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, et. al. v. Standard Chartered Bank International (Americas) Ltd., et. al.,* No. 10-CV-2878	Master File No. 09-cv-118 (VM) (THK) ECF CASE

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED CLASS-ACTION COMPLAINT

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED CLASS-ACTION COMPLAINT

Plaintiffs, Jose Antonio Pujals ("Mr. Pujals") and Rosa Julieta A. De Pujals ("Mrs. Pujals"), individually and in their representative capacities for all those similarly situated (the "Class"), hereby submit this Memorandum in Opposition directed to Defendants' Motion to Dismiss Plaintiffs' Amended Class Action Complaint (the "Motion") and state as follows:

INTRODUCTION

This case is about the Defendants (sometimes referred to jointly as "Standard Chartered") having charged Plaintiffs and the Class a fee equal to a percentage of "assets" that never really existed. In other words, Plaintiffs and the Class members were charged fees – collectively totaling millions of dollars – for nothing. And through this class-action, Plaintiffs and the Class seek to have those fraudulent fees returned.

Perhaps the most telling aspect of Defendants' Motion is not what it says, but rather what it does not say. Defendants do not disavow that Defendants charged a fee equal to a percentage of

"assets" that did not exist. Rather, Defendants argue there is nothing wrong with that because Plaintiffs allegedly agreed the Defendants could do just that. In fact, Defendants argue that it would be *"absurd"* if they were required to return those fees that they charged on a percentage of "assets" that did not even exist. But putting aside Defendants' off-putting sense of entitlement, Plaintiffs never agreed that Defendants could charge a fee based on "assets" that did not exist. As such, the fees charged either are in violation of the parties' "contract" (to the extent such a "contract" exists and applies here) or have enriched the Defendants unjustly (to the extent that such a contract does not exist or does not apply here). Either way, Defendants' Motion should be denied.

PRELIMINARY STATEMENT REGARDING PLAINTIFFS' "CONTRACT"

Defendants' Motion attaches – and is based largely upon – a copy of what they suggest represents a contract between Plaintiffs, on the one hand, and Defendants, on the other hand. In their Motion, Defendants refer to it as a "Purchase Letter."[1] There are, however, two obvious shortcomings with Defendants' reliance on that "contract."

First, the "contract," purports to be between only Mr. Pujals, on the one hand, and "AEB," on the other hand. The "contract" does not even purport to bind Mrs. Pujals. Nor does the "contract" even purport to explain the relationship between "AEB" and either of one of the two Defendants. Hence, the "contract" cannot govern the entirety of the relationship between Plaintiffs and Defendants.

Second, the "contract" speaks only to an investment in the amount of <u>$190,000</u>. That is, the "contract" states *"[p]lease purchase on my behalf $190,000.00"* of Fairfield Sentry Limited (the

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[1]A copy of the "Purchase Letter" is attached to the Motion as Exhibit B to the Declaration of Patrick B. Berarducci. Hereinafter, all such citations follow the format: Berarducci Declaration Ex. __ at __.

"Sentry Fund").[2] But as alleged in the Amended Complaint, Plaintiffs "invested" approximately $600,000 in the Sentry Fund (and, in turn, the Sentry Fund "invested," or rather lost, those funds by entrusting them to Mr. Madoff).[3] As such, Defendants have failed to present a written "contract" that even purports to govern the terms and conditions pursuant to which Plaintiffs made an additional "investment" in the approximate amount of $410,000 (*i.e.,* $600,000 - $190,000 = $410,000).

In sum, Defendants' Motion is based largely upon the "Purchase Letter" that they call a contract. But that "contract" does not even purport to apply to both Plaintiffs and is entirely unclear how its applies to either Defendant – and it simply does not speak to the super-majority of the funds "invested" by Plaintiffs. As such, it cannot justify dismissal of Plaintiffs' Amended Complaint.

Irrespective, even assuming, *arguendo*, that the "Purchase Letter" constitutes a binding contract applicable to all purchases by all Class members, that "contract" does not state what Defendants would like it to state, nor does it bar Plaintiffs' claims for unjust enrichment.

ARGUMENT

Plaintiffs' Amended Complaint pleads two causes of action: (1) Breach of Contract; and (2) Unjust Enrichment. Defendants' Motion argues that both claims fail as a matter of law. But as explained below, Defendants' arguments do not withstand scrutiny.

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[2](Berarducci Declaration Ex. B.)

[3](*See* Amended Complaint attached as Exhibit A to the Declaration of David A. Rothstein in Opposition to Defendants' Motion to Dismiss Plaintiffs Class Action Complaint, dated April 16, 2011. Hereinafter, all such citations follow the format: Rothstein Declaration Ex. ___ at ___.)

I. Plaintiffs' Breach-of-Contract Claim States a Cause of Action [4]

Defendants move to dismiss Plaintiffs' contract claim on two separate grounds. First, Defendants argue the plain language warrants dismissal. Second, Defendants argue Plaintiffs have waived the right to sue for breach of contract. But both arguments are easily debunked.

