at 31 n.20.) Plaintiffs misread *de Kwiatkowski*. The *de Kwiatkowski* court did not limit its analysis to negligence-type duties of care, and expressly recognized that most cases on point "are cast in terms of a fiduciary duty, and reflect that a broker owes no such duty to give ongoing advice to the holder of a nondiscretionary account." *de Kwiatkowski*, 306 F.3d at 1302.[8]

3. The Bank Had No Duty To Discover Madoff's Fraud.

Recognizing that their allegations that the Bank should have uncovered Madoff's fraud are a stretch, plaintiffs now argue that because some, like Harry Markopolos, supposedly figured out Madoff's fraud while others, like the Securities and Exchange Commission ("SEC"), did not, this Court cannot decide as a matter of law whether the Bank had a duty to do so. (Opp. at 33-35.) This is argument is both legally and factually flawed.

To begin with, as a matter of law, the Bank owed plaintiffs, at most, a limited duty to become informed as to the price, nature and financial prognosis of the Fairfield Funds. *See Milos II*, 744 F. Supp. at 1156. According to the complaints, the Bank recommended the Fairfield Funds based on their history of consistent and stable returns. (*Lopez* Am. Compl. ¶ 6; *Maridom* Am. Compl. ¶ 27; *Valladolid* Am. Compl. ¶ 40.) This is sufficient to satisfy the Bank's limited duties. The sufficiency of any SEC investigations has nothing to do with whether the Bank had duties to conduct the type of investigations with which the SEC is tasked, because

[8] Plaintiffs' assertion that *de Kwiatkowski* supports their idea that discovery should go forward regardless of whether their complaints adequately allege the duties the Bank owed does not hold weight. (Opp. at 31-32.) The language from *de Kwiatkowski* that plaintiffs rely on had nothing to do with what a plaintiff must plead in his complaint, but rather the sufficiency of the evidence adduced at trial. *de Kwiatkowski*, 306 F.3d at 1307.

the Bank did not owe such duties to plaintiffs. Nevertheless, the SEC's failure to uncover Madoff's fraud underscores that the investigation necessary to uncover Madoff's fraud was far more involved than becoming informed as to the "price, nature and financial prognosis" of the Fairfield Funds. In addition, the fact that Harry Markopolos may have uncovered multiple red flags over the course of his nine-year investigation and while attempting to replicate Madoff's "split-strike conversion" strategy has no bearing on what a reasonable broker or adviser would have done, other than to demonstrate the extraordinary measures required to detect Madoff's fraud and support the Bank's argument that it was under no legal duty to undertake such measures. *See* Assessing the Madoff Ponzi Scheme Before the H. Comm. on Financial Services at 2-3, 111th Cong. (2009) (statement of Harry Markopolos, Chartered Financial Analyst and Certified Fraud Examiner), http://financialservices.house.gov/markopolos020409.pdf; *see also Stephenson* v. *Citco Group Ltd.*, --- F. Supp. 2d ----, 2010 WL 1244007, at *1 n.1 (S.D.N.Y. 2010) (noting Markopolos as exception to "most of the country" who were unaware of Madoff's fraud prior to his confession).

To the extent plaintiffs now characterize their complaints as alleging only that the Bank had a duty to discover that the Fairfield Funds were "overly risky," plaintiffs' argument fares no better.[9] (Opp. at 32-33.) Both the Subscription Agreement and the PPMs made clear that the Fairfield Funds, as hedge funds, were highly speculative and risky. And in any event, this new claim is nothing more than a thinly veiled recharacterization of the claim actually pleaded in plaintiffs' complaints: that the Bank should have discovered that Sentry was "too

[9] This is despite the fact that the *Lopez* complaint fails to allege any red flags at all.

risky" because Madoff was likely operating a Ponzi scheme. (*See, Headway* Compl. ¶ 60; *Lopez* Am. Compl. ¶ 49; *Maridom* Am. Compl. ¶ 3; *Valladolid* Am. Compl. ¶¶ 14-15.)[10]

B. Exculpation Provisions in Plaintiffs' Account Agreements Preclude Plaintiffs' Breach of Duty Claims to the Extent They Do Not Rise to the Level of Gross Negligence.

1. The RRGA, Which Apply to All Plaintiffs' Accounts, Exculpate the Bank from Claims Not Rising to the Level of Gross Negligence.

Plaintiffs argue that the exculpatory provisions in the Rules and Regulations Governing Accounts ("RRGA") are unenforceable because they bar all claims, rather than just claims based on conduct less severe than gross negligence. (Opp. at 60-61.) However, plaintiff's own authority, *Loewe* v. *Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. Dist. Ct. App. 2008), holds that to the extent an exculpatory provision purports to limit liability for conduct more severe than gross negligence, only that portion of the clause is unenforceable—not the entire clause itself. And, in any event, the RRGA, which apply to all plaintiffs' accounts, cannot be read in the way plaintiffs' suggest; the RRGA clearly and unequivocally bar plaintiffs' breach of fiduciary duty and negligence claims, and no more.

Section 46 of the RRGA expressly relieves the Bank from liability to its customers for all claims arising out of, among other things, transactions made through customers' accounts. (Berarducci Decl. Ex. I (RRGA) § 46 & Ex. J (Amended RRGA) § 46.)

