UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: All Actions	Master File No. 09 Civ 118 (VM)

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO MOTIONS TO DISMISS

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
(212) 759-4600

LOVELL STEWART HALEBIAN
JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
(212) 608-1900

Interim Co-Lead Counsel for Plaintiffs

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Pursuant to the Court's order of June 8, 2010, plaintiffs submit this Sur-Reply Brief in further opposition to the motions to dismiss filed by all defendants.[1] As directed by the Court, this Sur-Reply is limited to decisions and legal developments arising after the filing of plaintiffs' opposition briefs on March 23, 2010.

I. PLAINTIFFS' STATE LAW CLAIMS ARE NOT PREEMPTED

A. The Martin Act Does Not Preempt Plaintiffs' Common Law Claims

The most significant recent development with respect to the Martin Act, N.Y. Gen. Bus. Law §§ 352, *et seq.,* is the unequivocal statement by New York's Attorney General that private causes of action like plaintiffs' claims here are in no way preempted by the Act. That position is set forth in two *amicus* briefs filed on April 7, 2010, in the Appellate Division, First Department, in which the Attorney General formally rejects the view that preemption applies to claims that allege the elements of a traditional common law tort without regard to any requirements imposed by or pursuant to the Martin Act.[2]

The Attorney General's position effectively eviscerates the ostensible logical underpinning of the recent decisions (as well as older cases) relied upon by defendants to support their preemption argument.[3] The principal justification for preemption is that allowing private

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[1] Plaintiffs refer to each Defendant using the same format that plaintiffs adopted in their opposition papers.

[2] *See* Briefs for the Attorney General of the State of New York as Amicus Curiae in *CMMF, LLC v, J.P. Morgan Investment Management, Inc., et al.*, Index No. 601924/09 (the "AG Brief") and *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.*, Index No. 603755/08 (N.Y. App. Div. Apr. 7, 2010) (attached as Appendix 1 and Appendix 2). These cases were argued in the Appellate Division on May 26, 2010, and have not yet been decided. Notably, although these briefs were filed six weeks before defendants' reply briefs and are clearly relevant to issues before the Court, defendants chose to ignore them.

[3] *See* FG Def. Reply at 7; PwC Canada Reply at 7; PwC Netherlands Reply at 10; Citco Adm. Reply at 7; Citco Bank Reply at 7; Citco Group Reply at 7, *citing Barron v. Igolnikov*, 2010 WL 882890 (S.D.N.Y. Mar. 10, 2010); *In re Tremont Sec. Law, State Law, and Ins. Litig.*, 2010 WL

tort claims "would impinge on the Attorney General's authority under the Martin Act." *See, e.g., Stephenson v. Citco Group Ltd.*, 2010 WL 1244007, at *13 (S.D.N.Y. Apr. 1, 2010). But the Attorney General has now emphatically rejected any such concerns about interference with his work, and indeed welcomes the assistance of "private attorney general" actions such as this case:

> The Martin Act . . . neither increased nor diminished the remedies available to private litigants. First, there is no warrant in the text and history of the Martin Act for finding any intent to preempt existing common-law actions. Second, the policy argument most often advanced to support preemption is that it is needed in order to protect the exclusive authority of the Attorney General to enforce the Martin Act. . . . *Private common-law actions for the most part advance, and do not hinder, the Attorney General's fundamental mission under the Martin Act to eliminate fraudulent practices in the sale or purchase of securities* across this State, because the Attorney General cannot possibly take sole responsibility for policing the marketplace.

AG Brief at 2 (emphasis added).

As the Attorney General has now eloquently demonstrated, "the Martin Act creates no private right of action, but also does not preempt common law remedies whose source is independent of the statute" (AG Br. at 8) – which is true of all of plaintiffs' claims here. Rather, there is a "separation between the Martin Act and the common law as independent bodies of law" (*Id.* at 18). If valid claims are stated "under common-law principles . . . those claims should be sustained;" if not, "the claims should be dismissed. The Martin Act has no relevance to that question" (*Id.*). In short, "the simple and correct understanding is that the Martin Act

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1257580 (S.D.N.Y. Mar. 30, 2010); *Stephenson v. Citco Group Ltd.*, 2010 U.S. Dist. LEXIS 32321 (S.D.N.Y. Mar. 31, 2010); *Meridian Horizon Fund, LP v. Tremont Group Holdings, Inc.*, 2010 WL 1257567 (S.D.N.Y. Mar. 31, 2010); *CRT Investments, Ltd. v. J. Ezra Merkin*, No. 601052 (N.Y. Sup. Ct. May 5, 2010). It should be noted that none of these recent cases have addressed Rule 10(b)-5 or common law fraud claims against fund advisors or managers, and so have no bearing on plaintiffs' claims against the FGG Defendants, except for *CRT v. Merkin* which upheld a fraud claim against the manager.

neither created nor destroyed any private rights of action" (*Id.*).[4] As demonstrated in plaintiffs' opposition briefs, when judged by the appropriate "common-law principles," the claims in the SCAC should be upheld.