A. The Plain Language of the "Contract" Supports Plaintiffs' Claim

Standard Chartered submits that the "contract" actually permits Defendants to charge a fee equal to a percentage of "assets" that do not really exist. But it is nonsensical to suggest that anyone would sign a contract agreeing to pay a fee for nothing. And Plaintiffs certainly did not do so in this case. The operative language of the "contract" states, in its entirety, as follows:

> I understand that in connection with my purchase of Shares [in the Sentry Fund], 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.[5]

1. Defendants' Reading of the Contract is Incorrect

But that language begs the obvious question: what is "NAV?" The "contract" certainly does not expound on that term. As such, the only reasonable construction and interpretation, and the only construction and interpretation appropriate under the law, is the ordinary usage of that term.[6]

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[4]Hereinafter, Plaintiffs assume, *arguendo*, that the "contract" is, in fact, a binding contract that governs all amounts invested in the Sentry Fund by all Class members. Of course, it does not (which is why Plaintiffs hereinafter refer to it in quotations). Plaintiffs make these assumptions only to show that the "contract" fails to support Defendants' Motion even if it were to apply here and govern the outcome.

[5](*See* Berarducci Declaration Ex. B (emphasis added).)

[6]*See* Equity Lifestyle Props., Inc. v. Florida Mowing & Landscape Serv., Inc., 556 F. 3d 1232, 1242 (11th Cir. 2009) (when interpreting a contract under Florida law, courts must "give effect to the plain language of contracts when that language is clear and unambiguous"); National R.R. Passenger (Amtrak) v. Roundtree Transp., 422 F.3d 1275, 1284 (11th Cir. 2005) ("where the contract terms are clear and unambiguous, a court must give effect to the plain meaning of the terms"); *see also* Supreme Laundry Serv., L.L.C. v. Hartford Casualty Ins., 521 F.3d 743, 748 (7th Cir. 2008) ("if a term in a contract is undefined, a court should afford the terms its plain, ordinary and popular meaning as derived from the term's dictionary definition").

"NAV" is a common acronym that stands for "net asset value"and is a method by which one may determine the true value of a fund by deducting total liabilities from total assets.[7] Black's Law Dictionary defines "net asset value" or "N.A.V." as follows:

> The net asset value is arrived at by deducting total liabilities (accounts payable, notes payable, etc.) from total assets (cash, securities, etc.) and dividing such amount by the number of shares outstanding.[8]

And at least one court has held that "[p]lain meaning can be determined using a dictionary."[9]

Here, the funds that Plaintiffs "invested" were virtually worthless from the outset because the entirety of those funds were entrusted to Mr. Madoff as part of his infamous Ponzi scheme, such that there were no underlying securities being purchased on Plaintiffs' behalf. As Mr. Madoff explained in his plea allocution, *"for many years up and until I was arrested on December 11, 2008, I never invested those funds in the securities."*[10] Thus, Plaintiffs only possessed an unwitting exposure to a giant Ponzi scheme which, was entirely worthless.[11]

Yet, Plaintiffs and the Class were charged a fee equal to a percentage of the *reported* value of their Sentry Fund holdings (which were reported to be worth millions) rather than the *actual* value

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[7]Oxford Concise Dictionary (11th ed. rev. 2008).

[8]Black's Law Dictionary 1040 (6th ed. 1991) (emphasis added). And the definition provided by the Securities Exchange Commission is virtually the same. *See* http://www.sec.gov/answers/nav.htm ("Net asset value," or "NAV," of an investment company is the company's total assets minus its total liabilities. For example, if an investment company has securities and other assets worth $100 million and has liabilities of $10 million, the investment company's NAV will be $90 million.").

[9]Sanders v. Jackson, 33 F. Supp. 2d 693, 696 (N.D. Ill. 1998)

[10](Plea Allocution, Exhibit A to Amended Class Action Complaint, Rothstein Declaration Ex. A at 1.)

[11]It certainly was worthless in this case because, once Mr. Madoff's fraud was exposed, the account statements issued by Defendants reflect that the "value" of Plaintiffs' Sentry Fund holdings dropped from over $600,000 to less than $5 and, moreover, Defendants stopped charging a fee in connection with those "holdings," thereby acknowledging they had no right to charge a fee on "assets" that did not exist.

of those holdings (which were worthless). In other words, Plaintiffs were charged a fee based on "assets" that did not exist. Incredibly, Defendants argue that the "contract" authorizes them to do just that. The "contract," however, does nothing of the sort.

The "contract" does not contain language to the effect that *Plaintiffs understand that they will be charged a fee based on the reported NAV provided to Defendants by the Sentry Fund irrespective of whether that reported NAV bears any relationship to the actual NAV.*

Nor does the "contract" contain language providing that *to the extent that the reported NAV of the Sentry Fund is wildly inflated compared to the actual NAV of the Sentry Fund due to massive fraud, the burden of that fraud shall fall on Plaintiffs, not Defendants; rather, Defendants shall get to keep whatever fees they charge based on the reported NAV irrespective of the actual NAV.*

To the contrary, the "contract" states only that Plaintiffs agreed to a fee based on the "NAV" of the Sentry Fund – *i.e.*, the net asset value. And here, the Sentry Fund had no "assets," no "value," and thus no "net asset value." As such, it was a breach of the "contract" to charge fees based on wholly fictitious and wildly inflated *reported* NAV, which bore no relationship to the *actual* NAV.

2. **The PPM is Not Part of the Parties' Contract**

Constrained by the foregoing, Defendants resort to relying on language that is not part of the parties' "contract." Specifically, Defendants rely on language in the Confidential Private Placement Memorandum ("PPM") for the Sentry Fund, which is not attached to Plaintiffs' Amended Complaint. More specifically, Defendants assert that the PPM dictates that the fee charged by Standard Chartered under the parties' "contract" was supposed be based on the *reported* NAV.[12] But it does not state that. It does not even come close.

