Anwar et al v. Fairfield Greenwich Limited et al Doc. 650

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. 09-CV-118 (VM) (THK)

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

This Document Relates To: *Ricardo Almiron v. Standard Chartered Bank International (Americas) Ltd., et al.,* No. 10-CV-6186; and *Carlos Carrillo v. Standard Chartered Bank International (Americas) Ltd., et al.,* No. 10-CV-6187

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PLAINTIFFS CARRILLO'S AND ALMIRON'S RESPONSE IN OPPOSITION TO STANDARD CHARTERED'S MOTION TO DISMISS

Plaintiffs Carlos Carillo ("Carrillo") and Ricardo Almiron ("Almiron") (collectively, "Plaintiffs") respectfully submit this memorandum in opposition to the motion to dismiss their respective Complaints[1] filed by Standard Chartered International (Americas) Limited ("SCBI"), Standard Chartered PLC, and StanChart Securities International, Inc. (collectively "Defendants").

I. INTRODUCTION

Plaintiffs Carrillo and Almiron have asserted claims for violations of Chapter 517 of the Florida Statutes, Florida's blue-sky law, breach of fiduciary duty, negligence, negligent misrepresentation, and unjust enrichment and constructive trust against SCBI. Defendants move

[1] For purposes of this memorandum, the Complaint in Case No. 10-CV-6187 is referred to as "Carrillo Complaint." The Complaint in Case No. 10-CV-6186 is referred to as "Almiron Complaint."

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to dismiss all of Carrillo and Almiron's claims. However, Defendants' arguments are legally flawed and necessarily fail.

First, to the extent that any of the claims advanced by Carrillo and Almiron "sound in fraud," all claims, including elements of scienter where applicable, have been pled with a sufficient level of particularity that comports with the requirements of Federal Rule of Procedure 9(b). *Second*, the economic loss rule is simply inapplicable to Plaintiffs' claims and does not bar Almiron and Carrillo's negligence claims. *Third*, not the nondiscretionary broker relationship or a written agreement can vitiate the Defendants' duty as fiduciaries and brokers to conduct due diligence on the investments it recommended or to inform their clients of material information that could impact their investments.

For the reasons discussed below, Plaintiffs have properly asserted their claims, and Defendants' motion should be denied in its entirety.

II. MOTION TO DISMISS STANDARD

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Supreme Court has held that

> Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Factual allegations are to be taken as true, while legal conclusions are not. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine

whether they plausibly give rise to an entitlement to relief." *Id*. In evaluating claims in the context of a 12(b)(6) motion, the district court is normally required to look only to the allegations on the face of the complaint. *See, e.g., Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

III. PLAINTIFFS STATE A CLAIM UNDER SECTION 517.301 OF THE FLORIDA STATUTES

In order to state a claim under Section 517.301 of the Florida Statutes, a plaintiff must allege: (1) a misrepresentation; (2) of a material fact; (3) on which the investor justifiably relied; and (4) scienter.[2] *See Durden v. Citicorp Trust Bank*, No. 3:07-cv-974-J-34JRK, 2009 WL 6499365, at *5 (M.D. Fla. Aug. 21, 2009); *Grippo v. Perazzo*, 357 F.3d 1218, 1222 (11th Cir. 2004). With regard to the first element, a court may consider omissions as well as misrepresentations. FLA. STAT. § 517.301(1)(a). With respect to the fourth element, the scienter requirement, it is satisfied by a showing of mere negligence when bringing a claim pursuant to Section 517.301. *See Grippo*, 357 F.3d at 1222.

Additionally, to state a claim for a violation of Section 517.301 a plaintiff must establish that the defendant falls within the class of individuals identified in Section 517.211. Finally, because the basis of a Section 517.301 claim is fraud, it is subject to the requirements of Federal Rule of Civil Procedure 9(b). *See Great Fla. Bank v. Countrywide Home Loans, Inc.*, No. 10-22124-CIV, 2011 WL 382588, *3 (S.D. Fla. Feb. 3, 2011); *see also* FED. R. CIV. P. 9(b). Count I of the Complaint satisfies each of the abovementioned requirements; therefore, Plaintiffs adequately allege a claim under Section 517.301 of Florida Statutes.

