IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-20206-CIV-MARTINEZ/BROWN

LORRENE DA SILVA FERREIRA and
ARLETE DA SILVA FERREIRA, individually
and on behalf of all other similarly situated,

Plaintiffs,

vs.

EFG CAPITAL INTERNATIONAL CORP. and
EFG BANK F/K/A EFG PRIVAGE BANK, S.A.,

Defendants.

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiffs, Lorrene Da Silva Ferreira and Arlete Da Silva Ferreira, hereby reply in support of their Motion for Class Certification [D.E. 66].

CLASSWIDE TREATMENT OF EFG CUSTOMER LOSSES IS APPROPRIATE

On December 11, 2008, when the Madoff fraud was revealed, 279 customers of EFG Capital lost their entire investments in Fairfield Sentry, totaling over $43 million in net losses. EFG Capital thereafter sent a number of written notices to those customers (the putative class members) proclaiming the virtues of the class action vehicle in recovering those losses. The notices described how class actions work, how they are typically resolved and how long they last. *See* **Ex. 1**. EFG Capital touted participation in the consolidated *Anwar* class actions against Fairfield Greenwich and others as "the best opportunity (for EFG customers) to maximize recovery." *Id.* EFG Capital takes a markedly different view of class actions now that Plaintiffs have filed one against it directly.

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EFG Capital's initial conclusion – that a class action is the best way for its customers to recover their losses from the Madoff fraud – is the correct one. None of EFG Capital's arguments precludes certification of a class in this case. First, common issues predominate: through a series of uniform actions with respect to all of its customers, EFG Capital assumed a fiduciary, advisory relationship with Plaintiffs and every class member. As a result, a jury may resolve Plaintiffs' breach of fiduciary claims without any inquiry into the circumstances of the

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putative class members' purchases of Fairfield Sentry, or whether EFG Capital "recommended" it. Moreover, EFG Capital's proffered defenses do not create individualized issues that predominate over the pivotal issues of liability common to Plaintiffs and class members. Any individualized issue may be addressed through a bifurcated trial plan, if necessary.

Second, Plaintiffs' claims are typical of the class claims. EFG Capital's allegation that Plaintiffs have unclean hands is untrue and does not control the determination of typicality. Moreover, EFG Capital misstates the law that controls any statute of limitations analysis in this case. Plaintiffs' claims are timely when examined under the correct legal standard.

Third, Plaintiffs have vigorously prosecuted the case and will continue to be adequate representatives of the class. Like every putative class member (including those who redeemed shares), Plaintiffs lost all of the money they had in Fairfield Sentry on December 11, 2008.

Fourth, class treatment is superior to the alternative: hundreds of individual arbitrations of whether EFG Capital was grossly negligent, was unjustly enriched, or breached its fiduciary duties. Resolving these predominant common issues in one trial rather than repeatedly litigating them, over and over again, is more efficient, less expensive and more just, as the possibility of inconsistent results would be eliminated.

Finally, Plaintiffs' class definition is more than adequate, and the Court may amend that definition as it deems necessary.

FACTS SUPPORTING CLASS CERTIFCATION

A. Fairfield was EFG Capital's Largest, Most Lucrative Hedge Fund Product

Fairfield Sentry ("FFS") was a hedge fund sponsored by Fairfield Greenwich Group ("Fairfield Greenwich"), that had delegated all investment decisions, trade execution authority, and physical custody of securities to Bernard Madoff Investment Securities ("BMIS"). *See* **Ex. 2** at 6, 13, 16. EFG Capital began selling FFS to its clients in 1998, shortly after EFG Capital began its business operations. (*See* Depo. of Sixto Campano ("Campano"), **Ex. 3,** at 12). From that time until the Madoff fraud was revealed, EFG Capital sold more FFS shares to its clients, in both dollar value and volume, than any other hedge fund. (*Id.* at 13).

Sales of FFS generated significant revenues for EFG Capital. From the beginning, and throughout its 10-year relationship with FFS, EFG Capital entered into a series of "Agency Agreements" pursuant to which – in return for selling FFS shares – EFG Capital received an incentive fee equal to a percentage of Fairfield Greenwich's 20% cut of any appreciation in the

value of investor's shares in Fairfield Sentry.[1] (*See* **Ex. 4**; Ex. 3 at 23-24). Over time, EFG Capital's cut as selling agent for Fairfield Greenwich fluctuated from 15% to 25%. (*Id.* at 27). EFG Capital also received a "management fee" equaling 20% of the 1% management fee that Fairfield Greenwich received for managing FFS.

Over time EFG Capital was paid more than $2.6 million in FFS-related fees (called "retrocessions")[2] for all of its customers' investments – regardless of whether they were recommended, solicited, unsolicited, or transferred in from another broker. (*Id.* at 31-32). EFG Capital also earned more than $1 million in rebates through a revenue sharing agreement with its affiliate, EFG Bank, which held accounts for those customers. (Ex. 5 ¶ 6). And EFG Capital received more than $660,000 in direct commissions from clients who subscribed for shares in FFS. (*Id.* ¶ 7). EFG Capital has not paid back any fees or commissions to Fairfield clients since Madoff's fraud was revealed. (Ex. 3 at 231).

B. EFG Capital Undertook the Duty to Conduct Due Diligence Analysis and Monitoring of Hedge Funds on its Recommended List

EFG Capital's brokers were not permitted to sell, or offer for sale, any hedge fund that was not on EFG Capital's "recommended" or "approved" list. (Ex. 3 at 61). Any customer wishing to purchase an unapproved hedge fund, or who had purchased such a fund elsewhere and then transferred it into an EFG Capital account, was required to sign a written disclosure stating that EFG Capital was not responsible for any losses associated with the Fund. (*Id.* at 62-63).

For those hedge funds that made it to the recommended or approved list, EFG Capital had a policy (i) to conduct an initial due diligence analysis of the fund, to ensure that it was a suitable fund and (ii) to periodically monitor the fund to determine its continued suitability to remain on the list. (*Id.* at 75-76). When funds were removed from the list, customers holding the fund were informed. (*See* **Ex. 6**; *see also* Depo. of Miguel Yannuzzi ("Yanuzzi"), **Ex. 7**, at 43-44). From 1998 until Madoff's fraud was revealed, FFS remained on EFG Capital's recommended list.

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[1] Fairfield Greenwich (Bermuda) Ltd. was the purported investment advisor to FFS, but in actuality all investment decisions were made by BMIS. Fairfield Greenwich nevertheless received 20% of the "earnings" of the fund on a quarterly basis, as a "performance fee." Curiously, BMIS was not paid for its "services" in actually making the trading decisions.

[2] *See* EFG Capital Am. Interrog. Resps., **Ex. 5**, ¶ 4.

C. <u>EFG Capital's Inadequate Due Diligence of Fairfield Sentry and Non-Existent Due Diligence of Madoff</u>

The relationship between the EFG group of companies and Fairfield Greenwich originated with and was maintained by EFG Capital. (Ex. 3 at 69, 103-04). Therefore, EFG Capital did an initial, but minimal, due diligence on FFS for all EFG affiliates. (*Id.* at 134-35). EFG Capital's early due diligence of FFS consisted primarily of collecting and reviewing the agreements between the Fund, its administrator and its purported custodian (Citco Global Custody N.V.), and engaging in informal discussions about the Fund by EFG Capital's three principals. (Depo. of Victor Echevarria ("Echevarria"), **Ex. 8**, at 68-69). EFG Capital did not conduct any background check of Madoff and BMIS. (*Id.* at 71). Two years later, EFG Capital sent its part-time, in-house counsel and compliance officer to New York City to meet with FFS. *See* **Ex. 9**. At the meeting, the compliance officer reviewed Fairfield's administrative and custodial agreements and drafted a memorandum summarizing them. He did not request or review any agreement between FFS and BMIS, a request that EFG Capital's subsequent due diligence officer, Michael Donnell, acknowledged would have been the "best practice." (Depo. of Michael Donnell ("Donnell"), **Ex. 10**, at 228-29).[3] Until 2005, that was largely the extent of EFG Capital's due diligence. The due diligence file was held in an office file cabinet where, as Echevarria described in 2005 email, it became "stale." *See* **Ex. 11**.