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[12](*See generally,* Defendants' Memorandum of Law [D.E. 613] at 10 - 11.)

As an initial matter, this Court should refrain from even considering the PPM's at this stage of the proceedings – just as this Court did in Anwar v. Fairfield Greenwich Ltd., No. 09 Civ. 0118, 2010 WL 4183645 (S.D.N.Y. Oct. 4, 2010) in the course of ruling on the motions to dismiss filed in the myriad other Standard Chartered "loss" cases pending in conjunction with this MDL.[13] In Anwar, the Court held that because the individual plaintiffs had not acknowledged receipt of the PPM in their pleadings, *"the Court finds no colorable grounds for Standard Chartered to suggest that any Plaintiff . . . received the [PPM]."*[14] In this case, Plaintiffs's Amended Complaint does not acknowledge receipt of PPM's. As such, the Court should refrain from relying on the language of the PPM's for that reason alone. But in Anwar, the Court went on to identify myriad other factual issues involved with regard to the PPM's and concluded that, in ruling on motions to dismiss, relying on the PPM's *"would be imprudent given the sinkhole of uncertainty from which the [PPM's] have emerged."*[15] For all the same reasons, the Court should refrain from considering the PPM's in this case.[16]

Even assuming, *arguendo*, that the Court could consider the PPM at this stage, it is of no avail to the Defendants because the PPM simply does not constitute a part of the parties' "contract." As an initial matter, the PPM is not itself a contract between Plaintiffs and Defendants. In fact, it

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[13] *See* Anwar, 2010 WL 4183645, at *5-6 (in the Standard Chartered "loss" cases, individual investors seek to recover all their underlying investment losses).

[14] Anwar, 2010 WL 4183645, at * 5.

[15] Anwar, 2010 WL 4183645, at * 6.

[16] Defendants' repeatedly rely on Anwar when it suits their purposes, but they make no mention of it when it cuts against them – as in this instance.

is not a contract at all. Rather, a private placement memorandum is nothing more than an offer by an issuer to sell securities via a private, rather than a public, offering.[17]

In this instance, Defendants are not even the issuer – that would be the Sentry Fund. Accordingly, the PPM expressly governs the fees to be charged by the Investment Manager of the Sentry Fund – *i.e.,* Fairfield Grenwich (Bermuda) Ltd. But there is nothing in the PPM to suggest that its terms govern the relationship between Plaintiffs and Standard Chartered or, more specifically, the fees to be charged by Standard Chartered. The PPM simply does not speak to that issue.

Likewise, there is nothing in the "contract" to suggest that the language of the PPM has been incorporated into, or otherwise modifies, the language of the parties' "contract." For example, the "contract" does not state that *Plaintiffs agree to pay a fee based on the reported NAV – as that term is specifically and uniquely defined in the PPM*. Defendants plainly could have drafted a contract that states just that. But they did not.

Rather, the "contract" states only that Plaintiffs agreed to a fee based on the "NAV" – *i.e.,* the net asset value. Nothing more. Nothing less. But as noted above, the term "NAV" has a common usage and meaning. And it is that usage and meaning that should be employed here, not the unique and self-serving definition that Defendants would like to excise from the PPM and graft onto the parties' "contract." The language of the PPM is wholly irrelevant and should not be considered in determining whether Defendants breached the parties' "contract."

In sum, the "contract" provides Defendants would charge a fee based on the "net asset value" of the Plaintiffs' Sentry Fund holdings. And because the Sentry Fund held no real "assets," no real "value," and thus had no real "net asset value," Defendants should not have charged any fees attendant to Plaintiffs' "holdings" in the Sentry Fund. Defendants improperly did so. In fact, they

[17] *See, e.g.,* Black's Law Dictionary 1196 (6th ed. 1991).

charged millions of dollars in fees based upon wholly fictitious *reported* NAV rather than the *actual* NAV. Defendants thus breached their obligations to Plaintiffs' arising under the parties' "contract."

3. **Defendants' Cases Are Easily Distinguishable**

Standard Chartered argues that two recently decided cases reject the contract theory advanced by Plaintiff, but both cases are easily distinguishable.

Standard Chartered suggests In re Beacon Associates Litig., No. 09 Civ. 777 (LBS), 2010 WL 3895582 (S.D.N.Y. Oct. 5, 2010) ("Beacon") stands for the proposition that the "contract" *in this case* permits fees to be calculated based not on *actual* asset values but rather on *reported* asset values (even though those *reported* asset values turned out to be fictional). But the Beacon court held only that the contract language *in that case* permitted fees to be based on *reported* assets rather than *actual* assets. And the contract language in Beacon is dramatically different from the contract language in this case.

In Beacon, the plaintiffs claims were brought under § 1104(a)(1)(D) of ERISA, which provides that an ERISA plan trustee may not stray from the language of the plan documents. The Beacon plaintiffs invested in a Madoff feeder fund (*i.e.,* the Beacon Fund) through transactions in which Defendants agreed to act as fiduciaries and comply with ERISA. In turn, the plaintiffs were charged fees based on *reported* asset values rather than *actual* asset values. The plaintiffs claimed that was inconsistent with the plan documents and, as such, they sought to recover all such fees from the plan fiduciaries for running afoul of § 1104 of ERISA.

