UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: *Jose Antonio Pujals* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-2878	Master File No. 09-CV-118 (VM) (THK)

MEMORANDUM OF LAW OF STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LTD. AND STANDARD CHARTERED BANK IN SUPPORT OF THEIR MOTION TO DISMISS THE PUJALS PLAINTIFFS' AMENDED COMPLAINT

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. and Standard Chartered Bank

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Standard Chartered Bank International (Americas) Ltd. and Standard Chartered Bank respectfully submit this memorandum of law in support of their motion to dismiss plaintiffs' Amended Class Action Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

In 1998, plaintiffs Jose Antonio Pujals and Rosa Julieta A. de Pujals opened a joint nondiscretionary investment account at American Express Bank International ("AEBI").[1] Beginning in January 2004, plaintiffs, through this account, purchased shares of Fairfield Sentry Ltd. (the "Sentry Fund"). As this Court is aware, the Sentry Fund placed nearly all of its assets with Bernard Madoff's brokerage firm, Bernard L. Madoff Investment Securities LLC ("BLMIS").

In order to purchase shares of the Sentry Fund, plaintiffs executed a standard purchase contract (the "Purchase Letter"), and a subscription agreement for the Sentry Fund (the "Subscription Agreement"). By executing the Purchase Letter, plaintiffs (1) authorized the Bank to purchase shares of the Sentry Fund on their behalf; and (2) acknowledged that the Bank would charge their account a "distribution and servicing fee" each month based on the month end net asset value ("NAV") of their shares (the "Servicing Fees"). This is precisely what the Bank did—purchase shares and calculate and charge plaintiffs Servicing Fees based on the month end NAV of plaintiffs' shares reported to the Bank by the Sentry Fund. The Bank charged plaintiffs the Servicing Fees in this manner—calculated on the reported NAV—every month for almost five years. Plaintiffs never challenged this method of calculating the Servicing Fees. Plaintiffs nonetheless now assert that the Bank breached the Purchase Letter when it charged them

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[1] AEBI was renamed Standard Chartered Bank International (Americas) Ltd. ("SCBI" or, collectively with AEBI, the "Bank") in 2008 after Standard Chartered PLC purchased AEBI's parent, American Express Bank Ltd.

Servicing Fees based on the reported NAV of their Sentry Fund shares, rather than based an "actual value," *i.e.*, an amount that reflected the amount of assets Madoff had misappropriated from the Sentry Fund. Plaintiffs do not allege that the Bank knew about Madoff's fraud before he revealed it to the world, or knew that the Sentry Fund valuations were not correct when and as reported.

The interpretation of the Purchase Letter plaintiffs urge on this Court is not plausible. The Purchase Letter, on its face, required the Bank to calculate and charge the Servicing Fees based on the "month end NAV" of the shares and payable on a quarterly basis, not some later discovered "actual value." The only reasonable way for the Bank to obtain a "month end NAV" was from the Sentry Fund's monthly reported prices, which plaintiffs themselves concede the Bank did faithfully and accurately. (Am. Compl. ¶ 31.) Nothing in the Purchase Letter imposed a duty on the Bank to uncover any inaccuracies or improprieties with respect to the reported month end NAV—indeed, plaintiffs' own account statements were clear that "[p]rices are believed to be reliable, but their accuracy is not guaranteed." Likewise, nothing in the Purchase Letter imposed a duty on the Bank to guarantee in perpetuity that the Servicing Fees were set based on an "actual value."

In fact, even if the Purchase Letter could be interpreted to have required the Bank to charge Servicing Fees based on some formula other than the NAV reported by the Sentry Fund, plaintiffs waived any claims with respect thereto by failing to challenge the Bank's method of charging Servicing Fees for more than five years. Plaintiffs' account statements are clear that the "document is considered approved" unless an objection was made within one month. (Am. Compl. Ex. C at 4.) This objection language reflects plaintiffs' account agreements, which set forth that any fees charged in connection with their accounts were deemed

binding unless plaintiffs objected within 30 days of the date any statement or confirmation reflecting such fees was sent to plaintiffs.

Finally, plaintiffs claim unjust enrichment. This claim fails as a matter of law because it is founded upon a contractual obligation. A claim for unjust enrichment cannot survive where a plaintiff admits, as plaintiffs do here, the existence of an express contract and does not allege the contract was invalid or unenforceable. *Anwar* v. *Fairfield Greenwich Ltd.*, --- F. Supp. 2d ----, 2010 WL 4183645, at *15 (S.D.N.Y. Oct. 4, 2010) (Marrero, J.).