A. Plaintiffs allege misrepresentations and omissions of material fact.

In order to state a claim under Section 517.301, Plaintiffs must allege a misrepresentation

[2] Proof of loss causation is not required in a civil securities proceeding under Section 517.301. *Rousseff v. E.F. Hutton, Co., Inc.*, 867 F.2d 1281, 1281–82 (11th Cir. 1989) (adopting the Florida Supreme Court's answer to a certified question of law)

or omission of a material fact by Defendants. *See Durden*, 2009 WL 6499365, at *5. "[T]he test of whether an omitted or misrepresented fact is material is whether a reasonable investor would have considered the fact important in deciding whether to invest." *Alna Capital Assocs. v. Wagner*, 532 F. Supp. 591, 599 (S.D. Fla. 1982). Defendants contend Count I should be dismissed because the misrepresentations or omissions identified by Plaintiffs are neither false nor material. Notwithstanding Defendants' arguments, a careful review of the Complaint demonstrates Plaintiffs identify representations that were false when made, and both representations and omissions that are material.

1. The alleged misrepresentations and omissions of Defendants are material.

Florida courts have held that misrepresentations and omissions made by a defendant concerning the advisability of an investment are material for purposes of analyzing a claim brought under Section 517.301. *See Azar v. Richardson Greenshields Secs., Inc.*, 528 So. 2d 1266, 1269 (Fla. 2d DCA 1988); *Carran v. Morgan*, 510 F. Supp. 2d 1053, 1060 (S.D. Fla. 2007). For example, in *Azar*, the complaint alleged that the defendant recommended the plaintiff make a particular investment, made representations about the circumstances surrounding the investment that were not true, and claimed to have conducted research regarding the investment (when no research had in fact been undertaken). *See Azar*, 528 So. 2d at 1269. These allegations were found to constitute material misrepresentations and omissions for purposes of Section 517.301. *See id.* Similarly, in *Carran*, the court found the amended complaint adequately stated facts of materially false statements and/or omissions where the plaintiff alleged that the defendant held himself out as an expert investment advisor who could invest plaintiff's money in "safe investments," when those investments did not exist or were not what the defendant represented. *See Carran*, 510 F. Supp. 2d at 1060.

Likewise, here, Plaintiffs make similar allegations regarding misrepresentations and omissions made by Defendants concerning the advisability of an investment. In particular, Plaintiffs allege:

- Standard Chartered Americas did not disclose the structure [that Fairfield Sentry Ltd. acquiesced to an unusual relationship with Madoff and BLMIS, where BLMIS served as both the sub-custodian of the assets and the executing broker] of Fairfield Sentry Ltd. or the inherent risks in such a structure to its customers. (Almiron ¶ 39, 36; Carrillo Compl. ¶¶ 39, 41).

- Had Plaintiff[s] known that Fairfield Sentry Ltd. was structured such that its subcustodian and executing broker were one and the same, and the inherent risks of this structure explained as its brokers should have done, Plaintiff[s] would not have allowed Standard Chartered Americas to invest his funds with Fairfield Sentry Ltd. (Almiron Compl. ¶ 40; Carrillo Compl. ¶ 42).

- Plaintiff invested $350,000 with Fairfield Sentry Ltd. based on Standard Chartered Americas' misrepresentations that it had chosen, after performing its extensive due diligence, a safe investment product for its customers to invest in. Rather, Standard Chartered Americas merely passed on and/or actively recommended, verbally and through documents, the misrepresentations being made by Fairfield Sentry Ltd. and related Fairfield entities, that Fairfield Sentry Ltd. was a low-risk, long-term investment that could generate steady returns. (Carrillo Compl. ¶ 43).

- Plaintiff invested $100,000 with Fairfield Sentry Ltd. based on Standard Chartered Americas' misrepresentations that it had chosen, after performing its extensive due diligence, a safe investment product for its customers to invest in. Rather, Standard Chartered Americas merely passed on and/or actively recommended, verbally and through documents, the misrepresentations being made by Fairfield Sentry Ltd. and related Fairfield entities, that Fairfield Sentry Ltd. was a low-risk, long-term investment that could generate steady returns. (Almiron Compl. ¶ 41).