But in Beacon, the underlying documents expressly permitted such fees to be to be calculated based on *reported* asset values rather than *actual* asset values. That is because the plaintiffs had invested in the Beacon Fund via Discretionary Investment Management Agreements ("DIMAs") that

incorporated the terms of the Beacon Fund Offering Memorandum ("OM").[18] And both the DIMA's and the OM made clear that the calculation of fees would not be tied to *actual* asset values, but rather would be calculated based on *reported* asset values.

For example, the DIMA provides that fees are to be based on the "market value" of the fund's assets. In turn the DIMA provides that the "market value" of assets like investments in Madoff "*shall be valued in such manner as determined in good faith by the Investment Manager to reflect its fair market value.*"[19] In other words, the language of the DIMA permits the Investment Manager to rely, in the exercise of his good faith, on *reported* asset values – *e.g.*, Madoff asset values reported to the Investment Manager by Madoff.

The language of the OM states even more clearly that fees are to be calculated based on *reported* values. Pursuant to the OM, the calculation of fees is tied to the amount of each investor's Capital Account, which ultimately is tied to the net worth of the fund. And when it comes to determining that, investments in "investment pools" (such as investments in Madoff) are valued based on valuations reported by the managers of those investment pools (*e.g.*, the valuations reported by Mr. Madoff). In pertinent part, the OM states as follows:

> Investments in Investment Pools are valued pursuant to the valuation submitted to the Company by the Managers of the Investment Pools, which valuations the Company expects to accept. All values are assigned by the Managing Member are final, binding and conclusive on all the Members.[20]

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[18]Beacon, 2010 WL 3895582, at *4.

[19](*See* Declaration of David A. Rothstein Ex. B ¶¶ 10, 11.) The Second Circuit has established that this Court may take judicial notice of pleadings filed in other matters. *See, e.g.*, Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991).

[20](*See* Declaration of David A. Rothstein Ex. C ¶ 35.)

In other words, the OM explicitly provides that for purposes of calculating fees, the company was permitted to value its clients' Madoff holdings based on the valuations reported by Mr. Madoff.

Based on the foregoing, it hardly should come as a surprise that the Beacon court held that the DIMAs and OMs *"anticipated that Defendants would use the figures reported to them to calculate fees."* The language of those documents was rather clear about that. Here, the language of the underlying contract is markedly different.

Unlike the DIMA, the "contract" in this case contains no "good-faith" safe harbor that allows Standard Chartered to rely on *reported* asset values. And unlike the OM, the contract in this case contains no language specifically stating that investments in Madoff are to be valued based on the *reported* valuations provided by Mr. Madoff. Rather, the contract in this case provides only that fees are to be determined based on the NAV – *i.e.*, "net asset value." And because Standard Chartered enriched itself with fees based on a *fictional* net asset value rather than the *actual* net asset value, Standard Chartered breached the language of the contract at issue. In sum, Beacon is wholly distinguishable and gets Standard Chartered nowhere.[21]

Standard Chartered also cites Hines v. FisServ, Inc., No. 8:08-cv-2569-T-30AEP, 2010 WL 1249838 (M.D. Fla. Mar. 25, 2010) – but Hines is even more easily distinguishable. Hines is not a fee case. Rather, Hines is a case in which the plaintiff class sought to recover all of its investment losses. Hines thus is distinguishable on that basis alone. But Hines is further distinguishable

[21]Beacon is further distinguishable insofar as the Beacon court ultimately determined that the plaintiffs in that case were not really alleging that the defendants had breached their contractual obligations by charging fees greater than those that they were entitled to charge. Rather, the court determined that the real grievance being advanced was that *"that Defendants knew or should have known the figures were false and used them anyway."* Beacon, 2010 WL 3895582, at *25. But here, Plaintiffs do not contend that Standard Chartered knew or should have known that the figures regarding plaintiffs' Madoff-related investments were false and used them anyway. That is the province of the Standard Chartered "loss" cases. But that has nothing to do with this case.

because in Hines, just as in Beacon, the underlying contract language expressly permitted the preparation of account statements based on *reported* values rather than *actual* values.

In Hines, the plaintiff class suffered losses when they were ensnared in a Ponzi scheme pursuant to which they purchased bogus "Transcon" securities. Their investments in Transcon, in turn, were to be held in IRA's that were to be maintained by defendent FiServ for the benefit of each class member. When the scheme ultimately imploded and plaintiffs lost all of their Transcon "investments," the plaintiffs brought claims against defendant FiServ, *inter alia*, for breach of contract. Plaintiffs complained that FiServ wrongly and improperly prepared account statements based on the *reported* value rather than the *actual* value of the plaintiffs 'Transcon investments. But the court rejected that argument because the underlying documents permitted FiServ to do just that as the following excerpt makes clear:

> And at least one of these alleged duties is specifically contradicted by the terms of the IRA contract. The valuation reporting policy of the IRA contract states that FiServ reports the values of illiquid investments, such as the Transcon investments, either at the original offering price or the values provided to FiServe by a general partner, officer, or sponsor of the investment. The policy goes on to state that FiServe "does not conduct appraisals of investments and does not seek to verify the prices or values provided to it." Plaintiffs fail to point to any term in the contract which even arguably creates an obligation that FiServe would report the "accurate" value of customers' holdings.[22]

As such, both Beacon and Hines are easily distinguishable. Both cases involved contracts that specifically empowered the defendants to charge fees (Beacon) or prepare statements (Hines) based on *reported*, rather than *actual,* asset values. Both cases demonstrate the kind of language that Standard Chartered easily could have inserted into its "contract" so as to allow it to charge fees based on a percentage of "assets" that did not really exist. But Standard Chartered did not incorporate any

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[22]Hines, 2010 WL 1249838, at *5.

such language in the "contract" at issue in this case. And that is why Standard Chartered must return those fees charged based on "assets" that do not exit.