Defendants offer no compelling reason why the New York Legislature – in contrast to other states across the country – would give financial tortfeasors a free pass from non-fraud tort claims involving securities. As defendants note, the weight of authority in federal court favors preemption.[5] The Attorney General, however, demonstrates that these cases are wrongly decided under the text and history of the Martin Act; are inconsistent with New York state court decisions; and find distinctions between common law fraud and negligent misrepresentation that have "no support in the statute" (AG Br. at 11-12).

The Attorney General's formal expression of the State's view that the preemption cases were wrongly decided is entitled to great weight in federal court. Martin Act preemption should be rejected.

B. SLUSA Does Not Bar Plaintiffs' Common Law Claims

Defendants cite one new district court decision from another circuit that applied SLUSA to a case where limited partnerships were marketed as making investments in "covered

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[4] As the Attorney General points out, if courts – including federal courts – were to "decide questions about the proper reach of the Martin Act in private litigation" (*i.e.,* whether a common law claim is preempted because it also "fall[s] within the purview of the Martin Act"), the court would, in effect, be making a decision about the scope of the State's enforcement authority without the Attorney General's participation – a highly inappropriate situation. *See* AG Br. at 18-19.

[5] The trend in State court is against finding preemption. *See Bd. of Managers of Marke Gardens Condo., Inc. v. 240/242 Franklin Ave. LLC*, 898 N.Y.S.2d 564 (App. Div. 2d Dep't 2010) (plaintiffs' claims "fit within a cognizable legal theory, and are not precluded by the Martin Act, as they do not 'rel[y] entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations'") (citations omitted)) (attached as Appendix 3).

securities". *See Sullivan v. Holland & Knight LLP*, 2010 WL 1558553 (M.D. Fla. Mar. 31, 2010).[6] Although *Sullivan* properly found that the partnership interests themselves did not constitute "covered securities," *Id.* at *6, the court went on to misapply *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008), to impose SLUSA preemption. As shown in plaintiffs' opposition brief, however, *Instituto de Prevision* does not apply where, both as here and in *Sullivan*, the plaintiffs did not deal directly with the fraudster or its agent, because in that situation there were no sales of covered securities to plaintiffs. Plaintifs' Opposition to Fairfield Greenwich Defendants' Motions to Dismiss ("Pl. FGG Opp.") at 89-90 (quoting *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Sec., LLC*, 2010 WL 546964 at *2 (S.D.N.Y. Feb. 16, 2010)).

II. PLAINTIFFS HAVE STANDING TO ASSERT STATE LAW TORT CLAIMS

Without distinguishing among fraud, negligent misrepresentation and breach of fiduciary duty, defendants argue that plaintiffs lack standing to pursue *any* of their common law claims. Yet defendants ignore that the very authority they cite instructs that standing requires a claim-by-claim analysis. *See Stephenson,* 2010 WL 1244007, at * 8.[7]

Plaintiffs unquestionably have standing to bring direct claims for fraud and negligent misrepresentation. (Pl. FGG Opp. at 63; Plaintiffs' Opposition to Citgo Defendants' Motions to Dismiss ("Pl. Citco Opp.") at 56). Such claims allege harm to the plaintiffs that is independent of any harm to the fund itself. Indeed, only investors – not the fund itself – can claim fraudulent or negligent inducement. In *Stephenson*, the court agreed, holding that under New York and

[6] FG Def. Reply at 11; Citco Adm. Reply at 6.

[7] FG Def. Reply at 1, 3; Citco Adm. Reply at 7; Citco Berm. Reply at 6-7.

Delaware law, there was standing to pursue claims sounding in inducement, whether styled as fraud or negligence. *Stephenson,* 2010 WL 1244007, at *9-10.