EFG Capital did not have an employee dedicated to the due diligence function until 2005, when it hired Donnell to formalize the company's due diligence procedures. (Ex. 8 at 76). In 2006, EFG Capital implemented a program to upgrade and "improve" its due diligence process (*Id.* at 260), but decided not to apply that program to hedge funds already on its approved list such as FFS. (*Id.*). In 2007, EFG Capital hired Greenwich Alternative Investments ("GAI") to do a "more robust review of the hedge fund platform that we approved." (*Id.* at 60, 68). But GAI did not conduct any comprehensive due diligence review of FFS, and later publicly announced that it had not recommended any Madoff-related investment to any of its own customers, because it was not allowed to conduct full due diligence about Madoff or his operations. *See* **Ex. 12**; *see also* Depo. of Campano, Part 2, **Ex. 13**, at 115-16.

[3] Donnell testified that he never reviewed a subcustodial agreement either. (Ex. 10 at 229).

EFG Bank and other EFG Capital affiliates also conducted due diligence of FFS and Madoff over the years. (Ex. 10 at 253; Ex. 3 at 91-93). Like EFG Capital's due diligence of FFS, EFG Bank's due diligence was unstructured; the only written FFS due diligence analysis done by EFG Bank consisted of notes on a computer laptop, which were never shared by EFG Bank with EFG Capital. (*Id.* at 143-46). Nor did EFG Bank share with EFG Capital its due diligence of Madoff relating to a hedge fund called the "Focus Fund." (Ex. 13 at 73-74). The Focus Fund was an EFG Bank-sponsored fund that fed investor money directly into BMIS. *See* **Ex. 14**. While EFG Capital believed that the Focus Fund had been given full transparency into Madoff's operations, it never reviewed EFG Bank's due diligence because of an inter-company dispute as to whether EFG Capital would pay EFG Bank for the privilege. (Ex. 13 at 81-83).

Other divisions of EFG Bank also conducted due diligence of FFS and/or Madoff and declined to do business with either. After the fraud was revealed, a senior EFG Bank official noted that several areas of the bank "did not accept the Madoff funds on DD [due diligence] grounds." *See* Composite **Ex. 15**. In fact, the former President of EFG Capital (and a present Director) redeemed all of his customers' investments in two Madoff feeder funds, including FFS, in 2007 "based upon the negative image I had regarding Madoff" and – in complaining to his own investment advisor about customer funds that had not been redeemed – stated:

> Many banks around the world decided long ago that Madoff did not pass their DD, basically because the returns could not be reproduced, the trades could not be verified with Madoff counter parties, and the auditors Madoff used were no-names instead of reputable world-class firms.

See **Ex. 16**. None of these due diligence analyses resulting in a rejection of FFS and Madoff by EFG Bank caused EFG Capital to discontinue doing business with FFS. (Ex. 13 at 121-122).

D. EFG Capital Knew of Numerous Red Flags Relating to Fairfield Sentry

Despite an initial due diligence analysis and supposed periodic monitoring of FFS, EFG Capital turned a blind eye to numerous red flags that caused many others – including EFG Bank and other affiliates – to refuse to do business with FFS or Madoff. For example, in May 2001, EFG Capital's Chairman, Victor Echevarria, received and read copies of articles from two financial publications, *Barron's* and *HedgeMar* (*see* Composite **Ex. 17**), that had raised questions about Madoff's purported returns and secret operations, and which had specifically pointed to FFS as having huge exposure to Madoff. Echevarria testified that the articles raised serious "concerns" within EFG Capital about Madoff's operations. (Ex. 8 at 129, 134). The

concerns were so severe that Echevarria claims to have contacted and questioned Fairfield Greenwich about the articles. (*Id.* at 134). Although Echevarria testified that Fairfield Greenwich provided "answers" to alleviate his concerns, he could not recall what exactly what the "concerns" were, or what Fairfield Greenwich told him to put him at ease. (*Id.*). Echevarria admitted, however, that the concerns were great enough to require communication with his boss, EFG Bank CEO Lawrence (Lonnie) Howell, who also had read the articles. (*Id.* at 138-40). Echevarria never contacted Madoff, however, whom he had met in Madoff's offices in the late 1990s. (*Id.* at 116, 153-55). Despite the red flags raised in the articles, EFG Capital continued to do business with FFS.

One of the red flags highlighted in the 2001 articles was Madoff's lack of "transparency." Transparency gives a broker "an understanding and an ability to understand and . . . even verify the trading activity of a manager, what they do, how they do it, when they do it." (Ex. 3 at 151). For years, EFG Capital had received warnings about this lack of transparency at FFS and BMIS, including numerous warnings from EFG Bank.[4] In fact, EFG Bank's management – led by its President – had "expressed strong doubts about Madoff as early as 2002."[5]

EFG Bank repeatedly asked EFG Capital, which managed EFG's relationship with Fairfield Greenwich (*see* **Ex. 21**), to seek more transparency from Fairfield and Madoff. On February 21, 2003, Jerome Schonbachler of EFG Bank emailed Campano and asked:

> "We are now talking about 2 flat months and 2 down months. I would not have a concern if we had more transparency . . . . <u>Do you think it would be a good time to ask Fairfield for more transparency??? I think so</u>.

See **Ex. 22** (emphasis added). Campano responded:

> [W]hat do you want to see exactly so that I may ask them? . . . <u>I understand that we have all had some discomfort w/ Fairfield for long. However, it seems to me that we are all going into a bit of a frenzy over this</u>. . . . Let's find out what we need to find out but let's not get too worked up yet!!!"

Id. (emphasis added). Schonbachler responded that he wanted copies of the most recent trade confirmations FFS had received from Madoff. *See* **Ex. 23**. When Fairfield offered to make those trade confirmations available for inspection in New York, Campano told EFG Bank he

[4] *See* 10/16/02 Email from Jerome Schonbachler of EFG Bank, **Ex. 18** ("Sentry is very opaque"); 8/14/07 Email from Jim Lee of EFG Bank, **Ex. 19** ("Just remember there is minimal disclosure. I wonder if GA has Fairfield (I think they said no because of non-disclosure).").

[5] *See* 12/15/08 Email from J. Lee to V. Echevarria, S. Campano, et al., **Ex. 20**.

would go there himself. (*See* **Ex. 24**). But he never did. (Ex. 3 at 165). Instead, Campano and EFG Capital resisted suggestions by EFG Bank to remove FFS from its recommended list.[6] Campano resisted, noting that "even if [FFS] all goes to hell, we [EFG] would only be hit like 3mm." (Ex. 22). Had Fairfield Sentry indeed "gone to hell" at that time, EFG Capital's customers stood to lose more than $100 million. (Ex. 3 at 159).

E. EFG Capital and EFG Bank Learn That Madoff is "Cheating" by Ignoring the "Chinese Wall" Between his Market Making and Advisory Activities

On February 24, 2003, EFG Capital and EFG Bank received a memo written by an EFG Bank employee, Mats Pehrsson, summarizing his meeting with senior FFS executives and an EFG Bank customer who was considering opening a Madoff feeder fund (with an EFG affiliate to serve as Fund administrator). ("The Pehrsson Memo", **Ex. 26**). In his Memo, Pehrrson stated that the senior FFS executives had told him "off the record" that Madoff and BMIS were "cheating". Pehrrson wrote:

> The key to [Madoff's] success and the very stable performance of F.S., most likely lies in his market making function: FGG said "off the record" -- that [BMIS] is "cheating" and there is a "hole in the 'Chinese wall' which is supposed to separate [Madoff's] market making from the fund managing function.' Due to [Madoff's] role as a leading market maker, the firm sees the whole market and where it is heading. . . ."

Id. at 2 (emphasis added). Pehrsson continued, "Fairfield Sentry is and remains something of a black box because of the concentration of all major functions with [Madoff]." Pehrsson aptly summarized "the black-box problem" at FFS – which had caused so many other banks, including divisions of EFG Bank, to refrain from doing business with FFS or Madoff – as follows:

> **The Problem:**
>
> 1. [BMIS] is investment advisor/manager and custodian and prime broker for the fund resulting in reduced transparency.
> 2. Fairfield's auditors (PWCL) rely largely on information provided by MS' auditors which is not one of the leading names.

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[6] *See* 2/24/03 Email from Bassam Salem ("Victor/Sixto, how about moving it from recommended list to approved list?"); *and* 2/24/03 Email from EFG Bank's Markus Caduff, who later became its CEO ("We are currently working on another letter to encourage clients to sell Fairfield and we have a ceiling from the board on assigning LV to it. I think Fairfield should be removed from the recommended list."), Composite **Ex. 25**.