Finally, in a questionable attempt to suggest that the overarching equities actually favor Defendants here, Standard Chartered responds that *"plaintiffs interpretation of the Purchase Letter cannot stand because it would lead to absurd results."*[23] That is to say, Standard Chartered submits it would be *"absurd"* if Standard Chartered were required to return those fees it charged based on a percentage of "assets" that did not exist. Plaintiffs submit the opposite is true – *i.e.,* that it would be absurd if the Court were to breathe "implied" terms into the plain language of the parties' "contract" such that Standard Chartered would be allowed to keep those fees that it charged based on a percentage of "assets" that did not exist.

B. Plaintiffs Did Not Waive Their Rights

Apparently lacking confidence in their primary argument based on the language of the "contract," Defendants now make a secondary argument that Plaintiffs have waived their breach-of-contract claims, but it is patently frivolous and pushes the boundaries of good-faith advocacy.[24]

According to Defendants, Plaintiffs' monthly bank statements *"remindedplaintiffs that they could object within one month to the charges reflected on their account statements."*[25] And because Plaintiffs did not object in writing to the fees charged within one month, Defendants argue Plaintiffs have waived the right to bring this action. Defendants' waiver argument fails for a host of reasons.

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[23](Memorandum of Law [D.E.613] at 11.)

[24]In fact, Defendant's prior counsel did not see fit even to raise the "waiver" argument in the prior motion to dismiss that Defendants filed, and was fully briefed, before this case was transferred into this MDL – which speaks volumes about the *bonafides* of this argument.

[25](Memorandum of Law [D.E. 613] at 13.)

1. <u>The Court Should Not Consider Defendants' "Waiver" Argument</u>

Waiver is a fact-intensive affirmative defense that generally is not properly raised on a Rule 12(b)(6) motion.[26] Here, Defendants argue that "one month period to object" was part of the Rules and Regulations Governing Accounts ("RRGA") and that the RRGA was incorporated into the Account Application and Agreement.[27] But none of those documents are attached to Plaintiffs' Amended Complaint. As such, the Court should not consider them at this stage of the proceedings for the same reasons that the Court should not consider the PPM's.[28] And because Defendants effectively concede their waiver argument is tied to the RRGA and other documents that are not part of the pleadings and thus raise a host of factual issues inappropriate for consideration at this stage, Defendants' waiver argument should be rejected out of hand.

2. <u>Defendants Cannot Establish the Elements of Waiver</u>

As Defendants correctly state in their memorandum, *"waiver requires (1) 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."*[29] But as Plaintiffs' Amended Complaint makes clear, the element of knowledge is sorely lacking here, as is the element of intent.

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[26]*See* <u>Twig v. Hospital Dist. of Hardee Florida</u>, 731 F. Supp. 469,472 (M.D. Fla. 1991) ("Finding that the doctrines of laches, estoppel and <u>waiver</u> are affirmative defenses to be raised and proven by a defendant, the Court finds no merit to the motion to dismiss.") (underline added); <u>Chang v. Servico, Inc.</u>, 144 B.R. 557, 559 (Bankr S.D. Fla. 1992) ("Estoppel and <u>waiver</u> are affirmative defenses to be pleaded and proven by a defendant. <u>They are not issues that should be considered in ruling on a motion to dismiss</u>.") (internal citations omitted and emphasis added).

[27](Memorandum of Law [D.E. 613] at 13 n.9.

[28]*See* Section A.2., *supra.*

[29](Memorandum of Law [D.E. 613] at 12); *see also* <u>Major League v. Morsani</u>, 790 So. 2d 1071, 1077, n. 12 (2001).

The true nature of the Sentry Fund – *i.e.*, that it was worthless because its underlying "assets" were non existent – was not known by Plaintiffs (or Defendants for that matter) until roughly December 2008.[30] Before then, Plaintiffs had no actual or constructive knowledge of the claims they are alleged to have waived. And, because Plaintiffs plainly had no such knowledge, it follows as a pure matter of law that they cannot have waived such claims.[31]

3. <u>The So-Called "Waiver" Does Not Apply to the Facts of this Case</u>

The single-line "legend" found at the bottom of Plaintiffs' monthly statement also fails to support Defendant's waiver argument. In pertinent part, that "legend" states as follows:

> This document is considered approved unless we are notified in writing of any objection within one month.

Attempting to give that phrase a broad and all-encompassing meaning that would "waive" Plaintiffs' fee-based claims, Defendants seem to suggest the above statement should be read to say:

> The [*fees charged to your accounts as reflected on this document are based upon values provided to us by Fairfield Sentry Fund, which we are permitted to rely upon and are*] considered approved unless we are notified in writing of any objection within one month [*and you hereby waive the right to complain about such fees unless you object, in writing, within that time frame – even if you do not become aware of the grounds for objection within that time frame*].

But to give such a broad and unintended meaning to that language would be far fetched indeed. The purpose of such language plainly is <u>not</u> to waive unknown claims regarding fraudulent fees. Rather, as numerous courts have made clear, such language is meant to apply to claims of churning or unauthorized trading – *i.e.,* activities that are evident from, and revealed by, the face of

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[30] *See* Amended Complaint, Rothstein Declaration Ex. A ¶¶ 5-6.