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[10] Recognizing that their claims are doomed if subject to the limited duties discussed above, plaintiffs argue that the scope of the duties owed can only be determined after discovery because they are all contingent on the parties' relationship. Plaintiffs' hyperbole about the Bank's "white-linen investment services [provided] . . . to its private banking clients," (Opp. at 26), provides no justification for granting plaintiffs' request to conduct discovery in order to divine some broad private banking duty. *See Romer* v. *Morgenthau*, 119 F. Supp. 2d 346, 356 (S.D.N.Y. 2000) (Marrero, J.) ("Romer's theory is that, were his complaint to survive the motion to dismiss, he would be able through discovery to develop a record substantiating his general pleadings. This aspiration need not detain the Court; Romer is entitled to proceed only if the facts he seeks to prove would state a legally cognizable claim.")

This section is not just an indemnification clause, as plaintiffs would have the Court believe. (*See* Opp. at 64-65.) The section begins by listing the liabilities and claims subject to indemnification by the customer, which include claims asserted against SCBI "in any way relating to or arising out of . . . any transaction effectuated through an Account." It goes on to state: "Customer hereby expressly waives and releases any and all claims and causes of action which Customer may at any time or times have against [AEBI] . . . in connection with any of the Indemnified Liabilities." (Berarducci Decl. Ex. I (RRGA) § 46 & Ex. J (Amended RRGA) § 46.) Under Florida law, this section clearly exculpates the Bank from negligence claims asserted by its customers. *Fuentes* v. *Owen*, 310 So. 2d 458, 459-60 (Fla. Dist. Ct. App. 1975) (broad provision releasing landlord from "any and all claims for damages" reasonably construed to exculpate all liability except for intentional torts). The fact that the section does not specifically say "negligence" does not make its scope ambiguous. *Hardage Enters., Inc.* v. *Fidesys Corp., N.V.*, 570 So. 2d 436, 437 (Fla. Dist. Ct. App. 1990) ("According to the great weight of authority in this country, specific wording is not a precondition to finding that a release precludes negligence claims." (citations omitted)).[11]

Section 42 of the RRGA also relieves the Bank of liability to its customers for failures, omissions or errors in its performance caused by the insolvency or negligence of other institutions. (Berarducci Decl. Ex. I (RRGA) § 42 & Ex. J (Amended RRGA) § 42.) There is no dispute that the insolvency of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the Fairfield Funds has prevented plaintiffs from redeeming their investments. Nevertheless, plaintiffs argue that section 42 does not apply here because (1) the RRGA do not address

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[11] Plaintiffs also argue that section 46 should be read to limit liability arising only from third-party claims or "claims arising from the operation of the accounts." (Opp. at 65.) Plaintiffs fail to cite any language from section 46 imposing this limitation, because no such limitation exists.

investment advisory services and section 42 only applies to breaches of the RRGA, which plaintiffs do not allege and (2) section 42 relates only to a defense of impossibility, which does not apply here. (Opp. at 62-63.) These arguments are unavailaing. By their terms, the RRGA "apply to all accounts and all transactions related thereto established and maintained with [AEBI]." (Berarducci Decl. Ex. I (RRGA) at 1 & Ex. J (Amended RRGA) at 1.) Plaintiffs' argument that section 42 relates only to a defense of impossibility likewise misses the point. Rather than reading the plain terms of the provision, which say nothing of impossibility of performance, plaintiffs take the "force majeure" heading of the section to mean that this section only exculpates the Bank if its performance became legally impossible to perform.[12] Impossibility of performance, though a related concept, is not a condition precedent to the limitations set forth in section 42.

2. Valladolid's Claims Are Also Barred Under the Exculpation Provision in the Nondiscretionary Investment Services Agreement.

In an effort to avoid the effects of the Nondiscretionary Investment Services Agreeement's ("NISA") exculpatory provision, which clearly and unequivocally bars Valladolid's negligence and fiduciary duty claims, Valladolid argues that California law should govern Valladolid's substantive claims and that under California law, the NISA's exculpatory provision is unenforceable. (Opp. at 70-73.) Valladolid signed the NISA and Account Application and Agreement with AEBI, both of which mandate that Florida law apply. (Berarducci Decl. Exs. N-O (Valladolid NISA) ¶ 9 & Ex. E (Account Application & Agreement) ¶ 14.) And under California choice of law rules, the Florida choice of law provision is valid.

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[12] The RRGA state that "headings are used herein for convenience and shall not affect the meaning or interpretation of these Rules." (Berarducci Decl. Ex. I (RRGA) § 53 & Ex. J (Amended RRGA) § 53.) Plaintiffs' citation to cases addressing the defense of impossibilty have no bearing on the Bank's motion to dismiss, as this defense was not raised in the motion.

Under California law, choice of law provisions are presumptively valid if "the chosen state has a substantial relationship to the parties or their transaction, or . . . there is any other reasonable basis for the parties' choice," and the chosen state's law is not "contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law." *Nedlloyd Lines B.V.* v. *Super. Ct.*, 834 P.2d 1148, 1151-52 (Cal. 1992) (applying parties' choice of law over California law, noting "a strong policy favoring enforcement of such provisions").