BACKGROUND

Plaintiffs opened a joint investment account with AEBI in October 1998. (Am. Compl. ¶ 10; Exhibit A to Declaration of Patrick B. Berarducci ("Berarducci Decl.") (Account Application and Agreement) ¶ 7.) Through this account, plaintiffs first purchased shares of the Sentry Fund. To do so, they executed their one-page Purchase Letter, (Am. Compl. ¶¶ 2, 22; Berarducci Decl. Ex. B), and the Subscription Agreement, (Berarducci Decl. Ex. C). In the Purchase Letter, plaintiffs agreed that the Bank would charge them Servicing Fees in connection with their purchase of Sentry Fund shares. (Berarducci Decl. Ex. B.) Plaintiffs therein also acknowledged receipt of the Subscription Agreement and the Sentry Fund's Offering Memorandum. (Berarducci Decl. Ex. B.) Specifically, the Purchase Letter states:

> I have received the Offering Memorandum and the Subscription Agreement for the Fund.
>
> I understand that in connection with my purchase of Shares, my account will be charged a distribution and servicing fee of .50% per annum, calculated monthly based on the month end NAV of the Shares and payable on a quarterly basis.

(Berarducci Decl. Ex. B.) In the Subscription Agreement, plaintiffs also confirmed that they "ha[d] received and read" the Offering Memorandum and that they were subscribing to shares of the Sentry Fund pursuant to that document. (Berarducci Decl. Ex. C ¶¶ 1, 7.)[2]

The Offering Memorandum, in turn, describes how the Net Asset Value per share would be calculated, namely, "on a monthly basis by the Fund's administrator, Citco Fund Services (Europe) B.V." (Berarducci Decl. Ex. D at 13.) The Sentry Fund reported this price per share—*i.e.*, the NAV—each month. (*See* Am. Compl. ¶ 31.)[3] That price per share was then reflected in plaintiffs' monthly Statements of Accounts as the "Price As of Date" for their Sentry Fund shares. (*See, e.g.*, Am. Compl. ¶ 31 & Ex. B at 4; *see also* Berarducci Decl. Ex. E at 6 & Ex. F at 6 & Ex. G at 6.) The Offering Memorandum was plain that: "All decisions on the valuation of assets and liabilities and determination of Net Asset Value shall be made by the Fund's Board of Directors." (Berarducci Decl. Ex. D at 12-13.)

The Bank calculated plaintiffs' Servicing Fees based on the month end NAV of plaintiffs' Sentry Fund shares, as reported by the Sentry Fund on a monthly basis. (Am. Compl. ¶ 31.) Plaintiffs do not allege any errors in these calculations. (*See generally* Am. Compl.) Those Servicing Fees were reflected as debits on plaintiffs' Statements of Accounts. (*See, e.g.*, Am. Compl. ¶ 31 & Ex. B at 8; Berarducci Decl. Ex. H at 8 & Ex. I at 8.) Each Statement of

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2 The "Offering Memorandum," as used in this memorandum of law, refers to the Fairfield Sentry Limited Confidential Private Placement Memorandum, a copy of which is attached hereto as Exhibit D to the Declaration of Patrick B. Berarducci.

3 The Subscription Agreement and Offering Memorandum made clear that the NAV represented the price per share of the Sentry Fund. (Berarducci Decl. Ex. C (Subscription Agreement) ¶ 1 (explaining that shares in the Sentry Fund were "offered at a price equal to the net asset value ('Net Asset Value') per Share as of the effective date of the purchase") & Ex. D (Offering Memorandum) at 12 ("The Fund will offer its Shares on a continuous basis at a price equal to its Net Asset Value as of the opening of business on the date of issuance of such Shares.").

Accounts advised that (1) the "[p]rices are believed to be reliable, but their accuracy is not guaranteed"; and (2) the Statement of Accounts "is considered approved unless [the Bank is] notified in writing of any objection within one month." (*See, e.g.*, Am. Compl. Ex. C at 4; Berarducci Decl. Ex. F at 6, 8 & Ex. G at 6, 9.) Plaintiffs never objected to any Servicing Fees reflected in their Statements of Accounts. (*See generally* Am. Compl.)