[31] And of course, because the Plaintiffs had absolutely no knowledge of the claims they are alleged to have waived, they could never have <u>intended</u> to waive such claims.

the account statement.[32] That is to say, bank and brokerage customers are presumed to have reviewed the transactions that are reflected on their monthly statements and that absent an objection, those transactions that are made known to the customer from the face of the statement are considered approved unless the customer objects on a timely basis.[33]

So *if* Plaintiffs were complaining that the purchase of Fairfield Sentry was unapproved or improper, *then* the language contained on the statements *might* apply. But that language has absolutely no application here, where Plaintiffs' complaint is not based upon information revealed on the face of the statement, but rather is based upon information that was not known (by Plaintiffs or Defendants) at the time the statements were issued. Not surprisingly, there is not one reported case in which a claim regarding fraudulent fees based on a percentage of non-existent assets was deemed waived based upon a failure to object within ten days. Defendants' certainly have not cited to any such case.[34]

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[32] *See e.g.* Modern Settings, Inc. v. Prudential Bache Securities, Inc., 936 F.2d 640 (2d Cir. 1991).

[33] For example, in Modern Settings, the Second Circuit explained the purpose of such language:

> The purpose of the ten day written complaint clause in the customer agreement is to require the customer to memorialize his or her complaint soon after receipt of the account statement rather than waiting to see if the trade is profitable. The writing requirement of the clause insures that unauthorized trading disputes are not relegated to "swearing contests" between broker and customer....There will be instances where a disparity in sophistication between a brokerage firm and its customer will warrant a flexible application of such written notice clauses. Similarly, we do not foreclose the possibility that a broker may be estopped from rasing a defense based on the written notice clause if the broker's own assurances or deceptive acts forestall the customer's filing of the required written complaint.

Modern Settings, 936 F.2d at 646 (internal citations omitted).

[34] Defendants cite to Abrogast v. Bryan, 393 So.2d 606, 608-609 (Fla. Dist. Ct. App. 1981). But Abrogast has no applicability here. Abrogast concerned a real-estate broker's claim that he had not been paid his full commission. But even though the broker was aware of all the pertinent facts at the time the broker received his partial payment, he did not bring his claim until six (6) years after the fact.

4. Agreements to Shorten the Statute of Limitations Are Void in Florida

Applied to the facts of this case and the contract claim that Plaintiffs have pleaded, the "waiver" language upon which Defendants rely is not really a "waiver" provision, but rather a private agreement to shorten the applicable statute of limitations. Essentially, Defendants read that provision to shorten the limitation period applicable to Plaintiffs' contract claim from five (5) years to one (1) month.[35] But it is clear beyond peradventure that any such agreement is void under Florida law. To wit, Fla. Stats. Section 95.03 states as follows:

> **95.03 Contracts shortening time-**Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations, is void.

And courts throughout Florida have affirmed and restated the clear, unambiguous mandate of this provision again and again.[36] Defendants' attempt to take this innocuous and boilerplate language and twist it into an all-encompassing waiver clause (that operates to waive even those claims of which Plaintiffs were not aware) thus fails as a pure matter of law.

II. Plaintiffs' Unjust-Enrichment Claim Properly States a Cause of Action

Defendants argue that the Plaintiffs' unjust-enrichment claim fails for two reasons: (1) a plaintiff cannot maintain an unjust-enrichment claim when an enforceable contract exists governing the same subject matter; and (2) a claim for unjust enrichment cannot be sustained when the plaintiff has an adequate remedy at law. Plaintiffs take no issue with either principle of law. But neither principle supports Defendants' Motion under the facts of this case.

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[35] *See* Fla. Stat. §95.11(2)(b).

[36] *See* Canon Latin America, Inc. v. Lantech (C.R.) S.A., 2011 WL 240684 at *7 (S.D. Fla. Jan. 24, 2011); Scratch Golf, LLC v.Lexington Ins. Co., 2009 WL 1287963 at *2 (S.D. Fla. May 6, 2009); Palma Vista Condominium Ass'n of Hillsborough County v. Nationwide Mut. Fire Ins. Co., Inc., 2010 WL 4274747 at *6 (M.D. Fla., Oct. 7, 2010).

A. A Claim for Unjust Enrichment May Be Pleaded in the Alternative

As a general matter, Florida law is clear that nothing prevents a plaintiff *"from pursuing alternative claims of breach of contract and unjust enrichment in separate counts."*[37] In Anwar, this Court quoted a 2002 opinion from the Southern District of Florida explaining that *"[a]n unjust enrichment claim can exist only if the subject matter of that claim is not covered by a valid and enforceable contract."*[38] But as more recent cases from the Southern District have explained, a party is precluded from pleading unjust enrichment as an alternative to breach of contract only where the existence of an express contract is not in dispute.[39] But, here, the existence of an express contract that governs all Plaintiffs' claims is very much in dispute.[40]

Plaintiffs do not retreat from their allegation that the claims of certain Class members appear to be subject to the terms of a written "contract." For example, Defendants have attached to their Motion a document suggesting that Mr. Pujals invested $190,000 subject to the terms of a written "Purchase Letter," which Defendants refer to as a "contract." So be it. But Plaintiffs "invested" a total of $600,000 in the Sentry Fund. So what about the other $410,000 that Plaintiffs invested? At least at this stage of these proceedings, there are no documents that even purport to apply to the "investment" of those funds. Such "investments" may or may not have been subject to written "contracts." At this point, we just do not know. Accordingly, the Amended Complaint seeks to

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[37] *See, e.g.,* Intercoastal Realty, Inc. v. Tracy, 706 F. Supp.2d 1325, 1332 (S.D. Fla. 2010).