Id. at 4 (emphasis in original).

Campano acknowledged reviewing the Pehrsson Memo (Ex. 3 at 183), but took no action on it. Campano acknowledged, however, that if FFS had told him (as opposed to Pehrsson) that Madoff was "cheating," then Campano would have investigated, called a "high-level meeting" with FFS and Madoff, and "likely then turn[ed] around and recommend[ed] that we take it off the recommended list and possibly even more." (*Id.* at 206-08). Campano did not investigate or act, however; in fact, he did not even speak to anyone — not Pehrsson, not Howell, not Echevarria, not "anyone" — about the high-level Memo that implicated EFG Capital's largest-selling hedge fund. (*Id.* at 186-87). EFG Capital never took FFS off of its Recommended List or otherwise alerted its customers.[7] Instead, Campano and EFG Capital kept selling FFS to its customers for almost six years. *See* **Ex. 28.**

F. As Concerns Grew, EFG Capital Limited EFG Bank's Own Exposure to FFS

As concerns about FFS grew within the EFG universe of companies, efforts were made to limit any EFG company's own financial exposure in the event that FFS collapsed. Beginning in 2002 and continuing until Madoff's confession, EFG Bank limited the amount of money that it would lend to those EFG Capital customers whose accounts held Fairfield Sentry Investments. *See* Composite **Ex. 29**. For purposes of making loans, EFG Bank valued FFS shares at only 25% of stated value, and the President of EFG Bank placed an aggregate global lending limit – for all customers owning Fairfield Sentry – of $15 million. *See* **Ex. 30.**

G. EFG Capital Ignored Other Discrepancies

EFG Capital not only ignored a direct statement by FFS that Madoff was "cheating," it discounted or missed other discrepancies in what it was being told. Shortly after the *Barron's* and *HedgeMar* articles came out in May 2001, Fairfield Greenwich sent a letter to EFG Capital denying, among other things, that BMIS was using information obtained from Madoff's market-making operation. *See* **Ex. 31**. However, less than two years later, in February 2003, EFG Capital received the Perhsson Memo showing that Fairfield Greenwich did, in fact, believe Madoff was peering through the Chinese Wall.

[7] EFG Capital delisted some funds on its Recommended List from 1998 to 2008. (Ex. 3 at 77). In fact, EFG Capital delisted another Madoff feeder fund, Kingate. (*See* **Ex. 27**). Notably, Kingate did not generate any retrocessions for EFG Capital. (Ex. 3 at 46).

EFG Capital was also told by Fairfield Greenwich that Madoff insisted upon having sub-custody over the Fund's shares because he did not want to reveal his "proprietary trading strategy." (Ex. 8 at 251-52, 329-30). At the same time, however, Fairfield Greenwich told EFG Capital that Madoff was sending trade confirmations containing that very strategy to both Fairfield Greenwich and Citco on a real-time basis.[8] (*Id.* at 252). In addition, the FFS prospectus that EFG Capital provided to its customers removed references to Madoff in 2003, then added them back in 2006. And despite the fact that Madoff clearly held subcustody of the fund's shares, EFG Capital received a curious letter from Fairfield Greenwich's general counsel insisting that custody of those shares was held by Citco. *See* **Ex. 32**.

H. EFG Capital Treated all of its FFS Customers Uniformly

With respect to FFS, EFG Capital did not differentiate among its customers; regardless of whether their holdings had been recommended, solicited, unsolicited, or transferred in from another brokerage account, holders of FFS were treated identically by EFG Capital.

For example, as EFG Capital sold more and more FFS Shares to its customers and as Madoff's purported investment returns continued their unprecedented upward path year after year – customer accounts grew. For this reason, throughout 2002, 2003 and thereafter, EFG Bank pressured EFG Capital's executives to address the issue. *See* Composite **Ex. 33**. Ultimately, in February 2003, EFG Capital complied with a request by EFG Bank President Lonnie Howell to draft and send a letter to all clients holding a 20% or greater concentration of FFS recommending that they reduce that concentration to below 20%. *See* **Ex. 34**. In doing so, EFG Capital required its brokers to analyze every customer account containing FFS, regardless of whether EFG Capital had recommended FFS to that customer. (Ex. 3 at 174). EFG Capital's brokers followed up with each customer receiving the letter and logged each communication. *See* Composite **Ex. 35**. EFG Capital has never sent a similar letter to clients holding any other hedge fund it has sold. (Ex. 3 at 175).

Another example of uniform treatment of EFG Capital customers is the manner in which EFG Capital dealt with the risk created by Madoff's sub-custody of FFS shares. Madoff not only had total discretionary authority to execute all trades for the Fund, he held physical custody of

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[8] There were also inconsistencies in Fairfield Greenwich's statement regarding the frequency of the trade confirmations. EFG Capital was told both that confirmations were reviewed on "a real-time basis" (Ex. 9) and "no less frequently than monthly" (Ex. 31).

the Fund's shares as well. In 2000, EFG Capital sent notices to all clients holding FFS, regardless of whether EFG Capital had recommended FFS to those customers, advising them of this sub-custody risk (the "Notice to Clients") (*See* **Ex. 36**; Ex. 3 at 213-18). EFG Capital also implemented a policy to provide the Notice to Clients to all subsequent customers at the time of purchase, regardless of whether the purchase was recommended or solicited. EFG Capital required all of its brokers to discuss the notice with customers and require them to sign it. *See* Composite **Ex. 37**. EFG Capital kept a log tracking customer sign-offs. *See* **Ex. 38**. EFG Capital also periodically sent all of its clients holding FFS other information about FFS, regardless of whether EFG Capital had recommended FFS to those customers.

When Madoff's fraud was revealed, EFG Capital unilaterally applied to FFS for redemptions of all of its customers' holdings, regardless of whether EFG Capital had recommended FFS to those customers. *See* **Ex. 39**.

LEGAL ARGUMENT

"Rule 23 is given liberal rather than restrictive construction and courts are to adopt a standard of flexibility in application in order to best serve the ends of justice and promote judicial economy." *Sharif v. N.Y. State Educ. Dep't*, 127 F.R.D. 84, 87 (S.D.N.Y. 1989); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). "Moreover, if an error is to be made with respect to class certification, it is to be in favor and not against the maintenance of a class action." *Sharif*, 127 F.R.D. at 87 (quotation omitted).

For the reasons stated below and in Plaintiffs' Motion for Class Certification, Plaintiffs have established the requisites to certification and litigation of this case as a class action.

1. COMMON ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES

In an effort to deny Plaintiffs and putative class members the strengths and efficiencies of class treatment, EFG Capital mischaracterizes the common issues in this case and exaggerates supposed individualized ones. As the evidence proffered above shows, contrary to EFG Capital's assertions, common issues predominate.

A. The Legal Standard for Predominance

Common issues of fact and law predominate if they "have a direct impact on every class member's effort to establish liability" that is greater than the impact of the individualized issues of each class member. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2009) (citation omitted) (affirming trial court's ruling that plaintiffs' RICO claims predominated over individual

issues specific to each plaintiff); *see also Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) ("The predominance requirement is met if the plaintiff can establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof.").

B. Each of Plaintiffs' Claims Contains Significant Common Issues That Predominate Over Individualized Issues

Each of Plaintiffs' three claims — gross negligence, breach of fiduciary duty and unjust enrichment — contains significant common issues that predominate over individualized issues.

1. The gross negligence claim contains pivotal common issues relating to EFG Capital's breaches of its duty of care and duty to warn

Under Florida law, EFG Capital has a duty to refrain from any "act or omission that a reasonable, prudent person would know is likely to result in injury to another." *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 793 n.17 (Fla. 2004). Moreover, EFG Capital has a duty to warn all parties with whom it has a special relationship about tortious or criminal conduct that could injure those parties. *See Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 338-39 (Fla. 4th DCA 1998). These duties create the following straightforward yet pivotal issues common to all Plaintiffs and putative class members:

1. Whether EFG Capital breached its duty of care by failing to conduct adequate ongoing due diligence analysis of FFS; and

2. Whether EFG Capital breached its duty to warn its FFS customers that FFS believed Madoff to be "cheating"?[9]

These issues are common to Plaintiffs and all putative class members, and will be resolved by common proof that does not vary from customer to customer. As to the first issue, EFG Capital conducted an insufficient due diligence analysis of FFS, which uniformly affected all of its FFS customers. As to the second issue, EFG Capital failed to warn all any of its

[9] The duty to warn also raises the common question of whether EFG Capital had a special relationship with Plaintiffs and putative class members. The answer to that question is undisputed. Citing the *Gochnauer* case, EFG Capital acknowledges that it has a heightened, fiduciary relationship with its FFS customers. (Resp. at 23-24). Thus, although the parties dispute the scope of the duties arising out of that relationship, see Part 1.B.2 below, there is no dispute about the relationship's existence.

customers about what it had learned from the Pehrsson Memo. (That is, EFG Capital did not warn some Plaintiffs or class members but not others).