Stephenson also held (in error) that a limited partner cannot pursue direct claims for breach of fiduciary duty against the external fund administrator, Citco. This holding misapplies the general principle that claims for corporate waste or mismanagement must be pursued derivatively. That rule was developed because such misconduct breaches the "directors' normal duty to manage the affairs of the corporation," and applies only to claims by shareholders against internal managers or directors of the company. *See Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004). By contrast, where shareholders in an investment fund sue an external third party alleging breach of a direct fiduciary obligation owed to them, the "normal duty" of corporate insiders to manage corporate affairs is simply irrelevant. Rather, plaintiffs can maintain a direct action based upon the third-party's independent duty arising directly from its fiduciary relationship with the investors. Here, plaintiffs allege the requisite fiduciary duties are owed directly to them by the FGG Defendants, Citco and GlobeOp (*see* SCAC ¶¶ 402-09, 488-94, 541-49, 559-61). Accordingly, *Stephenson* has no bearing on breach of duty claims against the defendants that solicited, managed and administered plaintiffs' investments in the Funds, and advised them concerning those investments. Such relationships and conduct entitle the investors to assert direct claims. *See* Pl. FGG Opp. at 62-63; Pl. Citco Opp. at 15-16, 56. *Stephenson* also is inconsistent with cases recognizing that fund investors can assert direct breach of duty claims against service providers. *Id.*.[8]

[8] For the reasons discussed in the text, the choice-of-law principle known as the "internal affairs doctrine," as discussed in *Stephenson*, is simply inapplicable here.

III. PLAINTIFFS PROPERLY ALLEGE CONTRACT-RELATED CLAIMS

Defendants rely on *dictum* in *Stephenson* to argue that plaintiffs were not intended beneficiaries of the agreements that PwC and Citco had with the Funds because "nothing within the four corners of [these] agreements expresses an intent to benefit third parties." *Stephenson* at *9 n.12. However, as shown in plaintiffs' opposition briefs, under the law of this Circuit, there is no such requirement – intent to benefit a third party need not be expressly stated in the contract, but rather is gleaned from the contract as a whole. S*ee* Pl. Citco Opp. at 33; Pl. PwC Opp. at 36. The additional *dictum* in *Stephenson* that the inurement and nonassignment clauses in the Citco administrator contracts preclude a finding of third-party beneficiary also is incorrect. S*ee* Pl. Citco Opp. at 35 (on a motion to dismiss, such clauses cannot be found as a matter of New York law to override countervailing evidence of intent to benefit plaintiffs).

IV. THE SCAC PROPERLY ALLEGES CLAIMS AGAINST CITCO

A. Reliance Is Shown under the "Attribution Requirement"

The "attribution requirement" for federal securities fraud set out in *Pacific Inv. Mgmt. Co. v. Mayer Brown*, 603 F.3d 144 (2d Cir. 2010) (*see* Citco Adm. Reply at 4), is satisfied here as to Citco because each of the PPMs expressly identified the Citco Administrators as responsible for calculating the Funds' NAVs, and plaintiffs relied on Citco's NAV calculations in making their purchases. *See* Pl. Citco Opp. at 43-44. By contrast, in *Pacific*, the defendant law firm was not mentioned by name nor were its duties described to the plaintiffs. *See Pacific,* 603 F.3d at 158.

B. Plaintiffs' Allegations of Citco's *Scienter* Are Sufficient

Plaintiffs have properly alleged *scienter* under the *Meridian* and *Stephenson* decisions (*see* Citco Adm. Reply at 1-2), because the SCAC's detailed allegations show how Citco gained knowledge of the red flags, including through its long-standing and extensive relationship with

the Funds and knowledge of the Funds' and FGG's operations; Citco's ongoing duty to verify the information it received and reported, and to monitor Madoff as sub-custodian; the service of Citco employees Pilgrim and Francoeur as directors of FGBL; and Citco's self-proclaimed position as a leading provider of services to the hedge fund industry (SCAC ¶¶ 157-60, 163-64, 217-23, 327, 332-35, 337-38, 341 512, 518). Such allegations are sufficient to establish *scienter*. *See* Pl. PwC Opp. at 10-22; Pl. Citco Opp. at 41-43; *see also* pp.   below.

Likewise, Citco's reliance on *Meridian* (Citco Adm. Reply at 3, n. 4) for the proposition that Citco should be exculpated because it did not provide services directly to BMIS overlooks Citco's fundamental obligations to the Funds and their investors, including the duty *independently* to calculate NAVs. S*ee* Pl. Citco Opp. at 4, 6, 11, 28-29. While Citco suggests that it was merely one of the "other financial professionals" whom Madoff deceived (Citco Adm. Reply at 3)**,** the fact that others may have been similarly derelict in their duties does not absolve Citco for its own transgressions, which are established by well-pleaded allegations of *scienter* and other elements of plaintiffs' claims.