In December 2008, "Madoff shocked the investing world" by revealing that BLMIS "was nothing more than an elaborate Ponzi scheme." (Am. Compl. ¶ 5.) On June 12, 2009, plaintiffs initiated a putative class action against SCBI and Standard Chartered Bank. Plaintiffs filed an amended complaint on August 13, 2009, asserting claims under Florida law for breach of contract and unjust enrichment arising from the Servicing Fees. The gravamen of plaintiffs' amended complaint is that the Bank breached the terms of the governing document—the Purchase Letter—by charging Servicing Fees based on the reported NAV of plaintiffs' Sentry Fund shares. (Am. Compl. ¶¶ 26-28.) Plaintiffs assert that the Bank instead was obligated under the Purchase Letter to calculate the Servicing Fees based on the "actual" value of the Sentry Fund's assets; in other words, a value adjusted to account for Madoff's fraud. (Am. Compl. ¶¶ 23, 48-49.)

Plaintiffs do not allege any ambiguity in the contract, nor point to any language in any governing agreements that specified some contractual obligation beyond the steps undertaken by the Bank. The Purchase Letter nowhere uses the term "actual value." The Bank performed as it was required under the operative agreements, and the plaintiffs' amended complaint should be dismissed.

ARGUMENT

For a claim to survive a motion to dismiss, "the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above

the speculative level.'" *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)). A "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do'. . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (quoting *Twombly*, 550 U.S. at 555-56). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 557).

Plaintiffs' principal claim—breach of contract—turns on the proper interpretation of the "form contract" (Am. Compl. ¶¶ 2, 22) alleged in the amended complaint: the Purchase Letter. (Berarducci Decl. Ex. B.) Where the existence of an unambiguous contract is not in dispute, its interpretation is a question of law. *Lawyers Title Ins. Corp.* v. *JDC (America) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995) (citations omitted). Here, Florida law governs the substance of plaintiffs' claims. *See Anwar*, 2010 WL 4183645, at *6 (applying Florida law to plaintiffs' common law claims).

At the motion to dismiss stage, the Court is free to consider the account statements attached to plaintiffs' amended complaint and other account statements that are exemplars of account statements from which plaintiffs quote in the amended complaint. Fed. R. Civ. P. 10(c); *Welch* v. *TD Ameritrade Holding Corp.*, No. 07-CV-6904, 2009 WL 2356131, at *9 (S.D.N.Y. July 27, 2009). The Court is likewise free to consider certain documents outside the amended complaint, including "any written instrument attached to [the complaint] by reference," any document upon which "the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint," and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Anwar*, 2010 WL 4183645, at *3 (internal citations omitted). Thus, in addition to the Purchase Letter

and Statements of Accounts, the Court may consider the Subscription Agreement, the Offering Memorandum, and plaintiffs' Account Application and Agreement (and the Rules and Regulations Governing Accounts referred to therein) because they are integral to the amended complaint and plaintiffs had notice of them. *Spain* v. *Deutsche Bank*, No. 08-CV-10809, 2009 WL 3073349, at *3 n.3 (S.D.N.Y. Sept. 18, 2009); *Schnall* v. *Marine Midland Bank*, 225 F.3d 263, 266 (2d Cir. 2000) (considering Cardholder Agreement, account history, and monthly statements). "If a plaintiff's allegations are contradicted by [these documents], those allegations are insufficient to defeat a motion to dismiss." *Matusovsky* v. *Merrill Lynch*, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (Marrero, J.).

I. PLAINTIFFS FAIL TO ALLEGE A CONTRACTUAL OBLIGATION TO CALCULATE SERVICING FEES BASED ON A "MADOFF-ADJUSTED" VALUE OF PLAINTIFFS' INVESTMENTS IN THE SENTRY FUND.

Plaintiffs allege that the Bank breached the Purchase Letter by calculating the Servicing Fees based on the value of the Sentry Fund reported to the Bank by the Sentry Fund before the Madoff scheme was revealed. (Am. Compl. ¶ 49.) In short, plaintiffs contend that it is unfair that, over the course of their investment, they paid Servicing Fees on an investment that ultimately proved worthless because it was stolen by a third party. Plaintiffs' contention fails to state a claim for breach of contract for two reasons. *First*, the Purchase Letter authorized the Bank to calculate and charge Servicing Fees based on the monthly NAV as it was reported by the Sentry Fund. *Second*, plaintiffs waived any claim by failing to object to the method of calculation at the time those fees were charged.