- Plaintiff[s] and other investors in Fairfield Sentry Ltd. did not find out that BLMIS had been managing FSL's assets until after December 11, 2008. Standard Chartered Americas never informed the Plaintiff[s] or any other investors in FSL, nor did the Plaintiff[s] or these other investors ever know that the funds invested in FSL were being turned over to BLMIS. (*Id.* ¶ 49; Carrillo Compl. ¶ 51).

- Defendants omitted to advise Plaintiff[s] that [Defendants'] recommendations that [Plaintiffs'] remain invested with Fairfield Sentry Ltd. were made without any investigation, or due diligence, and by relying solely on propaganda received from Fairfield Sentry Ltd. and the related Fairfield entities and the funds' inflated returns. (Almiron Compl. ¶ 57; Carrillo Compl. ¶ 59).

- BLMIS's identity and role in the investment management of FSL is a fact that Plaintiff[s] and other investors in FSL would have considered material, as Plaintiff[s] would have not invested in FSL had it known that when they purchased FSL shares through [Defendants], the funds FSL received from Plaintiff[s] were merely shuffled to BLMIS. (Almiron Compl. 95; Carrillo Compl. ¶ 96).

These allegations identify specific misrepresentations and omissions concerning the advisability of an investment, upon which Plaintiffs relied.

Nevertheless, Defendants contend these allegations are insufficient. For instance, Defendants point to Plaintiffs' allegation that: "BLMIS's identity and role in the investment management of FSL is a fact that Plaintiff[s] and other investors in FSL would have considered material, as Plaintiff[s] would have not invested in FSL had it known that when they purchased FSL shares through [Defendants], the funds FSL received from Plaintiff[s] were merely shuffled to BLMIS," (Almiron Compl. ¶ 95; Carrillo Compl. ¶ 96), and maintain that such allegation represents a bare and conclusory allegation. (Mot. at p. 27). In support of their contention, Defendants cite to *Kalil v. Blue Heron Beach Resort Developer, LLC*, 720 F. Supp. 2d 1335, 1345 (M.D. Fla. 2010). However, *Kalil* is inapposite.

In *Kalil*, the court addressed alleged misrepresentations and omissions concerning the sale of a condominium unit to the plaintiff by the defendant. The court found the defendants' failure to inform the plaintiff of a previous contract to purchase the same condominium unit was not material. *See Id.* In doing so, the *Kalil* court emphasized that the presence of the previous contract had no effect on the value of the plaintiff's condominium unit, and therefore, had no

effect on the nature and substance of the property purchased. In contrast, here, Defendants' omission concealed the exact nature and substance of the security Plaintiffs were purchasing. In particular, Plaintiffs allege Defendants concealed pivotal facts regarding where and how Plaintiffs' money was going to be invested. Unlike in *Kalil*, these allegations constitute material misrepresentations and omissions.

2. Defendants' misrepresentations were false when made.

Plaintiffs sufficiently allege that Defendants' representations were false at the time they were made. For instance, Plaintiffs allege that Defendants represented they had chosen Fairfield Sentry Ltd. after extensive research, when in fact no research had been performed; they misrepresented the fact that the information Defendants gave to Plaintiffs about Fairfield Sentry Ltd. was based solely on propaganda received from Fairfield Sentry Ltd. and not Defendants' own research; and Defendants misrepresented that the funds Plaintiffs thought were being controlled by Fairfield Sentry Ltd., were in fact turned over to BLMIS. Each of these representations was not true, as evidenced by Defendants' executive's own admissions that "[Defendants] had done none of their own due diligence or investigations with respect to Fairfield Sentry Ltd., but instead had relied wholly upon representations made by promoters of Fairfield Sentry Ltd." (Almiron Compl. ¶ 62; Carrillo Compl. ¶ 60). As a result, Defendants' argument that the representations were not false necessarily fails.

In sum, Plaintiffs' Complaint sufficiently alleges misrepresentations and omissions that are both material and false, and consequently, Plaintiffs' allegations survive a motion to dismiss.

B. Plaintiffs allege justifiable reliance on Defendants' misrepresentations and omissions of a material fact.

In order to state a claim under Section 517.301, Plaintiffs must allege facts in the complaint showing justifiable reliance on Defendants' misrepresentations or omissions of

material fact. *See Durden*, 2009 WL 6499365, at *5. The allegations in the Complaint, when viewed in the light most favorable to Plaintiffs, sufficiently establish justifiable reliance.