[38] Anwar, 2010 WL 418645 at *15 (*quoting* In re: Managed Care Litig., 185 F. Supp.2d 1310, 1337 (S.D. Fla. 2002).

[39] *See, e.g.,* Validsa, Inc. v. PDVSA Services, 632 F. Supp.2d 1219, 1243 (S.D. Fla. 2009) (While a party can plead breach of contract and unjust enrichment in the alternative, "a party is nonetheless precluded from pleading unjust enrichment where, as here, the existence of an express contract is not in doubt.").

[40] "That apparently was not the case in the Standard Chartered "loss" cases because, in dismissing the unjust enrichment claims, the Court held that all plaintiffs had referred to agreements between themselves and Standard Chartered. Anwar, 2010 WL 4183645 at *15. But as explained below, that is not the case here.

plead a claim for unjust enrichment (in the alternative to Plaitniffs' breach of contract claim) to the extent that the "investment" of those funds, or the "investments"of any other class members, were made in the complete and total absence of any "purchase letter" or other document that arguably could be construed as a "contract." And that is precisely the type of fact pattern for which an unjust enrichment claim is appropriate.[41]

But even assuming, *arguendo*, that there in fact is a written "contract" memorializing each and every penny's worth of funds that the members of the Class "invested" in the Sentry Fund – which the Court may not conclude at this stage of the proceedings – it does not necessarily follow that such "contracts" apply to and govern the subject matter of the instant dispute. And a claim for unjust enrichment is barred by the existence of an express contract only where the claim for unjust enrichment and the express contract concern the same subject matter.[42] Plaintiffs' primary argument is that the language of the "contract" is clear, unambiguous, and correlates to fees of "zero" given the fraud perpetrated by Mr. Madoff pursuant to which the Sentry Fund in fact had no real "assets," no real "value," and, hence, no "net asset value." But the alternative theory Plaintiffs have pleaded is that the scope of that "contract" does not govern the precise subject matter of this dispute.[43] That is to say, the "contract" does not speak to what, if any, fees Standard Chartered is entitled to charge or retain if any of the investments held in Plaintiffs' account were later determined to be worthless, *i.e.* part of a Ponzi scheme . Thus if it ultimately is determined by this Court that the scope of the

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[41]*See, e.g.,* Morris v. ADT Sec. Services, 580 F.Supp.2d 1305, 1312-13 (S.D. Fla. 2008) (a claim for unjust enrichment may proceed where plaintiff has not asserted a claim based on an express contract).

[42]*See* Rolyn Construction Corp. v. Coconut Grove Pt Limited, 2007 WL 2071268 (S.D. Fla. July 19, 2007) ("Indeed, where parties have entered into an express contract, a claim of unjust enrichment concerning the same subject matter fails as a matter of law."); *see also* Diamond S. Dev. Corp. v. Mercantile Bank, 989 So.2d 696, 697 (Fla. Dist. Ct. App. 2008) ("We agree that appellee's unjust enrichment claim was precluded by the existence of an express contract between parties concerning the same subject matter.").

[43](Amended Complaint, Rothstein Declaration Ex. A ¶ 54.)

"contract" in fact does not apply to fees based on the worthless assets invested with Madoff (because of the hard-to-imagine and impossible-to-foresee circumstances regarding Madoff's unprecedented fraud) then there is no bar to those Plaintiffs who are determined to have had "contracts" from proceeding forward with their unjust enrichment claim.

In other words, Plaintiffs submit that either Standard Chartered has breached the "contract" or, alternatively, the "contract" simply does not govern the subject matter of this dispute. Plaintiffs recognize full well that for each dollar "invested" subject to the language of the "contract," both statements cannot be true. But it must be one or the other – because the law simply will not allow Defendants to keep fraudulent fees charged based on a percentage of assets that did not exist. And Plaintiffs most certainly have the right to plead those legal theories in the alternative.[44]

B. Plaintiffs Can Allege the Absence of an Adequate Legal Remedy

Finally, Defendants argue that Plaintiffs cannot plead a valid claim for unjust enrichment because Plaintiffs have an adequate remedy at law – *i.e.*, their breach-of-contract claims. But that circular argument misses the point entirely. If there is no contract, or if the contract does not apply

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[44]*See* In re Checking Account Overdraft Litig., 694 F. Supp. 2d 1302, 1321 (S.D. Fla. 2010) ("Plaintiffs concede that they will not be permitted to recover damages under both [breach of contract and unjust enrichment] claims, but argue that dismissal of the unjust enrichment claim would be premature at this stage. The Court agrees with Plaintiffs' position. Federal Rule of Civil Procedure 8(d) allows pleading in the alternative, even if the theories are inconsistent. Defendants have not conceded that Plaintiffs are entitled to recovery under the contract, and it is possible that if their contractual claim fails, Plaintiffs may still be entitled to recovery under an unjust enrichment theory."); Abels v. JPMorgan Chase Bank, N.A., 678 F. Supp. 2d 1273, 1279 (S.D. Fla. 2009); ("Plaintiffs argue, and the Court agrees, that Federal Rule of Civil Procedure 8(d) allows pleading in the alternative, even if the theories are inconsistent. Defendant is correct in that Plaintiffs will not be permitted to recover on both theories, but at this point it would be premature to dismiss the unjust enrichment count simply because an express contract exists. Defendant has not conceded that Plaintiffs are entitled to recovery under the contract, and it is possible that if their contractual claim fails, Plaintiffs may still be entitled to recovery under the unjust enrichment count.").