A. Pursuant to the Terms of the Purchase Letter, the Bank Calculated and Charged Servicing Fees Based on the Value of Plaintiffs' Sentry Fund Shares as Reported to the Bank.

Plaintiffs do not allege that the Bank failed to accurately calculate or charge the Servicing Fees based on the reported value of their shares that the Bank received from the Sentry

Fund on a monthly basis. (Am. Compl. ¶ 31.) Rather, plaintiffs claim that the Bank was contractually obligated to calculate the Servicing Fees based on another value—a value based on the fraud perpetrated by BLMIS. (Am. Compl. ¶¶ 48-49.) Plaintiffs' argument finds no support in the actual terms of their agreement with the Bank.

The Purchase Letter states: "I understand that in connection with my purchase of [Sentry Fund] Shares, my account will be charged a distribution and servicing fee of .50% per annum calculated monthly *based on the month end NAV of the Shares* and payable on a quarterly basis." (Berarducci Decl. Ex. B (emphasis added).) "[S]hares of a hedge fund . . . do not trade over a stock exchange the same way that publicly-held securities are traded. Rather, hedge funds are open-end funds that directly sell and redeem their shares to and from shareholders at the shares' NAV," or price, which is set by the fund itself. *Jordan (Bermuda) Inv. Co.* v. *Hunter Green Invs. LLC*, No. 00-CV-9214, 2007 U.S. Dist. LEXIS 75376, *51 (S.D.N.Y. Oct. 3, 2007).[4] Unlike a closed-end fund or publicly traded security, the Sentry Fund did not trade on a stock exchange, such as the New York Stock Exchange. *See Strougo* v. *Bassini*, 282 F.3d 162, 165 (2d Cir. 2002) (distinguishing between closed-end and open-end funds). Rather, the Sentry Fund was an open-end fund and, thus, the Bank's necessary source of the "NAV," or "price," of the

[4] Such funds typically are priced by their net asset value, which is set by the fund and calculated by a third-party administrator or custodian. *E.g.*, *Pension Comm. of Univ. of Montreal Pension Plan* v. *Banc of Am. Sec. LLC*, 446 F. Supp. 2d 163, 172-73 (S.D.N.Y. 2006) (funds' offering documents established that third-party administrator would "report the values of securities held by the [f]unds," and that the funds' board of directors and investment manager would "determine at what value the investment securities are reported for the determination of the [NAV]"); *Anwar* v. *Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 393 (S.D.N.Y. 2010) (fund administrator of Sentry and other Fairfield Greenwich Group funds contracted to "calculate the Net Asset Value (the 'NAV')" of Sentry, which determined, among other things, plaintiffs' "reported profits"); *Bruhl* v. *PricewaterhouseCoopers Int'l*, No. 03-CV-23044, 2008 WL 899250, at *1 (S.D. Fla. Mar. 31, 2008) (Citco, as administrator, contracted to compute two hedge funds' net asset value).

Sentry Fund was the Sentry Fund itself. *See Jordan (Bermuda) Inv. Co.*, 2007 U.S. Dist. LEXIS 75376 at *51 (discussing price valuation of open-end fund); *see also* 11 FLA. JUR. 2D CONTRACTS § 158 ("Technical words are to be interpreted as usually understood by persons in the profession or business to which [the words] relate."); *Mellon Bank, N.A.* v. *Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1013 (3d Cir. 1980) ("Generally parties will be held to definitions given to words in specialized commercial and trade areas in which they deal. Similarly, certain words attain binding definition as legal terms of art."). It follows that the only reasonable interpretation of the term "month end NAV of the Shares" referenced in the Purchase Letter is the valuations and prices that the Sentry Fund reported on a monthly basis.[5]

The same theory raised by plaintiffs here was recently raised and rejected in *In re Beacon Associates Litigation*, No. 09-CV-777, 2010 WL 3895582 (S.D.N.Y. Oct. 5, 2010). In *Beacon*, plaintiffs sought to recover management fees from a Madoff feeder fund, claiming that the fees were charged in contravention of the applicable ERISA plan documents. The *Beacon* plaintiffs asserted that the plan documents should be interpreted to require that "fees [were] to be calculated as a percentage of *actual assets* under management" rather than the *reported* "assets and returns that turned out to be fictional." *Id*. at *24 (emphasis added). The *Beacon* court rejected plaintiffs' position on a motion to dismiss, reasoning that the defendants had acted in accordance with plan documents because, "[i]n providing the terms by which fees were to be calculated, . . . the [parties' agreements] *presumably anticipated that Defendants would use the figures reported to them to calculate fees*." *Id.* at *25 (emphasis added).