Not only are these issues common to all class members, a jury reasonably could answer them in the affirmative given the facts discovered thus far, which are common to all class members. Although EFG Capital's informal due diligence process recognized the subcustody issue, EFG Capital failed to examine the stated reasons behind that unusual and risky arrangement. EFG Capital accepted FFS's explanation for subcustody — that Madoff did not want to reveal his trading strategy to anyone — even though that explanation was completely inconsistent with FFS's statements that Madoff was sending trade confirmations containing that strategy to both Citco and Fairfield Greenwich on a real-time basis. EFG Capital also failed to step up its due diligence after it reviewed the *Barron* and *HedgeMar* articles or after it received the Pehrsson Memo and Fairfield Greenwich's inconsistent statements about Madoff's Chinese wall. Instead, EFG Capital allowed its due diligence of FFS to go stale, and then when it upgraded its due diligence processes, it failed to apply those upgrades to FFS. EFG Capital also failed to obtain or review due diligence analysis conducted by other EFG affiliates who had rejected Madoff on due diligence grounds. These failures are common to all of its customers.

A jury also could reasonably find that EFG Capital breached its duty to warn, which would extend to each client holding FFS. Campano, EFG Capital's corporate representative and CEO, explained its duty perfectly when he testified that, had Fairfield Greenwich told him (rather than Pehrsson) that Madoff was cheating, he would have "take[n FFS] off the recommended list and possibly even more." Fairfield Greenwich had clearly informed both EFG Bank and EFG Capital that Madoff was exploiting a "hole in the Chinese wall" to his market-making operation, an illegal practice that exposed FFS to the intervention of regulators. As Campano acknowledges, EFG Capital should have taken FFS off of its recommended list and warned customers.

2. The breach of fiduciary duty claim contains common issues relating to the scope of EFG Capital's duty and its breach of that duty

The following common questions exist relating to Plaintiffs' and class members' breach of fiduciary duty claims:

1. What is the scope of EFG Capital's fiduciary duties to Plaintiffs and putative class members, given the actions taken by EFG Capital with regard to all Plaintiffs and class members?

2. Whether EFG Capital breached those duties by failing to do adequate due diligence and/or disclose known risks?

EFG Capital acknowledges its fiduciary duties (i) to recommend investments only after conducting due diligence and (ii) to inform customers of known risks. *See Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987). But EFG Capital also tries to narrow the scope of those duties, arguing that because Plaintiffs' and some class members' accounts were nondiscretionary, EFG Capital's duties began and ended only with transactions in which EFG Capital "recommended" FFS. EFG Capital argues that a laborious, individualized analysis of those transactions is therefore required to determine who received a recommendation.

EFG Capital's argument ignores the fact that through its actions, EFG Capital assumed a broader, advisory role toward all of its customers holding FFS, thus expanding the scope of its duties to all such customers and transactions.[10] As Judge Marrero recognized in the multidistrict *Anwar* case, under Florida law the scope of a broker's fiduciary duties expand where the relationship between broker and investor "develops beyond a nondiscretionary one."[11] *Anwar v. Fairfield Greenwich Ltd.*, --F. Supp. 2d--, 2010 WL 4183645, at *13 (S.D.N.Y. Oct. 4, 2010)[12] ("*Anwar III*") (citing *Ward v. Atl. Sec. Bank*, 777 So. 2d 1144 (Fla. 3d DCA 2001)); *cf. Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994) (holding in analogous context that "[w]here the lender has voluntarily assumed additional roles, accompanying [fiduciary] responsibilities properly follow").

EFG Capital certainly exercised discretion with respect to all of its customers' FFS accounts, and advised all of them on a uniform basis after the customers had purchased FFS shares. Days after Madoff's fraud was discovered, EFG Capital unilaterally exercised discretionary power over the accounts by applying for redemptions from Fairfield Greenwich for all of its customers' shares of FFS, without first consulting those customers. In early 2003, EFG Capital conducted an analysis of the accounts of <u>every</u> client holding FFS to identify accounts with a greater than 20% concentration in FFS. EFG Capital then sent a letter to each such customer, advising them to reduce their concentration in FFS, and then followed up with each

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[10] *See* Expert Opinion of Paul F. Meyer, **Ex. 40**.

[11] EFG Capital has moved the J.P.M.L. to transfer Plaintiffs' case to Judge Marrero and consolidate it with *Anwar*.

[12] *Rev'd in part on other grounds*, -- F. Supp. 2d --, 2010 WL 4739949 (S.D.N.Y. Nov. 16, 2010) (reinstating certain claims dismissed in Oct. 4 order).

customer who received the letter. EFG Capital also implemented a uniform policy of notifying all clients investing in FFS that the fund's shares were sub-custodized by Madoff and BMIS, and requiring all clients to sign an acknowledgement of receipt of those notices.

Importantly, EFG Capital directed these actions toward all of its customers holding FFS, regardless of whether EFG Capital had recommended FFS to those customers or whether a particular customer had transferred its shares from another broker. As a result, the jury's determination of the scope of EFG Capital's fiduciary duties does not require an examination of EFG Capital's particular relationship or interaction with individual clients or transactions.[13]

With regard to the second common issue — whether EFG Capital breached the fiduciary duty described above — that determination can also be made by the jury on a class-wide basis using proof common to all class members. The facts supporting Plaintiffs' breach of fiduciary duty claim are substantially similar to the facts supporting gross negligence, and are common to every Plaintiff and class member.[14] EFG Capital's (inadequate) due diligence was uniform to all Plaintiffs and putative class members, and EFG Capital failed to disclose known risks, including the risks outlined in the Pehrsson Memo, to any of its customers.[15]

[13] EFG Capital's corporate representative, Campano, has testified that an examination of EFG Capital's trade tickets show that 186 of the Plaintiffs' and class members' subscriptions were "solicited." (Ex. 3 at 150; *See also* Affidavit of Sixto Campano, **Ex. 41**, ¶ 32). He also conceded that if a subscription is "solicited," then it is also "recommended." (Ex. 3 at 117). EFG Capital recommended FFS to Plaintiffs. (*Id.* at 119). Thus, even if a jury finds that the scope of EFG Capital's fiduciary duty is limited, and that EFG Capital owed a duty only to those Plaintiffs and class members to whom it recommended FFS, this Court can create a fiduciary duty subclass for those investors connected to those 186 solicited subscriptions.

[14] EFG Capital argues that an exculpatory clause in its account agreements forecloses certification of the breach of fiduciary duty claim because the clause limits claims to those involving "willful misconduct or gross negligence." Assuming the clause is valid and applicable (such clauses are disfavored in Florida), the facts discovered by Plaintiffs giving rise to their breach of fiduciary duty claim certainly rise to the level of willful misconduct and gross negligence. *See Anwar III*, -- F. Supp. 2d --, 2010 WL 4183645, at *14 (denying dismissal of similar clause).

[15] *See In re Old Naples Secs., Inc.*, 343 B.R. 310, 321-24 (Bankr. M.D. Fla. 2006) (holding that broker's failure to investigate red flags or disclose known risks to investors was a breach of fiduciary duty); *Silverman v. Pitterman*, 574 So. 2d 275, 276 (Fla. 3d DCA 1991) ("A broker is obligated to inform the principal of any circumstance which might reasonably be expected to influence the complete loyalty of the broker to the interests of his principal."); *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc.*, No. 97 CIV. 4978(LMM), 2002 WL 88226, at *4 (S.D.N.Y. Jan. 23, 2002) (denying summary judgment on breach of fiduciary duty claim where broker knew or should have known of fraudulent scheme).