Valladolid argues that her connections are with California and that Florida has no "substantial relationship" to her or her Sentry investment. (Opp. at 72.) The facts alleged in her complaint tell a different story. AEBI, now SCBI, was and is an Edge Act corporation headquartered in Miami, Florida. (*Valladolid* Am. Compl. ¶ 27.) Neither AEBL (now SCI) nor SC PLC is incorporated or maintains headquarters in California. (*Id.* ¶¶ 24, 27.) Valladolid's account was booked through SCBI in Miami, Florida. (Berarducci Decl. Ex. E (Account Application & Agreement); *Valladolid* Am. Compl. ¶ 27.) These facts alone give Florida a substantial relationship to the parties. *See ABF Capital Corp.* v. *Berglass*, 30 Cal. Rptr. 3d 588, 594 (Cal. Ct. App. 2005) ("That one of the parties resides in a foreign state gives the parties a reasonable ground for choosing that state's law."); *Hughes Elecs. Corp.* v. *Citibank Del.*, 15 Cal. Rptr. 3d 244, 249 (Cal. Ct. App. 2004) (presence of defendant's principal place of business in New York supplied substantial relationship with New York and reasonable basis to apply New York law). By contrast, Valladolid has no connections to California whatsoever. Indeed, to demonstrate some connection between California and her claims, Valladolid argues that she lives in the "San Diego region in Tijuana." (Opp. at 70.) What this means, of course, is that Valladolid is a citizen and resident of Mexico, not California. (*Valladolid* Am. Compl. ¶ 22.)

Valladolid next argues that application of Florida law would conflict with California law because (1) the exculpatory clauses would be unenforceable under California law, (2) the NISA is a contract of adhesion, which California courts look upon with disfavor, and (3) California's economic loss rule would not bar her fiduciary duty claim.[13] Each of these arguments fails. *First*, the exculpatory clause in the NISA would be enforceable under California law as it does not purport to exculpate grossly negligent or willful misconduct, and the private banking services the Bank offered do not affect the public interest. *See, e.g.*, *CAZA Drilling (Cal.), Inc.* v. *TEG Oil & Gas U.S.A., Inc.*, 48 Cal. Rptr. 3d 271, 283-84 (Cal. Ct. App. 2006) (upholding exculpatory clause limiting liability for negligence where contract did not affect public interest); *YMCA of Metro. Los Angeles* v. *Super. Ct.*, 63 Cal. Rptr. 2d 612, 615 (Cal. Ct. App. 1997) (upholding exculpatory clause limiting liability for negligence in take-it-or-leave-it agreement). *Second*, the NISA is not an unenforceable contract of adhesion; Valladolid does not allege that there were no other private banks available to her. *See Morris* v. *Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 807 (Cal. Ct. App. 2005) (adhesion contracts become unenforceable where weaker party "lacks any realistic opportunity to look elsewhere for a more favorable contract" (quotation marks and citation omitted)). *Third*, like Florida, California courts recognize an economic loss rule barring recovery in tort for claims alleging breaches of duties arising from contract. *See Erlich* v. *Menezes*, 981 P.2d 978, 984-85 (Cal. 1999) (no tort damages where jury found negligent breach of contract).

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[13] Valladolid makes the additional argument that Luisa Serena, the "investment advisor" she names in her complaint, could be held liable along with "her principal if Plaintiff can show Ms. Serena failed to exercise due care in recommending Plaintiff purchase an interest in Fairfield." (Opp. at 73.) The cases Valladolid cites for this proposition do not address the issue of when an employee may be held personally liable for her actions. Nor does Valladolid provide any authority from Florida showing the rules in this area are any different.

With no conflict between Florida law and any fundamental policy of California, the Court should apply the law the parties chose: that of Florida.[14] For the same reasons the RRGA exculpatory clauses limit the Bank's liability, the NISA likewise limits the Bank's liability to Valladolid to claims of gross negligence or willful misconduct.

3. Plaintiffs Have Not Adequately Alleged That the Bank Was Grossly Negligent, Therefore Their Breach of Duty Claims Fail.

Because the exculpatory provisions of the RRGA and the NISA exculpate the Bank from liability for negligent conduct, plaintiffs cannot maintain their common-law claims unless they allege that the Bank's conduct, at a minimum, was grossly negligent. Only Lopez even purports to meet this standard, while the plaintiffs in *Maridom*, *Valladolid* and *Headway* apparently choose instead to cross their fingers and hope that the Court will not enforce their contractual exculpatory clauses. (Opp. at 38-42.) Despite Lopez's efforts, his allegations come nowhere close to adequately pleading gross negligence.

Under Florida law, a plaintiff must allege a conscious disregard of a clear and present danger to plead gross negligence. *Greathouse* v. *Ceco Concrete Constr., L.L.C.*, No. 06-CV-2, 2007 WL 624550, at *4 (N.D. Fla. Feb. 23, 2007) (citations omitted). Lopez argues that he has pleaded gross negligence in light of the "red flags surrounding Madoff's operation." (Opp. at 40.) But his argument suffers from a fatal flaw: in his complaint, Lopez never even mentions the concept of "red flags," much less any specific red flags that demonstrate gross negligence on the part of the Bank. Thus, not only are Lopez's allegations deficient under

[14] Even if the NISA's exculpatory clause were in conflict with California's public policy, California has no greater interest than Florida in the determination of any of the issues Valladolid cites as conflicts. Given that neither Valladolid nor the Bank call California their home, and they voluntarily agreed to Florida law in the NISA and the Account Application and Agreement, applying California law in this case "would further no ascertainable fundamental policy of California; indeed, it would undermine California's policy of respecting the choices made by parties to voluntarily negotiated agreements." *Nedlloyd Lines B.V.*, 834 P.2d at 1155.