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[5] Plaintiffs do not allege that the Bank had a contractual obligation either to value the Sentry Fund itself or to obtain independent valuations from a third party. (*See generally* Am. Compl.)

Likewise, in *Hines* v. *Fiserv, Inc.*, No. 08-CV-2569, 2010 WL 1249838 (M.D. Fla. Mar. 25, 2010), a Florida federal district court dismissed a breach of contract claim where plaintiffs, who had invested in a Ponzi scheme through their IRA accounts, asserted that the custodian of their IRA accounts failed to report the "accurate value" of their holdings. *Id.* at *5-6. In rejecting this claim, the *Fiserv* court found that plaintiffs did not "point to any term in the contract which even arguably creates an obligation that [the custodian] would report the 'accurate' value of customers' holdings," and that "[v]ague allegations of some unidentifiable duties are not sufficient to state a claim for breach of contract." *Id.* at *5. This reasoning is just as applicable here. The Purchase Letter states that the Servicing Fees were to be calculated based on the month end NAV, not the "accurate" or "actual" value. There is nothing in the Purchase Letter that states or even implies that such fee would be adjusted or void in the event that the month end NAV was years later discovered to be false (in either direction).

Indeed, the Subscription Agreement and Offering Memorandum confirm that the parties understood that the Servicing Fees were to be based on the valuation figures reported to the Bank by the Sentry Fund.[6] Among other things, the Offering Memorandum explains that the "NAV of the Shares" referenced in the Purchase Letter could come only from the Sentry Fund:

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[6] The Purchase Letter and Subscription Agreement were executed at the same time, and both documents, along with the Offering Memorandum, are part and parcel of the plaintiffs' alleged purchase of the Sentry Fund shares. (Berarducci Decl. Exs. B-D.) These documents therefore may be interpreted together as part of the same general transaction. *Huntington on the Green Condo.* v. *Lemon Tree I-Condo.*, 874 So. 2d 1, 4 (Fla. Dist. Ct. App. 2004) ("[W]here two contracts are part and parcel of the same general transaction, they may . . . be interpreted together."); *see also Nat'l Fire Ins. of Hartford* v. *Fortune Constr. Co.*, 320 F.3d 1260, 1275 (11th Cir. 2003) ("[I]t is the general rule of contract law that where a writing expressly refers to and sufficiently describes another document, the other document is to be interpreted as part of the writing" (citation omitted)); RESTATEMENT (SECOND) OF CONTRACTS §§ 202(1), (2) ("all writings that are part of the same transaction are interpreted together").

- It defines the monthly "Net Asset Value of the Shares" as the subscription and redemption price that was set by the Sentry Fund on a monthly basis.
- It states that "[a]ll decisions on the valuation of assets and liabilities and determination of Net Asset Value [were] . . . made by the [Sentry] Fund's Board of Directors."
- It explains that the net asset value of the Sentry Fund was to be calculated "on a monthly basis by the [Sentry] Fund's administrator, Citco Fund Services (Europe) B.V."

(Berarducci Decl. Ex. D at 12-13, 28.)

Moreover, the Subscription Agreement and plaintiffs' monthly Statements of Accounts make clear that the valuations used to calculate the Servicing Fees were not guaranteed to be the "actual" value of the Fund's assets at any given time. The Subscription Agreement discloses that "the value of [the subscriber's] Shares and redemptions thereof, and the performance of the Fund, may be based on unaudited and in some cases, estimated, valuations of the Fund's investments and that any valuation provided in Subscriber's account statement may be an unaudited, estimated value." (Berarducci Decl. Ex. C ¶ 10.) The Statements of Accounts reiterate: "Prices are believed to be reliable, but their accuracy is not guaranteed." (Am. Compl. Ex. C at 4.) Further, pursuant to the express language of the Statements of Accounts, the charges to their accounts, including the Servicing Fees, were to be final after one month. (*See, e.g.*, Am. Compl. Ex. C at 4 ("This document is considered approved unless we are notified in writing of any objection within one month."); Berarducci Decl. Ex. F at 6, 8 (same) & Ex. G at 6, 9 (same).) In light of these documents, it simply is not plausible that the parties either understood or agreed that the Bank would charge the Servicing Fees based on a later discovered "actual" value of the Sentry Fund's assets.