V. THE SCAC PROPERLY ALLEGES CLAIMS AGAINST PWC

A. <u>The SCAC Adequately Alleges Scienter for the Federal and State Fraud Claims</u>

The PwC Defendants cite four cases handed down after plaintiffs' opposition briefs were filed, where courts dismissed Federal Rule 10(b)-5 or common law fraud claims against auditors of Madoff feeder funds for failure to plead scienter adequately.[9] The allegations in the SCAC here, however, allege far more concretely than other cases that PwC knew of warning signs that were "so obvious that the auditor must have been aware of them." *Stephenson* at *18.

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[9] *In re Tremont Sec. Law, State Law, and Ins. Litig*., 2010 WL 1257580 (S.D.N.Y. Mar. 30, 2010); *Stephenson v. Citco Group Ltd*., 2010 WL 1244007 (S.D.N.Y. Apr. 1, 2010); *Meridian Horizon Fund, LP v. Tremont Group Holdings, Inc*., 2010 WL 1257567 (S.D.N.Y. Mar. 31, 2010); *CRT Investments, Ltd. v. J. Ezra Merkin*, No. 601052 (N.Y. Sup. Ct. May 5, 2010).

As *Stephenson* recognized, "complaints alleging that an auditor had actual knowledge of and consciously disregarded red flags have been found to sufficiently plead scienter." *Id.* The allegations of the SCAC meet this standard. Among other things, the SCAC alleges that PwC's audit plan and its actions in interviewing Madoff show that it knew, or clearly should have known, that certain inquiries were necessary, but PwC did not in fact carry out those inquiries with proper "professional skepticism" in accordance with applicable audit standards that are set forth in detail. The SCAC here thus differs dramatically from defendants' recent cases, which the courts found were lacking in allegations of "actual knowledge of [the red flags] by PwC." *Stephenson* at *17.

For example, PwC was the long-time auditor of the Funds (SCAC ¶ 259). It had years to learn the books and records of the Funds inside out, including that Madoff purportedly held over 95% of the Funds' assets, but that the Fairfield Defendants performed no meaningful due diligence on BMIS (SCAC ¶¶ 314, 317). PwC also knew that it could not rely on BMIS's financial statements because BMIS – supposedly with billions of dollars under management – was audited by a three-person storefront firm that could not possibly meet the requirement of a "qualified reputable independent audit firm." (SCAC ¶¶ 222, 272, 314; Vickery Decl. Ex. 8). Accordingly, to properly audit the Funds' financial statements, PwC had to inquire into BMIS – an obligation that PwC expressly acknowledged in its Audit Plan and by visiting Madoff's operations on several occasions (SCAC ¶ 307).

PwC was told by Madoff himself that "99% of all trades are electronic, therefore records are updated daily and all reconciliations are performed daily (automated process)" (SCAC ¶¶ 223, 272). Yet PwC also knew that Madoff was providing the Funds only with delayed paper confirmations of supposed trades (*Id.*). The disconnect between Madoff's claim of highly

automated trading and his actual use of paper confirmations, together with PwC's knowledge that BMIS was acting both as broker and custodian, required PwC to validate the existence of assets beyond accepting Madoff's word and BMIS account statements as gospel truth.

Similarly, PwC knew that Madoff dealt with unidentified "various, numerous counterparties." (PwC Report, Vickery Decl. Ex. 6 at 7) Audit standards required PwC to verify these transactions, and the counterparties were the only independent source for doing so. PwC, however, failed to perform any procedures to audit the occurrence of the transactions involved in the split-strike conversions (SCAC ¶¶ 306), including obtaining confirmation from counterparties or settling parties (SCAC *¶¶* 272, 306-310, 315).

PwC's audits also showed that Madoff purportedly held the Funds' assets entirely in government securities at the end of each quarter (SCAC ¶308; *see, e.g.*, audit report, Ex 1 to Duffy Decl. in Support of PwC Canada Motion to Dismiss) – itself an implausible circumstance that should have led to great professional skepticism. And although Madoff himself told PwC where the government securities supposedly were held (PwC Report , Vickery Decl. Ex. 6 at 4), PwC never confirmed their existence with the custodians (SCAC ¶305, 310). By failing to obtain independent verification, PwC violated its own Audit Plan (SCAC ¶¶287-288, Audit Plan at 11 cited at ¶276) and its Guide to auditing alternative investment funds, which recognized that "it [is] necessary for the auditor to request confirmation of the fund's holdings on a security-by-security basis." (SCAC ¶292 quoting Vickery Decl. Ex. 7 at 3).