Rule 9(b),[15] but they do not establish that the Bank was aware of *any* risk, much less a clear and present danger, that the Fairfield Funds were feeding a Ponzi scheme.[16]

III. MADOFF'S PONZI SCHEME CAUSED PLAINTIFF'S LOSSES, NOT THE ALLEGED ACTIONS OF THE BANK.

Unable to substantively refute the Bank's argument that Madoff, not the Bank, caused their losses, plaintiffs resort to arguing that proximate cause is a "question for the finder of fact not to be determined on a motion to dismiss." (Opp. at 65.) Plaintiffs are wrong. In cases such as this, "where there is an active and efficient intervening cause," proximate cause is a question of law that should be considered on a motion to dismiss. *Nat'l Airlines, Inc.* v. *Edwards*, 336 So. 2d 545, 547 (Fla. 1976).[17] Plaintiffs' argument (without any citation because

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[15] Lopez admits that the same factual allegations that supposedly make up his gross negligence claim also establish his common-law, and federal securities fraud claims. (Opp. at 40-42, 47.) His gross negligence claim therefore sounds in fraud, and must be pleaded with particularity under Rule 9(b). *See DeBlasio* v. *Merrill Lynch & Co., Inc.*, No. 07-CV-318, 2009 WL 2242605, at *11 (S.D.N.Y. July 27, 2009) (Marrero, J.).

[16] Lopez appears to make an additional argument, relying on *In re Cascade Int'l Sec. Litig*, 840 F. Supp. 1558 (S.D. Fla. 1993), that the Bank was grossly negligent because it represented it had conducted extensive due diligence of the Fairfield Funds. (Opp. at 40.) In *In re Cascade*, however, the court held that plaintiffs had adequately pleaded scienter in the federal securities context because the broker "was aware of 'red flags' as to [a company's] financial viability but continued to recommend its stock." 840 F. Supp. at 1579. The court mentioned the broker's representation of due diligence only to demonstrate that the broker *had conducted* the due diligence and was thus aware of the alleged red flags. *See id.* at 1578-79. Here, Lopez does not allege that the Bank was aware of any "red flags." (*Lopez* Am. Compl. ¶ 9.)

[17] The cases plaintiffs cite on this point are inapposite. In *Sosa* v. *Coleman*, 646 F.2d 991 (5th Cir. 1981), the Fifth Circuit found a district court's dismissal of a case premature where the complaint alleged that a defendant police officer was liable for wrongful death of a victim murdered by a known violent felon the officer allowed to escape from his custody. Similarly, in *Coral Gables Fed. Sav. & Loan Association* v. *City of Opa-Locka*, 516 So. 2d 989 (Fla. Dist. Ct. App. 1987), a Florida appeals court permitted a plaintiff, whose checks were wrongfully cashed by a bank employee, to hold the defendant bank held liable for the defendant's alleged negligent banking procedures. *Id.* at 992-93. Unlike an officer tasked with keeping watch over a violent felon, or a bank overseeing its customer's checking account, the Bank had no duty to maintain ongoing oversight over the Fairfield Funds. Moreover, the indirect risk that the Bank's due diligence of an investment for its clients, if conducted inadequately, would allow Madoff to perpetuate a complicated and successful Ponzi scheme is far more attenuated than the direct risk

"no citation is needed") that fraud and Ponzi schemes are not that uncommon generally in the U.S. is beside the point. (*See* Opp. at 69.) The question is whether, given the Bank's alleged negligent acts or omissions, the resultant injury "seem[s] beyond the scope of any fair assessment of the danger." *Dep't of Transp.* v. *Anglin*, 502 So. 2d 896, 899 (Fla. 1987) (quoting *Stahl* v. *Metro. Dade County*, 438 So. 2d 14, 19 (Fla. Dist. Ct. App. 1983)). If ever there were a risk that was "beyond the scope of any fair assessment of the danger" of the Bank's alleged failure to conduct adequate due diligence, it is this case where the Bank's alleged negligence purportedly caused it to fail to discover that a well-respected market-maker and investment adviser—Bernard Madoff—duped the investment and regulatory world for decades to perpetuate a criminal scheme on an unprecedented scale and level of sophistication.[18]

IV. THE UNJUST ENRICHMENT CLAIMS FAIL BECAUSE PLAINTIFFS ADMIT THE EXISTENCE OF CONTRACTS WITH THE BANK.

Under Florida law, "where there is an express contract between the parties, claims arising out of the contractual relationship will not support a claim for unjust enrichment." *Moynet* v. *Courtois*, 8 So. 2d 377, 379 (Fla. Ct. App. 2009). Plaintiffs in *Headway*, *Lopez* and *Valladolid* try to avoid this rule by arguing that "the existence of express contracts covering the acts complained of is in dispute." (Opp. at 38.) As discussed *infra* at 22 n.23, however, plaintiffs have conceded the existence of express contracts governing their relationship with the

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of injury to third-parties from a police officer allowing a violent felon to go free or of embezzlement due to a bank's inadequate check cashing procedures.