Finally, plaintiffs' interpretation of the Purchase Letter cannot stand because it would lead to absurd results. Any interpretation of the Purchase Letter that required the Bank to calculate the Servicing Fees based on the "actual" value of the Sentry Fund's assets would have

to be based on a finding that plaintiffs and the Bank had contractually agreed either (1) that the Bank had a duty to uncover Madoff's Ponzi scheme (or any other improprieties) and to adjust for it when calculating the Servicing Fees each month despite the fact that plaintiffs do not contend the Bank had knowledge of the fraud before Madoff revealed his Ponzi scheme, (Am. Compl. ¶¶ 5-7, 26-27); or (2) that the Bank would guarantee in perpetuity the accuracy of the Sentry Fund valuations used and adjust the Servicing Fees, even if it learned years later that the valuations were inaccurate due to the fraud of a third party or for any reason.[7] Neither of these obligations finds any support in the Purchase Letter, and it would be absurd to read them into a so-called "form contract," (Am. Compl. ¶ 22), that, on its face, merely authorizes the Bank to charge standard servicing and distribution fees on an investment.[8] Courts should "construe a contract in a manner that accords with reason and probability and avoid an absurd construction." *Sigel* v. *Whitaker*, 946 So. 2d 1079, 1083 (Fla. Dist. Ct. App. 2006).

B. In Any Event, Plaintiffs Waived Any Breach of Contract Claim by Acquiescing for Almost Five Years to the Bank's Method of Calculating and Charging Servicing Fees.

Even if there were some contractual basis to complain about the Bank's method of calculating the Servicing Fees, plaintiffs waived any objections long ago. In general, "[w]aiver requires (1) the existence at the time of the waiver a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit." *Dooley* v. *Weil (In re*

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[7] Such an argument would of course mean that the Bank also could charge new fees in perpetuity if it turned out valuations were too low. Presumably, no customer would agree to that.

[8] *Cf. Rotolante* v. *Rotolante*, 22 So. 3d 684, 687 (Fla. Dist. Ct. App. 2009) (avoiding absurd construction of imposing a duty in perpetuity because, "[d]espite the use of the term 'future' in the provision, there is nothing to indicate an intention by the parties to obligate forever the former husband to pay all medical bills incurred by the former wife and children").

Garfinkle), 672 F.2d 1340, 1347 (11th Cir. 1982) (citations omitted). A waiver need not be express to be operative; it "can occur by failing to speak out in vindication of a claim when there is a duty to do so." *Arbogast* v. *Bryan*, 393 So. 2d 606, 608-09 (Fla. Dist. Ct. App. 1981) (citation omitted).

As discussed above, plaintiffs were informed of the manner in which their Sentry Fund shares would be valued when they executed the Purchase Letter and Subscription Agreement. Plaintiffs also received monthly Statements of Accounts that disclosed the reported value of their Sentry Fund shares, the amount of the Servicing Fees being charged to their account, and the fact that the Sentry Fund valuations may be estimates and were not guaranteed by the Bank. (*See, e.g.*, Am. Compl. ¶ 31 & Ex. C at 4; Berarducci Decl. Ex. F at 6 & Ex. G at 6.) Those statements also reminded plaintiffs that they could object within one month to the charges reflected on their account statements. (*See, e.g.*, Am. Compl. Ex. C at 4; Berarducci Decl. Ex. F at 6, 8 & Ex. G at 6, 9.)[9]

Simply put, plaintiffs "fail[ed] to speak out in vindication of" any right to have the Servicing Fees calculated based on a value other than the reported month end NAV of their Sentry Fund shares, and thereby waived any right to raise an objection now. *Arbogast*,