3. Plaintiffs' unjust enrichment claim contains common issues

Plaintiffs' unjust enrichment claim may be treated on a class-wide basis too. These issues include:

1. Whether Plaintiffs and class members conferred a benefit on EFG Capital?
2. Whether EFG Capital voluntarily accepted and retained that benefit?
3. Whether, given EFG Capital's failure to conduct adequate due diligence or warn Plaintiffs and class members about known risks relating to Fairfield Sentry, it would be inequitable for EFG Capital to retain those benefits?

Here, it is undisputed that all customers who purchased FFS from EFG Capital conferred a collective multimillion-dollar benefit on EFG Capital in the form of commissions paid by those customers directly and retrocessions paid by Fairfield Greenwich (through a reduction in the value of customers' shares). EFG Capital even received retrocessions relating to the transferred accounts. The issue of whether EFG Capital voluntarily accepted and retained those benefits is not only common to all, it is undisputed, as EFG Capital has not paid back any fees since Madoff's fraud was revealed.

Finally, the issue of whether it would be inequitable for EFG Capital to retain the benefits is also a common one. Campano himself wrote in an email to EFG Bank that he believed EFG Capital should give back the rebates it received for Madoff funds because those "rebates came from a performance that was bogus and with money that really belonged to investors."[16] Because Plaintiffs' unjust enrichment claim is subject to generalized proof relating to all class members, it is appropriate for it to be given class treatment. *See Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 581 (M.D. Fla. 2006) (certifying unjust enrichment claim); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 697-98 (S.D. Fla. 2004) (same).

[16] At his deposition, Campano retreated from this statement, saying that after speaking with his boss, EFG Bank President Lonnie Howell, "I am not right now in a position to make that determination because I don't know how much clients are going to get back from this and, frankly, since then, I've also realized that [EFG Capital] did a lot of work during the years for this [money]. So I don't have exactly the same position right now." (Ex. 3 at 233-24).

4. EFG Capital's defenses do not defeat class certification

EFG Capital argues that its comparative negligence, unclean hands, reliance and statute of limitations defenses present individualized issues that should defeat class certification.[17] EFG Capital's reliance and statute of limitations defenses can be dispatched immediately. Reliance is not an element of any of Plaintiffs' claims.[18] *See, e.g., Gochnauer*, 810 F.2d at 1050 (holding that reliance is not an element of fiduciary duty claim under Florida law). Even if it were, Plaintiffs have not alleged that EFG Capital has misrepresented or omitted anything. Rather, Plaintiffs have alleged broadly that EFG Capital breached its fiduciary duty and was grossly negligent and unjustly enriched by failing to conduct adequate due diligence and to warn about known risks relating to FFS. With respect to the statute of limitations (discussed in Part 2.B below), no such defense is applicable to the claims of any Plaintiff or class member. Claims did not accrue until December 11, 2008, the date Madoff's fraud was revealed, which is well within the applicable limitations period.

With regard to EFG Capital's remaining defenses of comparative negligence and unclean hands, the mere existence of individualized defenses will not bar class treatment of the claims. Courts acknowledge that although "a defense may arise and may affect different class members differently, this does not compel a finding that individual issues predominate over common ones." *Brown*, 609 F.3d at 483 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001)). "As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification under Rule 23(b)(3)." *Id.* (quoting *In re Visa*, 280 F.3d at 138).

Here, common liability issues predominate over EFG Capital's individualized defenses. The common issues described above are the pivotal issues in the case. To address the common issues, Plaintiffs will proffer considerable documentary evidence of EFG Capital's limited and

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[17] Unclean hands is a defense only to the unjust enrichment claim, and would not have any impact upon certifying the fiduciary duty and gross negligence claims.

[18] Even if reliance were an element, "[u]nder well-established Eleventh Circuit precedent, the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification." *LaGrasta v. First Union Sec., Inc.*, No. 2:01-CV-251-FTM29DNF, 2005 WL 1875469, at *10 (M.D. Fla. Aug. 8, 2005).

insufficient due diligence of FFS and Madoff — including testimony of witnesses, EFG Capital's due diligence file, documents evidencing the warnings that EFG Capital received not only from the financial press but from its own parent, EFG Bank, and documents showing EFG Capital's grossly negligent or even willful disregard of those warnings. Plaintiffs and class members also will proffer testimonial evidence from numerous witnesses about EFG Capital's supposed due diligence efforts, and its reactions to all of the warnings and red flags it received (particularly the Pehrsson Memo). Resolution of the common issues will "significantly advance" every class member's underlying case not only in the practical sense, but in the legal sense. *See Jenkins*, 782 F.2d at 472-73. Until the common issues are presented and resolved, the factfinder cannot even reach individualized issues of comparative negligence, unclean hands or damages.

Individualized issues are not as prevalent. This case does not involve complicated choice-of-law analyses or the examination of people's medical histories. It does not involve multiple sources of injury over extended time periods. It will not even involve the review of customer files and individual transactions. The uniform nature of EFG Capital's treatment of Plaintiffs and class members relieves any need to conduct customer-by-customer or transaction-by-transaction inquiries.

The individualized issues that EFG Capital wants this Court to consider essentially revolve around whether Plaintiffs and class members lied on their account applications (unclean hands) which they contend would somehow bar the customers' ability to have their commissions and EFG Capital's retrocession payments returned, or knew about the red flags (comparative negligence) that EFG Capital ignored. EFG Capital has not proffered any evidence as to whether – and how many – putative class members may actually be subject to those defenses.[19] EFG Capital does not even guess, thereby failing "to demonstrate that the existence of this issue is so prevalent among the claimants that they will present much proof on the issue later at trial." *See Arthur Young & Co. v. U.S. Dist. Ct.*, 549 F.2d 686, 696 (9th Cir. 1977).

Although individualized damage calculations may be required for class members, those calculations will be largely mechanical, and do not warrant the denial of certification given the

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[19] EFG Capital has not even revealed the names of its customers. It has superior knowledge about the authenticity of their account applications and their customers' level of Madoff understanding, yet failed to proffer any competent, admissible evidence to support these supposed individualized defenses.

overall predominance of liability issues.[20] *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2009); *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y. 1988).

5. The Court has discretion to address individualized issues through bifurcation

The Court also has the "sound discretion," if it chooses, to address any individual issues through a bifurcated trial plan. *See Brown*, 609 F.3d at 486. Applying Fed. R. Civ. P. 23(c)(4), courts throughout the country routinely address individualized defenses by "holding separate trials for plaintiffs subject to individual defenses that remain after the common questions of law and fact are resolved." *Brown*, 609 F.3d at 486; *see also, e.g.*, *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible."); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986) (affirming certification of class where individualized issues relating to numerous defenses would be resolved later in mini-trials of seven to 10 plaintiffs); *Arthur Young & Co.*, 549 F.2d at 690 (denying mandamus review of order that granted certification of liability issues and bifurcated reliance, causation and other defenses); *Mehl v. Canadian Pac. Ry., Ltd.*, 227 F.R.D. 505, 521-22 (D.N.D. 2005) (certifying class of people injured in train derailment and holding that individualized defenses as to whether derailment was the cause of each class member's injuries could be addressed separately).

This Court has the discretion to bifurcate EFG Capital's comparative negligence defense in particular. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1270-71 (Fla. 2006) (citing *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 632-33 (5th Cir. 1999)); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1023 (5th Cir. 1992) (affirming class certification in which the issue of defendant's negligence would be adjudicated on a class basis in first trial phase, with

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[20] Determinations relating to compensatory damages would involve a simple mathematical calculation: for fiduciary breach it would be the amount of each claimant's investments as of December 11, 2008; for gross negligence it would be the value of each claimant's investment on December 11, 2008 (numbers that EFG Capital already has calculated and produced) times the claimant's percentage of comparative fault, if any, less any set off. Damages relating to unjust enrichment would simply require the calculation of commissions and retrocessions EFG Capital received for the purchases of each Plaintiff and class member. With regard to punitive damages, the jury must determine whether EFG Capital's conduct "was so reckless or wanting in care that it constituted a conscious disregard or indifference to" Plaintiffs' and class members' rights. Fla. Stat. § 768.72((2)(b). An affirmative answer to that question would allow the jury to award punitive damages of up to $2 million per claimant. *See id.* § 768.73(1)(b).

individualized issues of causation and damages to be determined in subsequent phase); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561-62 (S.D. Fla. 1973) (Atkins, J.) (certifying class to determine defendant's negligence in exposing cruise passengers to contaminated food and water, and recognizing that the court's ruling on that issue would apply prospectively to subsequent actions addressing causation and other individualized issues).