1. The allegations demonstrate justifiable reliance.

The Eleventh Circuit, interpreting Florida law, has held that:

> Determinations of whether an investor's reliance was justified requires the consideration of all relevant factors, including: (1) the sophistication and expertise of the plaintiff in financial and security matters; (2) the existence of long standing business or personal relationships between the plaintiff and the defendant; (3) the plaintiff's access to relevant information; (4) the existence of a fiduciary relationship owed by the defendant to the plaintiff, (5) concealment of fraud by the defendant; (6) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Bruschi v. Brown, 876 F.2d 1526, 1529 (11th Cir. 1989). Applying these factors to the instant Complaints, it is clear Plaintiffs have adequately pleaded justifiable reliance.

With regard to the first factor, Plaintiffs allege they "lacked the expertise to evaluate investment strategies for [themselves], and justifiably relied on the expertise of [Defendants and their] investment specialists to provide guidance and advice as to [their] investments." (Almiron Compl. ¶ 28; Carrillo Compl. ¶ 29). Plaintiffs also allege a long-standing business relationship existed between Plaintiffs and Defendants because they entered into a business relationship with Defendants approximately two years prior to investing in Fairfield Sentry Ltd. (*See* Almiron Compl. ¶¶ 22, 25; Carrillo ¶¶ 23,26). Additionally, Plaintiffs allege, with specificity, the misrepresentations made by Defendants. For instance, Plaintiffs state: "Defendants recommended FSL to Plaintiff[s] as being in line with [their] investment preferences and as having a purported history of stable and steady returns, and advised the Plaintiff[s] that extensive due diligence had been done on Fairfield Sentry Ltd. before recommending it to Plaintiff[s] and other STANDARD CHARTERED AMERICAS clients." (Almiron Compl. ¶ 29; Carrillo

Compl. ¶ 31). Finally, Plaintiffs indicate that due to their "ignorance of the false and misleading statements set forth above and the deceptive and manipulative devices and contrivances employed by the Defendants, [Plaintiffs] relied to [their] detriment on such misleading statements and omissions by investing in Fairfield Sentry Ltd. (Almiron Compl. ¶ 67; Carrillo Compl. ¶ 69). After careful review of the relevant factors, it is clear Plaintiffs have made sufficient allegations to support a finding that their reliance was justified under the circumstances.

Defendants assert that the reasonable person test proclaimed by the Florida Supreme Court counsels against a finding of justifiable reliance in the instant case. *See* Mot. at 28 (citing *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) ("plaintiffs are responsible for 'investigating information that a reasonable person in the[ir] position . . . would be expected to investigate'")). However, *Butler* actually supports ***Plaintiffs'*** position and allegations. Plaintiffs allege they lacked the expertise to evaluate and select investments and thus relied on the representations of Defendants. (Almiron Compl. ¶ 28; Carrillo Compl. ¶ 29). The allegations in the Complaints illustrate a course of conduct consistent with the "reasonable person" test set forth by the Florida Supreme Court. This is because a reasonable person, who lacks expertise and knowledge on investment matters, would reasonably rely on the representations of "investment experts" in making their investment decisions. *Id.*

2. Written agreements cannot preclude Plaintiffs' justifiable reliance.

Defendants also contend Plaintiffs cannot establish justifiable reliance because contracts between the parties state that Plaintiffs cannot rely on Defendants' representations. In support of this contention, Defendants cite cases which discuss the general proposition that a plaintiff cannot claim reliance on prior representations where a contract expressly precludes them from

doing so.[3] Based on that general rule, Defendants argue that as a matter of law, Plaintiffs could not have justifiably relied on any prior agreements or representations. Yet this is merely another attempt by Defendants to confuse the facts and law at issue, as the facts underlying the holdings in the cases cited by Defendants are fundamentally different than the facts in the instant case. Those cases involved real estate transactions where the contracts expressly stated that any prior representations made by the parties were supplanted and controlled by the provisions in the respective contracts. *See Garcia*, 528 F. Supp. 2d at 1295; *Weaver*, 2008 WL 4145520, at *4-5; *Adrianne Roggenbuck Trust, AH v. Dev. Res. Grp., LLC*, 2010 WL 3824215, at *3. Ultimately, none of the courts in those cases could find justifiable reliance because the alleged misrepresentations were in direct conflict with provisions in the purchase contract, and as such, the written purchase contract supplanted the alleged oral representations. The courts in those cases emphasized that the plaintiffs could not assert reliance on an oral statement when that oral statement was directly contradicted by the subsequent contract between the parties.