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9 This one month period to object was consistent with AEBI's and SCBI's Rules and Regulations Governing Accounts ("RRGA"). Each version of the RRGA in effect during the time plaintiffs held shares in the Sentry Fund states that "[a]ny statement . . . shall be deemed to have been examined by the Customer and shall be conclusive and binding on the Customer unless, within 30 days of the date on which such statement . . . is sent . . . the Customer notifies AEBI [or SCBI] in writing that it disputes any debit item thereon." (Berarducci Decl. Ex. J (2003 RRGA) § 9 & Ex. K (2006 RRGA) § 9 & Ex. L (2008 RRGA) § 9.) By signing an Account Application and Agreement when they opened their AEBI investment account, plaintiffs agreed to be bound by the terms of the RRGA, as amended from time to time. (Berarducci Decl. Ex. A ¶ 6(a).) Pursuant to the RRGA, the Bank was also authorized to charge plaintiffs fees for account services—such as executing securities transactions and providing safe custody of purchased securities—at its prevailing rates. (Berarducci Decl. Ex. J (2003 RRGA) § 17(c) & Ex. K (2006 RRGA) § 17(c) & Ex. L (2008 RRGA) § 17(c).)

393 So. 2d at 608-09 (finding real estate broker waived employer's alleged failure to properly calculate his commissions pursuant to agreement by accepting underpayments and failing to object for six years). Indeed, under Florida law, "[w]here a party fails to declare a breach of contract, and continues to perform under the contract after learning of the breach, it may be deemed to have acquiesced in an alteration of the terms of the contract, thereby barring its enforcement." *Acosta* v. *Dist. Bd. of Trs. of Miami-Dade Cmty. Coll.*, 905 So. 2d 226, 229 (Fla. Dist. Ct. App. 2005). Having accepted this method of calculating the Servicing Fees for some five years, plaintiffs cannot now maintain a breach of contract action against the Bank.

II. BECAUSE THIS IS A MATTER OF CONTRACT, THERE CAN BE NO CLAIM FOR UNJUST ENRICHMENT.

Plaintiffs allege alternatively that the Bank was enriched by its receipt of the Servicing Fees, and that it would be unjust to permit the Bank to retain the Servicing Fees because they "were calculated based on fraudulent and non-existent assets and, therefore, were well in excess of what is just and fair." (Am. Compl. ¶¶ 56-59.) Plaintiffs' unjust enrichment claim fails as a matter of law.

As this Court recognized in its decision and order of October 4, 2010, "[a]n unjust enrichment claim can exist only if the subject matter of that claim is not covered by a valid and enforceable contract." *Anwar*, 2010 WL 4183645, at *15 (citation omitted). This Court thus dismissed unjust enrichment claims brought by plaintiffs in *Headway Investment Corp.* v. *American Express Bank Ltd.*, No. 09-CV-8500; *Lopez* v. *Standard Chartered Bank International (Americas) Ltd.*, No. 10-CV-919; and *Valladolid* v. *American Express Bank Ltd.*, No. 10-CV-918, because those plaintiffs' complaints "explicitly or implicitly refer[red] to agreements between themselves and Standard Chartered." 2010 WL 4183645 at *15. Likewise here, plaintiffs' unjust enrichment claim should be dismissed because contracts governed their

relationship with the Bank. Plaintiffs explicitly rely on the existence of an agreement—the Purchase Letter—governing their relationship with the Bank in regards to the Servicing Fees. (*See* Am. Compl. ¶¶ 2, 22-23, 29, 39, 51.) Moreover, even if, as plaintiffs allege, members of the putative class "may not have contracts that govern some or all of their" Sentry Fund investment, (*id.* ¶ 53), or "the parties did not agree as to what would happen to fees that were charged based on investments in what turned out to be a Ponzi scheme," (*id.* ¶ 54), this does not remove their claims from the realm of their contracts with the Bank, which plainly govern the subject matter at hand: the Bank's charging of Servicing Fees.

"It is blackletter law that 'the theory of unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy.'" *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1337 (S.D. Fla. 2002) (citation omitted). Where "[p]laintiffs have not explicitly alleged that an adequate remedy at law does not exist, . . . the failure to do so is fatal." *Id.* (citing *Webster* v. *Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1326-27 (S.D. Fla. 2000); *Martinez* v. *Weyerhaeuser Mortg. Co.*, 959 F. Supp. 1511, 1518 (S.D. Fla. 1996)). Plaintiffs make no such allegation and therefore their claim must fail.

CONCLUSION

Plaintiffs do not plead a cognizable claim for breach of contract because the Bank properly carried out its contractual obligations to plaintiffs. Plaintiffs also fail to plead a valid claim for unjust enrichment because written contracts govern their claims. The Bank thus respectfully requests that the Court dismiss with prejudice plaintiffs' amended complaint in its entirety.

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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. and Standard Chartered Bank