The Fifth Circuit's decision in *Mullen* is instructive. In that case, the Fifth Circuit affirmed the certification of a class of 300 floating casino crew members who developed respiratory illnesses resulting from conditions inside the casino. *Mullen*, 186 F.3d at 623. The trial court approved a bifurcated trial plan that called for an initial phase of common liability issues, including consideration of whether the defendant was negligent. *Id.* If the plaintiffs succeeded in the initial phase, then individual issues of causation, damages and comparative negligence would be tried in a second phase. *Id.* The Fifth Circuit approved the plan, citing the trial court's finding that the plan would "avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually." *Id.* at 627.

Moreover, the Fifth Circuit distinguished an earlier ruling it made in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 751 (5th Cir. 1996) — a case relied upon by EFG Capital (Resp. at 26) — and held that the Seventh Amendment does not prohibit bifurcation of a negligence claim when causation and comparative negligence are considered in the second phase:

> In *Castano,* we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." Thus, in considering comparative negligence, the phase-two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the Casino unseaworthy, but only the degree to which those conditions were the sole or contributing cause of the class member's injury. Because the first jury will not be considering any issues of causation, no Seventh Amendment implications affect our review of the district court's superiority finding.

Mullen, 186 F.3d at 628-29 (citations omitted). Notably, the Supreme Court of Florida subsequently cited *Mullen* as persuasive authority on this very point in its consideration of the trial plan in the landmark Florida tobacco litigation. *See Engle*, 945 So. 2d at 1270-71 (holding that trial plan did not violate Florida Constitution's analog to Seventh Amendment where phase

one jury did not decide issues involving "whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries").

Mullen provides a blueprint for trying Plaintiffs' gross negligence claim on a class basis. The pivotal common issues listed above — whether EFG Capital breached its duties of care and to warn — can be tried in an initial trial phase, along with the fiduciary duty and unjust enrichment claims. If EFG Capital prevails, then the gross negligence claim is defeated. However, if Plaintiffs and class members prevail on either question, then a second phase of trials (perhaps, like *Mullen*, in waves of about five class members) could commence, if necessary,[21] to determine individualized issues relating to Plaintiffs and the class members, who by that time will be identifiable and reachable after having opted-in to the class. Specifically, this second phase would address the issues of causation and damages.

When viewed objectively, the common issues' "impact on every class member's effort to establish liability" is far greater than the impact of any individualized issue. *Klay*, 382 F.3d at 1255. The resolution of the key common issues of liability would greatly "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Brown*, 609 F.3d at 483. Moreover, the addition or subtraction of plaintiffs from the class would in no way "effect the substance or quantity of evidence offered." *Klay*, 382 F.3d at 1255.[22]

2. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLASS

Neither EFG Capital's unclean hands nor statute of limitations defenses precludes a finding of typicality.

A. <u>EFG Capital's Unclean Hands Defense Is Meritless, and in any Event, Does Not Defeat Typicality</u>

In an effort to defeat typicality, EFG Capital alleges that Lorrene da Silva Ferreira acted in a way that would support defenses such as comparative fault, causation and unclean hands, and would "distract" her attention from issues common to the class. (Resp. at 13). EFG Capital's allegations are greatly exaggerated. Lorrene did not tell her CRO, Yannuzzi, to list "financial

[21] If the class prevails on the breach of fiduciary duty claim, it may elect to forgo the gross negligence claim.

[22] If EFG Capital revealed 100 new putative class members tomorrow, it would have no impact on the evidence Plaintiffs will offer to prove EFG Capital's liability on the common issues, because those issues focus on the actions of EFG Capital — actions EFG Capital took uniformly in relation to all Plaintiffs and class members.

advisor" as her occupation. (Ex. 7 at 141; Depo. of Lorrene da Silva Ferreira, **Ex. 42**, at 38). Moreover, Yannuzzi knew Lorrene was not a financial advisor. (*Id.* at 22-23; Ex. 7 at 113). At her deposition, Lorrene was up-front about the circumstances of her account application and her bonus.[23] She has nothing to hide, and comes to this Court with clean hands.[24]

Even if, assuming for the sake of argument only, the opposite were true, EFG Capital's allegations still would not defeat typicality. "The test for typicality . . . is not demanding." *Bruhl v. Price WaterhouseCoopers Int'l*, 257 F.R.D. 684, 689 (S.D. Fla. 2008) (quoting *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996)). The "key inquiry . . . is whether the class representative is part of the class and possesses the same interest and suffers the same injury as the class members." *Clausnitzer v. Fed. Express Corp.*, 248 F.R.D. 647, 656 (S.D. Fla. 2008) (citations omitted). Here, Lorenne testified that she shares the putative class members' interest in recouping money lost as a result of EFG Capital's negligence, breach of fiduciary duty, and unjust enrichment.

Moreover, a class representative "may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him that would not impact other class members." *Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534 (N.D. Cal. 2010) (certifying class despite allegations by defendant that class representative misstated her income and was subject to unclean hands defense); *Bruhl*, 257 F.R.D. at 690 (holding that "unique

[23] A jury could easily find after a short round of testimony by each that Lorrene is more credible than Yannuzzi, who likely listed her as a financial advisor to get her application past the EFG Capital compliance department and earn the commission on her sale.

[24] The $100,000 bonus that Lorrene used to purchase the FFS shares in 2005 was earned through a profit-sharing program in which all employees of her company participated, and was given in part to reward loyal employees like her who had moved with the company from Brazil to Uruguay two years earlier. (Ex. 41 at 40-41). Uruguay had no income tax at the time, and Lorrene is not required to pay taxes in Brazil. (*Id.* at 77, 85). Lorrene never received from EFG Capital or signed any form swearing that she had a net worth of $1 million. And she did not receive from EFG Capital the lengthy, single-spaced, English-language FFS prospectus containing the $1 million requirement until weeks after she signed the account opening documents and sent EFG Capital her money. (Ex. 42 at 89-90; *see also* **Ex. 43**). When EFG Capital's counsel asked the question "Did you have any discussions with Mr. Yannuzzi regarding how EFG Capital was to be compensated for your investment in the fund?," Lorrene did not answer whether any discussions were had, but instead stated her present understanding of how EFG Capital had been compensated. (Ex. 42 at 119). When asked two questions later the more direct question of whether Yannuzzi told her that EFG Capital would receive retrocessions, she repeatedly answered no. (Ex. 42 at 120, 122).

defenses" such as lack of standing and unclean hands did not negate class representatives' ability to serve where those representatives' claims shared "the same essential characteristics as the claims of the class at large"). Any finding of unclean hands would be particular to Lorrene, and would not impact the claims of class members.

In addition, "[t]ypicality under Rule 23(a)(3) should be determined with reference to the [defendant's] actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, No. 05 Civ. 4116 RWS, 2007 WL 103073, at *6 (S.D.N.Y. Jan. 12, 2007) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)). As argued above, liability here stems from EFG Capital's actions toward Plaintiffs and all class members.

Finally, as a practical matter, the allegations leveled at Ms. Ferreira do not "threaten to become the focus of the litigation." (Resp. at 13). EFG Capital cross-examined Ms. Ferreira at her deposition regarding the information contained in her account application, and that examination took no more than a couple of hours. It would take no longer at trial. Plaintiffs' own cross-examination of Yannuzzi regarding his role in filling out Ms. Ferreira's application likely would take even less time. The entire issue is a sideshow compared with the considerable evidence and testimony that the parties must proffer relating to the substantive issues in this case — all of which focus on EFG Capital's conduct, not Ms. Ferreira's.[25]

B. Statutes of Limitation Do Not Bar Plaintiffs' Claim

Under Florida law, "[a] statute of limitation does not commence to run until the cause of action accrues." *Penthouse N. Ass'n, Inc. v. Lombardi*, 461 So. 2d 1350, 1352 (Fla. 1985). Mistakenly citing the standard for "accrual" under a breach of contract claim, EFG Capital argues that Plaintiff's claims accrued when they made their investments. (Resp. at 14-15 (citing *Potiker v. Gasiunasen Gallery*, No. 09-82356-CIV, 2010 WL 2949943, at *2-3 (S.D. Fla. 26, 2010) (holding that in a breach of contract claim, the statute runs when "the last act constituting the breach occurs....")).