[18] Plaintiffs fail in their attempt to distinguish *Roberts* v. *Shop & Go, Inc.*, 502 So. 2d 915 (Fla. Dist. Ct. App. 1986). Plaintiffs' quote *Roberts* for the general standard for when a court should decide proximate cause as a matter of law—"where reasonable men could not differ." Applying this standard, the court looked to whether the result was the "natural and probable consequences" of an act "because they happen so frequently from the commission of such act that . . . they may be expected to happen again." *Id.* at 917 (citations omitted). It cannot be said that the natural and probable result of recommending a well-known hedge fund with a history of stable and steady returns to a customer is the loss of that investment to a criminal Ponzi scheme.

Bank. Therefore, plaintiffs' unjust enrichment claims cannot stand as a matter of law. *See, e.g.*, *Webster* v. *Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1326 (S.D. Fla. 2000) (dismissing unjust enrichment claim where, "unlike the situation . . . in which the defendant denied the existence of an express contract, the defendant . . . admitted to the existence of an express contract between the parties . . . .").

V. LOPEZ FAILS TO STATE A CLAIM UNDER SECTION 10(b) OF THE EXCHANGE ACT.

Lopez's claims under Section 10(b) of the Exchange Act fail for the reasons stated in section I(A) of the Bank's brief in support of its motion to dismiss the Florida Cases and the reasons stated in the Bank's reply memorandum in support of its motion to dismiss the Singapore Cases. (*See* Reply Mem. in Support of Mot. to Dismiss Singapore Cases at 7-15.) In particular, Lopez does not allege any actionable misstatements with the particularity required by Rule 9(b) and the PSLRA, and he additionally fails to adequately allege that any of the supposed misstatements were made with scienter.

VI. LOPEZ AND THE *BHATIA* AND *TRADEWAVES* PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 20(a) OF THE EXCHANGE ACT.

Lopez and *Bhatia* and *Tradewaves* plaintiffs argue that they adequately pleaded a violation of Section 20(a) of the Exchange Act because the Second Circuit supposedly does not require a plaintiff to plead culpable participation in order to state a claim. (Opp. at 31.) Not so. In *In re Alstom S.A. Secs. Litig.*, 406 F. Supp. 2d 433, 490 (S.D.N.Y. 2005) ("*Alstom III*"), this Court held that culpable participation is a necessary element to a Section 20(a) claim. More recently, the Second Circuit reached the same conclusion in *ATSI Commcn's, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007). Plaintiffs' reliance on *Suez Equity Partners, L.P.* v. *Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001), is misplaced. In reaching its decision in *Alstom III*, this Court explained that *Suez Equity* "does not provide any clarity" on the issue of

the culpable participation requirement because the Second Circuit "first set out language suggesting that culpable participation is an element but then seemed to blur the . . . element." 406 F. Supp. 2d at 490 n.52. Notwithstanding *Suez Equity*, "the weight of well-reasoned authority is that to withstand a motion to dismiss a section 20(a) controlling person liability claim, a plaintiff must allege 'some level of culpable participation at least approximating recklessness in the section 10(b) context.'" *Edison Fund* v. *Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 231 (S.D.N.Y. 2008) (citation omitted).

Lopez also argues that his control person claims are subject only to the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. (Opp. at 43-46.) This position is contrary to the analysis of this Court in *Alstom III*.[19] Under *Alstom III*, plaintiffs must plead with particularity "facts giving rise to a strong inference that [SC PLC] knew or should have known that [SCI or SCBI] was engaging in fraudulent conduct, or that [SC PLC] failed to review or check information that [it] had a duty or monitor, or that [SC PLC] ignored obvious signs of fraud." *In re Alstom SA*, 406 F. Supp. 2d at 491-92. Plaintiffs have not met this standard. In any event, Rule 8 requires something more than "[a] pleading that offers labels and conclusions" "devoid of further factual enhancement." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). Lopez fails to allege any "further factual enhancement" beyond SC PLC's ultimate ownership of SCI. (*See* Florida Mem. at 34-35.) This is insufficient.[20]

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[19] *See also In re MBIA, Inc., Sec. Litig.*, --- F. Supp. 2d ----, 2010 WL 1253925, at *23 (S.D.N.Y. Mar. 31, 2010); *Kalin* v. *Xanboo, Inc.*, 526 F. Supp. 2d 392, 406 (S.D.N.Y. 2007); *Lapin* v. *Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 246-47 (S.D.N.Y. 2006). Although this Court also has applied a Rule 8 standard on occasion, it has done so without analysis and without regard to its earlier reasoning in *Alstom III*. *See Cornwell* v. *Credit Suisse Group*, --- F. Supp. 2d ---, 2010 WL 537593, at *8 (S.D.N.Y. 2010); *Varghese* v. *China Shenghuo Pharm. Holdings, Inc.*, 672 F. Supp. 2d 596, 611 (S.D.N.Y. 2009).