to the subject matter of this dispute, then plaintiffs have no remedy at law. But the mere allegation that Plaintiffs have an adequate remedy at law is not dispositive.[45]

1. There is No Remedy at Law for "Investments" Made without Contracts

As noted above, certain "investments" in the Sentry Fund appear to have been made without any contracts at all. That is precisely the type of scenario pursuant to which it is proper to plead claims for breach of contract (for those instances in which there is a governing contract) and, in the alternative, for unjust enrichment (for those instances in which there is no governing contract). The case of Tracfone Wireless, Inc. v. Access Telecom, Inc., 2009 WL 2207818 (S.D. Fla. July 24, 2009) is right on point.

In Tracfone, the plaintiff brought claims for both breach of contract and unjust enrichment, *inter alia*, based on allegations that the plaintiff provided a benefit to defendants by providing them with specialty phones at a price below cost. Some of the phones were sold pursuant to so-called "shrinkwrap" contracts that formed the basis of plaintiffs' breach-of-contract claims, but some of the phones were not. And as to the latter category, the Court held that they could support a valid claim for unjust enrichment to be pleaded in the alternative to a claim for breach of contract:

> Courts have held that a claim for unjust enrichment, a form of equitable relief, cannot stand if an express contract exists. Although Plaintiff has alleged a breach of contract claim which I have concluded can proceed, it would be premature to dismiss Plaintiff's count for unjust enrichment in this case. Here, on the face of the

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[45]As one court recently explained this issue:

> A plaintiff is not prevented from asserting an equitable cause of action merely because the plaintiff also alleged an adequate legal remedy. Rather, it is the existence of a legal remedy that bars an equitable cause of action. *Cf.* Am. Honda Motor Co., Inc. v. Motorcycle Info. Network, Inc., 390 F. Supp.2d 1170, 1178 (M.D.Fla.2005) ("It is well settled in Florida that unjust enrichment is an equitable remedy and is, therefore, not available where there is an adequate legal remedy." (emphasis added)). A mere allegation cannot bar Plaintiff's claim.

Intercoastal Realty, Inc. v. Tracy, 706 F. Supp.2d 1325, 1331-32 (S.D. Fla. 2010).

> Complaint, Plaintiff's allegations of unjust enrichment encompass specialty phones allegedly bought by Defendants that are not necessarily subject to the "shrinkwrap" agreements that form the basis of Plaintiff's count for breach of contract, where the Complaint alleges that Defendants not only bought specialty phones from retail stores, but from bulk resellers. While one court has held that where it is unclear from a complaint that there is an inadequate remedy at law, the failure to clearly allege unjust enrichment on the basis of an inadequate legal remedy will warrant dismissal, I conclude that reasonable inferences drawn from the Complaint demonstrate that there may be an inadequate remedy at law as to some of Defendants' alleged misconduct. Therefore, the motion to dismiss [the unjust-enrichment claim] is denied.[46]

2. There May Be No Remedy at Law for "Investments" with Contracts

But even where there exist actual contracts governing "investments" in the Sentry Fund on behalf of Plaintiffs and members of the Class, those contracts should pose no obstacle to the ability of Plaintiffs and the Class members to recover under a theory of unjust enrichment – at least not to the extent it is determined those contracts do not speak to the precise subject matter of the fees to be charged *vis-á-vis* Sentry Fund holdings in the event those holding are ensnared in a fraud such that they are essentially worthless. Again, Plaintiffs have an adequate remedy at law only to the extent that contracts at issue speak to the same subject matter as Plaintiffs' claims. But to the extent that they do not, Plaintiffs have no adequate remedy at law, and thus may proceed forward with their pleaded-in-the-alternative claim for unjust enrichment.

CONCLUSION

At the end of the day, this all comes down to which side should bear the risk. The real villain here is Madoff. And perhaps, one could argue that both Standard Chartered and Plaintiffs were victims. But between the two, Standard Chartered profited from Madoff's fraud by charging Plaintiffs fees based on a percentage of "assets" that did not exist. The ultimate question presented is whether Standard Chartered should be allowed to keep such improperly charged fees.

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[46] Tracfone, 2009 WL at 2207818, *8 (citations omitted).

Against that backdrop, the plain language states only that fees are to be charged based on the NAV – *i.e., net asset value* – of Plaintiffs' shares. There is no qualifying or modifying language memorializing that Standard Chartered gets to rely on the *reported* NAV as uniquely defined in the PPM for the Sentry Fund. As such, Standard Chartered was entitled to charge fees based on the "net asset value." But as we all now know, the Sentry Fund has no real "assets," no real "value," and thus had no "net asset value." As such, Defendants should not have charged any fees at all. But they did. In fact, Defendants charged Plaintiffs and the Class millions of dollars in fees. Defendants' thus breached their obligations arising under the parties' "contract."

Alternatively, there do not appear to be any "contracts" governing certain of the investments made by Plaintiffs and members of the Class, or those "contracts" simply do not apply here. In either event, Plaintiffs have no adequate remedy law. And Defendants obviously have enriched themselves unjustly by charging fees based on a percentage of "assets" that do not exist.

For all the foregoing reasons, Defendants Motion to Dismiss should be denied.

Dated: New York, New York
April 6, 2011

Respectfully submitted,

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