Plaintiffs have not sued for breach of contract — they have sued EFG Capital under theories of gross negligence, breach of fiduciary duty and unjust enrichment. It is well settled

[25] This is not a case, such as the *Tenet* case cited by EFG Capital, requiring "in-depth analysis" of the class representative's background or actions. *See Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 238 F.R.D. 679, 694 (S.D. Fla. 2006) ("[I]t is clear that Tenet's [unclean hands] defense will require an in-depth analysis of Boca's charging practices and intent").

under Florida law that such claims accrue "when the last element constituting the cause of action occurs." *Sussman v. First Fin. Title Co. of Fla.*, 793 So. 2d 1066, 1069 (Fla. 4th DCA 2001) (negligence); *see also Penthouse North*, 461 So. 2d at 1352 (fiduciary breach); *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 577 (Fla. 4th DCA 2006) (unjust enrichment). With regard to Plaintiffs' negligence and breach of fiduciary duty claims, Plaintiff's damages were the last element to occur. *See Penthouse North*, 461 So. 2d at 1352 (holding in breach fiduciary duty case that "[a] cause of action does not accrue until someone has been damaged by the acts complained of"); *Sussman*, 793 So. 2d at 1069 (holding that "appellants' cause of action did not accrue until such time as they suffered damage as a result of appellee's alleged negligence"). Plaintiffs incurred those damages on December 11, 2008, the date the Madoff fraud was revealed and the value of FFS shares went to $0. Plaintiffs' claims for negligence and breach of fiduciary duty are therefore timely.

With regard to Plaintiffs' unjust enrichment claim, the elements of that cause of action include: "1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." *Barbara G. Banks, P.A.*, 938 So. 2d at 577. Here, it became inequitable for EFG Capital to retain the benefits it received from Plaintiffs and class members when EFG Capital learned of the Madoff fraud in December 2008. Campano's email shortly thereafter, stating that EFG Capital should return these fees because "they came from a performance that was bogus," highlights this fact. Like Plaintiffs' negligence and fiduciary breach claims, their unjust enrichment claim accrued on December 11, 2008.

3. PLAINTIFFS ARE ADEQUATE REPRESENTATIVES

Plaintiffs' claims are consistent with the other class members' claims, and Plaintiffs will continue to vigorously pursue their claims on behalf of the class members.

A. <u>No Fundamental Conflict Exists Among the Class</u>

EFG Capital argues that Plaintiffs cannot adequately represent putative class members who made a net profit from FFS. (Resp. at 16-17). That argument has no merit. Plaintiffs and all 279 putative class members who redeemed a portion of their shares have the following fundamental fact in common: they had an investment in Fairfield Sentry on December 11, 2008, and they lost that investment when the value of the fund went to $0. Plaintiffs and all of the

putative class members have been harmed by the same occurrence. The nature and amount of class members' redemptions are germane to only to the damages phase. If a customer redeemed $30,000 of a $100,000 investment, then that member's damages calculation may decrease by $30,000, depending upon whether the redemption was for principal or profits.

EFG Capital's argument that some class members will be fearful of releasing their identities and subjecting themselves to clawback claims is completely speculative. A court should not decline to certify a class because it fears that insurmountable problems may later appear: "Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the rule." *Conn. Ret. Plans and Trust Funds v. Amgen, Inc.*, No. CV 07-2536, 2009 WL 2633743, at *3 (C.D. Cal. Aug. 12, 2009) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). Here, EFG Capital has offered no evidence that class members who lost their investments on December 11, 2008 would resist being members of this class action for any reason.[26]

With regard to the threat of clawbacks in particular, that issue already has been thrust into the spotlight in the FFS liquidation litigation. FFS's liquidator has sued EFG Bank (the "street-name" holder of Plaintiffs' and class members' shares in the fund) and all "beneficial shareholders" (i.e., putative class members in this case) who redeemed shares of FFS. *See In re: Fairfield Sentry Limited*, No. 10-13164 (BRL) (Bankr. S.D.N.Y.).[27] If the liquidator successfully prosecutes those claims, then most likely he will obtain redeemers' identities in that case. Thus, opting out of this case to hide his or her identity would not relieve a putative class member from exposure to claims asserted directly against him or her them in the liquidation case. And even if the liquidator obtains those identities through information disclosed in <u>this</u> case, the liquidator will not be allowed to take any clawbacks until he successfully prosecutes his claims in that case. Finally, a redeemer who opts out of this case to avoid clawback exposure faces the possibility of being a "two-time loser": missing out on a recovery in this case while still having to pay a clawback in the liquidation case. It is unlikely that a putative class member would turn down the potential for recovery in this case just to avoid the disclosure of his or her identity, and EFG

[26] Furthermore, Plaintiffs cannot test EFG Capital's allegation because EFG Capital has refused to produce the identities of the putative class members. *See* Ex. 5 ¶ 2.
[27] A copy of the Amended Complaint is attached as **Ex. 44.**

Capital has provided no evidence that suggests otherwise. In any event, EFG Capital has proffered no admissible evidence to support this speculative argument.

B. The Named Plaintiffs Will Vigorously Prosecute Their Claims

Lorrene and Arlete da Silva Ferreira are adequate class members who have vigorously prosecuted their claims on behalf of the putative class members.

1. Arlete da Silva Ferreira has made herself available for deposition

Lorrene's mother, Arlete da Silva Ferreira, has not yet obtained the visa necessary to travel from Brazil to the United States for a deposition. (Ex. 42 at 99). However, the undersigned offered numerous times to make Arlete available for deposition via videoconference pursuant to S.D. Fla. L.R. Gen. App. D(2) or in Brazil. Plaintiffs viewed this as a reasonable offer given Arlete's current immigration status. *See, e.g., Luna v. Del Monte Fresh Produce (S.E.) Inc.*, No. 1:06-CV-2000-JEC, 2007 WL 1500269, at *2-3 (N.D. Ga. May 18, 2007) (ordering deposition of class representatives to occur in Mexico where representatives had "limited ability to travel to United States"). If EFG Capital wants to take Arlete's deposition prior to the discovery cutoff, then it may do so via videoconference. If not, Arlete's intention is to obtain her visa and appear for trial in this case in August 2011.

As the undersigned has told EFG Capital's counsel, if Arlete is unable to obtain a visa by the time this case goes to trial, then the undersigned will agree to voluntarily drop her as a class representative in this case. Although Arlete was a joint account holder with her daughter Lorrene, the account was funded by Lorrene. (Ex. 42 at 20-21). Lorrene put Arlete on the account just in case something happened to Lorrene, a single woman. (*Id.* at 19)

2. Plaintiffs have not abdicated the case to their attorneys

EFG Capital argues that Lorrene da Silva Ferreira is an inadequate representative because she did not "independently verify" the facts in the Complaint or make any revisions to it. (Resp. at 17). Although Lorrene did not make edits to the Complaint, "[i]t is not a requirement that representative plaintiffs . . . play a personal role in the direction and management of the action." *See Morris v. Transouth Fin. Corp.*, 175 F.R.D. 694, 698 (M.D. Ala. 1997).

Rather, when examining adequacy, the courts look principally at the representative's willingness to participate in the action. *See In re Ins. Mgmt. Solutions Group, Inc. Sec. Litig.*, 206 F.R.D. 514, 517 (M.D. Fla. 2002). In that context, even "[m]inimal actions such as having read the complaint and asserting that a wrong occurred, although not understanding the exact

nature of the wrong, may constitute a sufficient showing of lack of total abdication to counsel." *Id.* (quoting *Morris*, 175 F.R.D. at 698). Here, Lorrene has shown an extraordinary willingness to participate in the action and represent her fellow class members. Within three weeks of EFG Capital requesting her deposition, Lorrene took time off from work, arranged for childcare and flew from Montevideo, Uruguay to Miami for her deposition.[28] She testified that her goal as class representative is "[t]o be able to have the losses back, not only for myself, but for the members that I represent in Fairfield fund . . . . My duties are to expose my case and to say what really happened. . . . And I'm representing the people who are in the same situation as I am." (Ex. 42 at 129, 135). Lorrene "has demonstrated more understanding of the case than a lay person, and has an understanding of the basic nature of the case. Such knowledge is enough to . . . represent the class." *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV, 2008 WL 5479111, at *9 (S.D. Fla. Dec. 11, 2008).