[20] *Cf. Cornwell*, 2010 WL 537593, at *8 (Rule 8 standard met for culpable participation where plaintiff alleged that the defendants had "direct and supervisory involvement in the day-

VII. THE COMMON-LAW FRAUD AND MISREPRESENTATION CLAIMS IN *LOPEZ* AND *MARIDOM* FAIL.

Lopez and *Maridom* plaintiffs fail to state claims of common-law fraud and negligent misrepresentation because they have not adequately alleged actionable misrepresentations or omissions of material fact or the requisite scienter. Moreover, they have not alleged facts with sufficient particularity to meet the heightened pleading standards of Rule 9(b). Notably, plaintiffs devote nearly four pages to arguing against dismissal on these bases without citing a single case for anything other than generic standards, and without pointing to any specific allegations as evidence of the requisite particularity. (*See* Opp. at 47-50.) Not surprisingly, these hollow arguments do not hold up to scrutiny.

A. Plaintiffs Have Not Alleged Actionable Misrepresentations or Omissions.

Lopez characterizes his fraud claim as depending entirely on the Bank's alleged misrepresentation that (i) it conducted extensive due diligence of the Fairfield Funds, and (ii) the Fairfield Funds would generate consistent returns with low volatility. (Opp. at 46.) Lopez does not respond to the Bank's argument that its alleged due diligence representation was too vague to be material, or explain how he was misled about the future prospects of the Fairfield Funds when the Sentry Offering Documents—which he indisputably received—expressly disclosed that the funds were "speculative and involve a high degree of risk." Nor does Lopez even attempt to argue that he has adequately pleaded scienter for either of these misrepresentations, as he does not allege that his relationship manager, or anyone else at the Bank, had actual knowledge that the alleged statements were false when made. Lopez alleges only that "Defendants acted in reckless disregard for the truth." (*Lopez* Am. Compl. ¶ 95.) There is thus no way he can meet

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to-day operations" of the corporation and "had high-level positions giving them intimate knowledge of the false financial statements at issue." (internal quotations omitted)); *Varghese*, 672 F. Supp. 2d at 612 (same, on similarly detailed allegations).

Florida's scienter requirement for fraud claims, which requires actual knowledge of the falsity of a statement rather than mere recklessness. *See Bruhl* v. *Conroy*, No. 03-CV-23044, 2006 U.S. Dist. LEXIS 66387, at *30 (S.D. Fla. Mar. 31, 2006).

Maridom plaintiffs' fraud and misrepresentation claims fare no better. *Maridom* plaintiffs argue that the Bank knew or should have known that BLMIS had custody of virtually all of the Fairfield Funds' assets but failed to inform them of this arrangement and its risks. (Opp. at 48.) Yet, *Maridom* plaintiffs' PPM fully disclosed that BLMIS would have custody of up to 95% of the assets of the Fairfield Funds,[21] along with the risk that the broker executing the split-strike conversion strategy could misappropriate the Funds' assets. (Berarducci Decl., Ex. A (Sigma 10/1/04 PPM) at 20, Ex. X (Sentry 10/1/04 PPM) at 14-15, 19, & Ex. W (Sentry 7/1/03 PPM) at 16, 21.)

B. Plaintiffs' Fraud and Negligent Misrepresentation Claims Fail To Meet the Heightened Pleading Standard of Rule 9(b).

Once again, without citing any specific allegations or supporting case law, plaintiffs claim that they have met Rule 9(b)'s heightened pleading standard, which requires facts to be pleaded with particularity as to where, when and by whom alleged misrepresentations were made, and why the alleged statements were fraudulent. *See DeBlasio*, 2009 WL 2242605, at *10. Plaintiffs have not made such allegations. *Maridom* plaintiffs and Lopez argue that their complaints satisfy Rule 9(b) because they do not "suffer[] from the vice of lumping together different defendants without adequate distinctions among them." (Opp. at 49.) But they cite no case for the proposition that a plaintiff alleging a fraud or misrepresentation claim against a

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[21] *Maridom* plaintiffs' allegation that the PPM did not disclose that a third party, rather than Sentry itself, would execute the split-strike conversion strategy is also refuted by the PPM itself. The PPM includes disclosures that investments in the strategy would be conducted through a third-party broker, and that Sentry would not have custody of assets invested in the strategy. (Berarducci Decl., Ex. X (Sentry 10/1/04 PPM) at 17, 19.)

corporate defendant need not name the individual speaker of the alleged misstatement so long as the corporate defendant is sufficiently identified. And neither *Maridom* plaintiffs nor Lopez identify the particular speakers of most of the alleged misstatements. *Maridom* plaintiffs identify only "SCBI" generally, and Lopez likewise attributes most of the statements or omissions he alleges to "AEB" or "the Standard Chartered Defendants."

Moreover, *Maridom* plaintiffs provide no specificity on when or where statements were made and fail to explain why any alleged omissions regarding BLMIS's role in the Fairfield Funds were fraudulent.[22] Lopez similarly fails to explain why the Bank's alleged statements regarding past performance of the Fairfield Funds, or the Bank's due diligence, were false or fraudulent at the time they were made. *Sofi Classic S.A.* v. *Hurowitz*, 444 F. Supp. 2d 231, 248-49 (S.D.N.Y. 2006) (Marrero, J.) (dismissing fraud claim where "Complaint fail[ed] to specify the content of the alleged false statements, fail[ed] to state where and when particular statements were made, and fail[ed] to identify which of the two Defendants made each statement or omission").