Several of defendants' recent cases justify dismissal of claims against PwC because the firm was not BMIS's auditor. This is a red herring. PwC's own Audit Plan recognized that it had to make inquiries of BMIS to understand its controls and "perform transaction testing" because of BMIS's dual role as custodian and prime broker (SCAC ¶ 307). Moreover,

accounting rules required that PwC conduct additional audit procedures to confirm the existence of the Funds' assets if BMIS's auditors were incapable of conducting a proper audit, which manifestly they were not (SCAC ¶¶222, 302-303). Such confirmatory procedures are not, as hyperbole in the recent decisions suggests, the same thing as auditing BMIS as a whole or issuing an opinion on BMIS's financial statements. Rather, such procedures are a matter of simple common sense mandated by the rules applicable to audits of the Funds alone.

Finally, the inference that PwC was reckless in conducting its audits is more compelling than PwC's claim (accepted in the recent decisions) that it was fooled by Madoff along with many (though by no means all) others. Unlike the SEC, for example, PwC had unfettered access to the Funds' records for over a decade. Unlike the SEC, PwC acknowledged its responsibility to verify the existence of the Funds' assets and to investigate Madoff's operations in its Audit Plan. Unlike the SEC, PwC was subject to professional auditing standards and internal guides that required it to seek independent verification of BMIS's accounts from counterparties and custodians. Notwithstanding these admitted duties, PwC recklessly failed to make inquiries that would have readily exposed the fraud. These allegations, set out in the SCAC and supported by substantial documentation, go far beyond the facts discussed in defendants' cited cases, and distinguish those decisions.

B. Plaintiffs Have Established Linkage for Purposes of Negligent Misrepresentation

Plaintiffs also satisfy the "linkage" requirement set forth in *CRT Invs. Ltd. v. J.R. Merkin*, Index No. 601052/09 (Sup. Ct. N.Y. Co. May 5, 2010),[PwC Canada Opp. at 9], namely that to state a claim for negligent misrepresentation, more evidence is required than showing that accountants knew that investors would rely upon financial statements that the fund documents entitle them to receive.

The SCAC alleges that the audited financial statements – which were addressed directly to the shareholders and partners of the Funds – were prepared specifically to persuade investors that the Funds were legitimate and that their assets in fact existed (SCAC ¶¶275, 277, 279, 292). Since the Funds had no obligation under Delaware or B.V.I. law to provide audited financials (*see* Affidavit of Lewis Hunte, Q.C. dated March 19, 2010, ¶27),[10] giving the financial statements to investors was a voluntary marketing device. Further, PwC's Audit Plan explicitly acknowledged "we are responsible for reporting to . . . *shareholders, and/or partners* on the financial statements of the Funds" and PwC allowed its name to be used in the Funds' offering documents (SCAC ¶¶276, 278)(emphasis added). These allegations are ample to establish linkage**.**

CONCLUSION

For the foregoing reasons, and those stated in plaintiffs' Briefs in Opposition to defendants' motions to dismiss, all of the motions to dismiss should be denied.

Dated: June 15, 2010

Respectfully submitted,

By: /s/ David A. Barrett
David Boies
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

David A. Barrett
Howard L. Vickery
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022

[10] Defendants have not disputed that the Funds' provision of audited financial statements to investors was voluntary.

Telephone: (212) 446-2300
Facsimile: (212) 446-2350

Stuart H. Singer
Sashi Bach Boruchow
David P. Nelson
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard, #1200
Ft. Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Robert C. Finkel
James A. Harrod
E. Elizabeth Robinson
Natalie M. Mackiel
WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
Telephone: (212) 759-4600
Facsimile: (212) 486-2093

Christopher Lovell
Victor E. Stewart
LOVELL STEWART HALEBIAN JACOBSON LLP
500 5th Avenue, Suite 5800
New York, NY 10110
Telephone: (212) 608-1900

Interim Co-Lead Counsel for Plaintiffs

Of Counsel:

Robert S. Schachter
Hillary Sobel
ZWERLING, SCHACHTER & ZWERLING, LLP
41 Madison Avenue
New York, NY 10010
(212) 223-3900

Counsel for Plaintiffs Nadav and Rohit Zohar

Steven J. Toll
S. Douglas Bunch

COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005
(202) 408-4600

Jacob Sabo
THE TOWER
#3 Daniel Frisch St.
Tel Aviv, Israel
011 (972) 3607-8888

Counsel for Plaintiffs Arie and Dafna Gruber, Carling Investment Ltd., Madanes Investment & Enterprise Ltd., and Shimon Laor

Daniel W. Krasner
Gregory M. Nespole
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
(212) 545-4600

Counsel for Plaintiff The Knight Services Holdings Limited

David A. Gehn
GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC
120 Wall Street
New York, NY 10005
(212) 269-1400

Counsel for Plaintiff Pacific West Health Medical Center, Inc. Employee's Retirement Trust