4. CLASS TREATMENT IS THE SUPERIOR METHOD OF RESOLUTION

Predominance has "a tremendous impact" on any superiority analysis "for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." *Klay*, 382 F.3d at 1269 (citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 n.12 (11th Cir.1997)). As discussed in detail in Part 1 above, common issues predominate in this case. A class action is also superior when compared to the alternative — individual arbitrations.

A. A Class Trial on Common Issues Is Superior to Individual Arbitrations

Where the other requisites of Rule 23 are met, a class action is superior to arbitration. *See In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 429 (S.D.N.Y. 1986); *In re Miva, Inc., Sec. Litig.*, No. 2:05-cv-201-FtM-29DNF, 2008 WL 681755, at *9 (M.D. Fla. March 12, 2008); *Lopez v. Tyson Foods*, No. 8:06CV459, 2008 WL 3485289, at *20 (D. Neb. Aug. 7, 2008). As the Southern District of New York stated in *In re Baldwin-United*:

> Not only are interests of consistency, efficiency and completeness served [by a class action], but there is also the assurance that most if not all potential claimants will be apprised of their rights and of the named plaintiffs' comparatively inexpensive efforts to vindicate them. This Court finds it hard to believe that any class action defendant so situated would prefer separate arbitration of each of thousands of potential claims that might otherwise be decided by class action at far less transactional cost.

[28] Her first trip to the United States.

122 F.R.D. at 429 (emphasis added).

In addition to being much more expensive, individual arbitrations would be much more time-consuming and inefficient. EFG Capital's own principals would have to spend countless hours at arbitration hearings fielding the same questions about the company's due diligence, its responses to red flags and other issues. Unlike a class action, arbitration hearings among the putative class members could be spread out across the Americas. *See Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 133 (S.D.N.Y. 2001) (finding superiority where foreign class members were geographically dispersed); *Silva-Arriaga v. Tex. Express, Inc.*, 222 F.R.D. 684, 691 (M.D. Fla. 2004) (same). Moreover, individual arbitrations would potentially result in inconsistent decisions. For example, arbitration panels may take differing views of what represents adequate due diligence, even after considering identical testimony and documentary evidence. In contrast, Plaintiff's trial plan resolves those issues collectively in a single class trial. The savings of time will result in considerable savings of fees and costs to the parties (<u>including EFG Capital</u>), and spare legal resources. Given these savings, there simply is no good reason to roll out the same evidence and witnesses over and over again, in proceeding after proceeding.

EFG Capital offers no evidence that class members likely would choose arbitration over the class vehicle. Indeed, as EFG Capital acknowledges, only two arbitrations have been filed in the more than two-plus years since the Madoff fraud was revealed. (Ex. 3 at 218). Those two arbitrations include only 12 class members (less than 5% of the total putative class, according to EFG Capital's records). (Ex. 46 ¶ 43). There is no indication that class members are especially interested in the prosecution of separate actions.

Finally, the cases cited by EFG Capital are distinguishable. Unlike the instant case, common issues did not predominate in any of those cases. *See, e.g.*, *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 229 (S.D. Fla. 2002) (finding that individualized factual inquiries precluded class certification); *Fischler v. AmSouth Corp.*, 176 F.R.D. 583, 589 (M.D. Fla. 1997) (finding that common issues did not predominate); *O'Neil v. Appel*, 165 F.R.D. 479, 507-08 (denying certification where predominance existed in only one of five counts).

B. <u>No Res Judicata Issues Warrant the Denial of Certification</u>

Among the "parade of horribles" set forth by EFG Capital in an effort to defeat class certification is the speculation that if EFG Capital is victorious in this case, putative class members from Argentina, Brazil and Mexico may nonetheless sue in the courts of those

countries without this Court's judgment having res judicata effect. (Resp. 19-20). As an initial matter, even if this were true, it is not dispositive of the Courts' consideration of class certification. It is just one factor to be weighted in any superiority analysis. *See In re Alstom Sec. Litig.*, 253 F.R.D. 266, 282 (S.D.N.Y. 2008).

But even beyond that, the argument is highly speculative, and discounts the practical difficulties facing any class member from Argentina, Brazil or Mexico who attempts to avoid the effects of an adverse final judgment in this case. As the Southern District of New York noted when considering a similar argument:

> Many events would have to occur before [the defendant] would be prejudiced by an inability to assert the defense of res judicata successfully. Specifically, (1) the class action would have to be tried to judgment, despite the greater likelihood that the case would instead be settled; (2) the class would have to lose on the merits; (3) an absent class member would have to bring a subsequent lawsuit in [foreign] court, despite such practical deterrents as the unavailability of contingent-fee representation or a class action vehicle in those courts; (4) the absent class member would have to succeed in establishing jurisdiction over the defendants in that foreign court; (5) the absent class member would have to convince the foreign court to ignore this Court's ruling and render judgment in its favor on the merits....

Cromer Finance, 205 F.R.D. at 135 n.32.

Even ignoring these practical realities, the res judicata issue is not truly a legal threat to EFG Capital. In Argentina, it is more likely than not that an Argentine court would recognize this Court's judgment in EFG Capital's favor.[29] And with regard to Brazilian and Mexican class members, it does not matter whether the a judgment would have res judicata effect in their countries because, more likely than not, if any of those class members attempted to file an individual suit against EFG Capital, the Brazilian and Mexican courts would recognize and enforce the arbitration provision between EFG Capital and those investors.[30] Any post-judgment claim by a Brazilian or Mexican investor would most likely be sent to a FINRA arbitration, where EFG Capital could indeed enforce its Final Judgment.

5. THE COURT CAN TAILOR THE CLASS DEFINITION AT THIS STAGE

EFG Capital's final argument posits that EFG Capital's class definition is fatally overbroad. That argument ignores the fact that courts have discretion to tailor class definitions to fit the facts of the case. *See The County of Monroe, Fla. v. Priceline.com*, 265 F.R.D. 659, 666

[29] *See* Decl. of Mario Eduardo Castro Sammartino, **Ex. 45**, at 5.
[30] *See* Decl. of Juan Manuel Camarena Egido, **Ex. 46**, 2-3; Decl. of Carlos Rameh, **Ex. 47**, ¶ 10.

(S.D. Fla. 2010) (certifying class after excising portion of class definition and limiting another portion); *LaGrasta*, 2005 WL 1875469, at *13 (certifying class after narrowing timeframe of originally proposed class definition). Thus, the Court can delete from the class definition EFG Bank, which it dismissed from the case.

The Court should go no further than that. As explained in Part 3.A above, even those 19 class members who redeemed more than their underlying investment in FFS suffered a loss on December 11, 2008 when the value of their shares went to $0. They should remain members of the class, and their redemptions should be addressed as part of their damages calculation.[31]

EFG Capital's attempt to limit the class definition to those class members who received "recommendations" or who made a "point-of-purchase" investment also misses the mark. EFG Capital attempts to create distinctions that do not exist. As shown above, none of Plaintiffs' claims relies on the existence or occurrence of a "recommendation" by EFG Capital.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify a class in this case and to provide any other relief the court deems necessary.

Dated: January 26, 2011.

Respectfully submitted,

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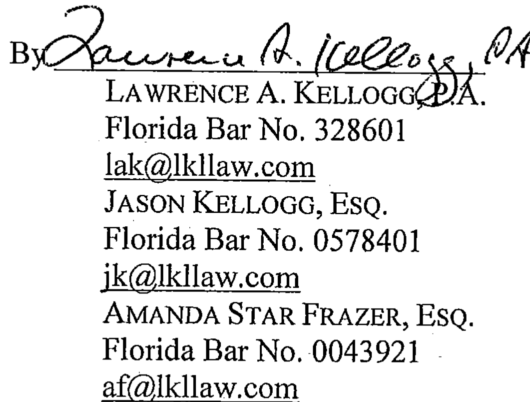

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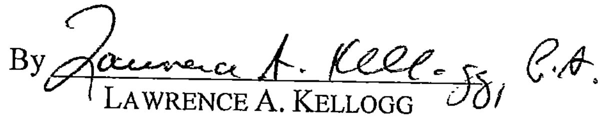
[31] Alternatively, this Court can narrow the class to include only customers of EFG Capital who invested in Fairfield Sentry, had not redeemed their interest in the fund as of December 11, 2008, and had not redeemed shares whose value exceed their total principal investment in the fund.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **January 26, 2011**, I served the foregoing document on all counsel of record or *pro se* parties identified on the attached Service List via electronic transmission and U.S. Mail.



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