VIII. THE ACCOUNT AGREEMENTS AND OFFERING DOCUMENTS ARE PROPERLY CONSIDERED ON THIS MOTION TO DISMISS.

Plaintiffs seek to prevent the Court from considering three categories of documents, each of which is properly considered here: (1) plaintiffs' account agreements and the rules and regulations incorporated by reference in those agreements; (2) the subscription agreements plaintiffs signed before investing in the Fairfield Funds along with the private

[22] *Maridom* plaintiffs also assert that their negligent misrepresentation claim need not be pleaded with particularity, arguing that the application of Rule 9(b) to such a claim would be "hyper-technical" where they incorporated by reference other allegations in the complaint. (Opp. at 50-51.) Incorporating allegations of fraud by reference into a non-fraud claim, however, is sufficient to trigger the heightened pleading requirements of Rule 9(b), *DeBlasio*, 2009 WL 2242605, at *11.

placement memoranda referenced therein; and (3) matters of public record concerning the Madoff scandal, the facts of which plaintiffs do not dispute.

A. The Account Agreements, and Incorporated Rules and Regulations Governing Accounts, Are Integral and Relevant to Plaintiffs' Complaints, and Were Properly Authenticated.

Plaintiffs argue that their account agreements should not be considered in connection with the Bank's motion to dismiss supposedly because they are not integral to their complaints and because plaintiffs "dispute" the relevancy and authenticity of the agreements. (Opp. at 7-11.) Plaintiffs' blatant attempt to avoid the consequences of the agreements they signed should be rejected.

First, plaintiffs' claims depend on the nature of their business relationships with the Bank, including the resulting duties owed by the Bank, which plaintiffs concede arose from their agreements with the Bank.[23] In light of these allegations, plaintiffs' failure to cite all of the relevant agreements by name in their complaints seems more a matter of strategy than of substance. *See Yak* v. *Bank Brussels Lambert*, 252 F.3d 127, 131 (2d Cir. 2001) ("Carefully avoiding all mention of the [contract] does not make them any less integral to [the] complaint."); *RBS Holdings, Inc.* v. *Wells Fargo Century, Inc.*, 485 F. Supp. 2d 472, 476-77 (S.D.N.Y. 2007) (Marrero, J.).[24] *Second*, plaintiffs argue that the RRGA are not relevant because the two versions offered by the Bank as exhibits post-date some of plaintiffs' original investments. (Opp. at 10-

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[23] Specifically, *Maridom* plaintiffs allege that their "account relationship" with the Bank led to their eventual investments in the Fairfield Funds, and that SCBI had multiple duties as their "investment advisor." (*Maridom* Am. Compl. ¶¶ 17-19, 38.) Lopez claims that he established a "business relationship" with "AEB," and executed several agreements with the Bank. (*Lopez* Am. Compl. ¶¶ 23, 69.) Similarly, Valladolid alleges that she entered into "investment contracts and related agreements" with the Bank (*Valladolid* Am. Compl. ¶ 37), and Headway alleges that it signed "relationship documents" with the Bank. (*Headway* Compl. ¶ 28).

[24] Plaintiffs' argument that the Bank is attempting to apply the terms of the NISA to all of the plaintiffs is unfounded. (Opp. at 11.) The Bank seeks to hold all plaintiffs to the agreements they signed, and Valladolid signed the NISA. (Florida Mem. at 8-9.)

11.) However, by signing the Account Application and Agreement, plaintiffs agreed to the terms of the RRGA as amended from time to time, and the RRGA includes a change-in-terms provision authorizing any amendments that may have been made.[25] *Third*, plaintiffs attempt to dispute the "authenticity" of the documents, not by questioning their actual authenticity, but by raising "questions" about whether the attorney who proffered those documents was competent to do so. He was. Rule 901(a) of the Federal Rules of Evidence requires only "evidence sufficient to support a finding that" the document is what it purports to be. This does not require personal knowledge of the substance of the underlying document. *See In re Worldcom, Inc.*, 357 B.R. 223, 228 (S.D.N.Y. 2006).

B. The Fairfield Offering Documents Are Integral to Plaintiffs' Complaints.

Plaintiffs do not argue that the Sentry and Sigma Subscription Agreements are not integral to their complaints. Instead, they assert that the key offering documents referenced in those agreements—the PPMs—should not be considered because only the *Maridom* plaintiffs allege that they received a PPM.[26] This argument fails for two reasons. *First*, when signing the subscription agreements, plaintiffs affirmed that they had received and read a copy of the PPM. (Berarducci Decl. Exs. P-V (Subscription Agreements) ¶ 7.) Accordingly, plaintiffs were on

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[25] Headway also argues that "there was no operative account agreement governing the Headway investments between April 8, 2003 and July 24, 2008" because its account agreement was marked "cancelled" on April 8, 2003 and a new agreement was not executed until July 23, 2008. (Opp. at 11.) But the agreement was never cancelled. As Headway's Account Application and Agreement shows, the reason for the "cancelled" stamp was merely a changing of corporate officers that required new signature pages, not the cancellation of the agreement. (Berarducci Decl. Ex. H.)

[26] Although Headway claims that its first investment in Sentry occurred before the July 1, 2003 version of the Sentry PPM became effective, (Opp. at 12), Headway cannot argue that it never received the July 1, 2003 PPM because in connection with an additional investment in Sentry in the summer of 2005, Headway signed a subscription agreement affirming that it had received the operative (i.e., July 1, 2003) PPM. (Berarducci Decl. Ex. R (Headway Subscription Agreement.)

notice of the contents of the PPM as a matter of law. *See Gold* v. *Deutsch AG*, 365 F.3d 144, 149 (2d Cir. 2004) (party "who signs or accepts a written contract . . . is conclusively presumed to know its contents and to assent to them" (quotation marks and citation omitted)). *Second*, courts considering motions to dismiss often treat the offering documents for a security as integral even if a plaintiff fails to reference those documents in the complaint. *See, e.g.*, *Credit Suisse First Boston Corp.* v. *ARM Fin. Group, Inc.*, No. 99-CV-12046, 2001 WL 300733, at *3 (S.D.N.Y. Mar. 28, 2001) ("Defendants in securities actions are permitted to produce the prospectus when challenging the legal sufficiency of a complaint because a 'plaintiff should not so easily be allowed to escape the consequences of its own failure.'" (quoting *Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)); *Spain* v. *Deutsche Bank*, No. 08-CV-10809, 2009 WL 3073349, at *3 n.3 (S.D.N.Y. Sept. 17, 2009).

Plaintiffs' reliance on *Faulkner* v. *Beer*, 463 F.3d 130 (2d Cir. 2006) is misplaced. In *Faulkner*, the Second Circuit vacated and remanded a case in which the district court had considered certain documents outside of the complaint without first determining whether the plaintiffs had received the offering documents, which plaintiffs alleged were *not even created* until after they made their investments. 463 F.3d at 134-35. Here, all of the plaintiffs signed Subscription Agreements—the accuracy, authenticity and relevance of which plaintiffs do not legitimately contest—stating that they had received and read a copy of the PPM *before investing*. (Berarducci Decl. Exs. P-V (Subscription Agreements) ¶ 7); *see Cortec Industries, Inc.*, 949 F.2d at 48 ("The stock purchase agreement, Bowles' offering memorandum, and the warrant were documents plaintiffs had either in their possession or had knowledge of and upon which they relied in bringing suit. It [sic] did not lack notice of those documents; these papers were integral to its [sic] complaint.").

C. The Court May Take Judicial Notice of Cited Matters Relating to BLMIS and Madoff.

Finally, plaintiffs argue that the Court should not take into account the published opinions of the Bankruptcy Court overseeing the BLMIS liquidation, the SEC report on the Madoff scandal or Madoff's plea allocution because, according to plaintiffs, the Bank is seeking to improperly present these cited documents for the truth of their contents. This argument misses the point. The Court is free to notice any fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *In re Alstom SA Sec. Litig.* (*"Alstom II"*), 406 F. Supp. 2d 402, 409 (S.D.N.Y. 2005) (Marrero, J.) (quoting Fed. R. Evid. 201(b)). The amount that the trustee has recovered in the BLMIS liquidation proceedings pending in this District, that Bernard Madoff admitted to operating a Ponzi scheme from at least the early 1990s to his arrest in December of 2008, and that the SEC did not uncover Madoff's scheme are facts not in dispute. Madoff's unprecedented fraud is infamous throughout the world, and courts in this district and others have taken judicial notice of similar facts regarding the Madoff scheme. *E.g.*, *Meridian Horizon Fund, LP* v. *Tremont Group Holdings, Inc.*, No. 09-CV-3708, 2010 WL 1257567, at *2 (S.D.N.Y. Mar. 31, 2010) (taking judicial notice of Madoff's conviction and subsequent actions commenced by New York Attorney General).[27] The Court need not consider the sufficiency of plaintiffs' complaint in a vacuum.

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[27] *See also, e.g.*, *In re Tremont Sec. Law, State Law & Ins. Litig.*, --- F. Supp. 2d ---, 2010 2010 WL 1257580, at *2 (S.D.N.Y. 2010) (taking judicial notice of Madoff's conviction); *Barron* v. *Igolnikov*, No. 09-CV-4471, 2010 WL 882890, at *1 (S.D.N.Y. Mar. 10, 2010) (taking judicial notice that "Madoff had been operating an enormous Ponzi scheme for nearly 20 years"); *Lautenberg Found*. v. *Madoff*, No. 09-CV-816, 2009 WL 2928913, at *1 (D.N.J. Sept. 9, 2009) (taking judicial notice of plea and conviction of Madoff).

CONCLUSION

Plaintiffs fail to present any argument that might save their complaints from dismissal. Simply put, their claims against the Bank are misguided, as the Bank had only limited duties to plaintiffs, none of which were to ferret out fraud at the Fairfield Funds. In the end, it was Bernard Madoff, not the Bank, that was robbing Peter to pay Paul. Plaintiffs' attempt to hold the Bank liable for Madoff's infamous swindle should be rejected, and their claims dismissed with prejudice.

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/s/ Sharon L. Nelles

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 Bank International (Americas) Ltd., Standard Chartered International (USA) Ltd., Standard Chartered Bank and Standard Chartered PLC