In contrast, here, the representations on which Plaintiffs relied do not contradict the express terms of the contract. In fact, the representations themselves are *supported* by the contract. For example, Plaintiffs contend Defendants misrepresented the fact that they would conduct due diligence with regard to the entities in which they would invest Plaintiffs' funds. This representation is not contradicted by any express term of the contract. In fact, the contract actually contemplates Defendants will conduct this sort of due diligence. This is because the contract establishes a non-discretionary broker-investor relationship between the parties.

[3] *See Garcia v. Santa Maria Resort, Inc.*, 528 F. Supp. 2d 1283, 1295 (S.D. Fla. 2007); *Weaver v. Opera Tower, LLC*, No. 07-CV-23332, 2008 WL 4145520, at *4-5 (S.D. Fla. Aug. 1, 2008); *Adrianne Roggenbuck Trust, AH v. Dev. Res. Grp., LLC*, no. 09-CV-2158, 2010 WL 3824215, at *3 (M.D. Fla. Sept. 27, 2010).

Embedded in that relationship, is an understanding that the parties will perform the obligations placed on them as broker or investor.

Performing due diligence and becoming informed regarding the investments into which a broker is placing his investors' funds is a duty imposed on all brokers. Indeed, the Eleventh Circuit has expressly identified the various duties imposed in a nondiscretionary investment advising relationship:

> (1) the duty to recommend [investments] only after studying it sufficiently to become informed as to its nature, price, and financial prognosis; (2) the duty to perform the customer's orders promptly in a manner best suited to serve the customer's interests; (3) the duty to inform the customer of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-dealing ...; (5) the duty not to misrepresent any material fact to the transaction; and (6) the duty to transact business only after receiving approval from the customer.

Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987); *see also Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (D.C. Mich. 1978).

The contract, by establishing a broker-investor relationship between the parties, reaffirms Defendants' obligation to conduct due diligence. Moreover, Defendants cannot disclaim the fundamental duties imposed on them as a non-discretionary broker merely by inserting simple boilerplate disclaimer language into the contract.

Based on the foregoing reasons, Plaintiffs have sufficiently alleged justifiable reliance.

C. Plaintiffs adequately allege the scienter requirement of Florida securities fraud statute Section 517.301.

Courts interpreting Florida law have consistently held the scienter requirement of Section 517.301 is satisfied by a showing of mere negligence. *See Grippo*, 357 F.3d at 1222; *Rousseff v. E.F. Hutton, Co., Inc.*, 867 F.2d 1281, 1281-82 (11th Cir. 1989); *see Gochnauer*, 810 F.2d at 1046; *Merrill Lynch, Pierce, Fenner & Smith v. Byrne*, 320 So. 2d 436 (Fla. 3d DCA 1975).

Negligence under Florida law requires a plaintiff to "establish that the defendant owed a duty, that the defendant breached that duty, and that this breach caused the plaintiff damages." *Fla. Dept. of Corrections v. Abril*, 969 So. 2d 201, 204 (Fla. 2007). Plaintiffs' allegations satisfy all of those elements.

First, the allegations support the finding that Defendants owed Plaintiffs a duty. In fact, as stated above, the Eleventh Circuit has identified various duties present in a nondiscretionary investment advising position. *See Gochnauer*, 810 F.2d at 1049, *supra* at p.11.

Second, as Plaintiffs discussed previously, Defendants made material misrepresentations and omissions in direct contravention of their duties as investment advisors. *See* Section I.A., *supra*. Finally, Plaintiffs allege they relied on these material misrepresentations and omissions, and ultimately suffered damages because of them. *Id.* Accordingly, Plaintiffs' allegations in their respective complaints support a finding of scienter necessary to bring a cause of action based on Section 517.301.

D. Plaintiffs allege facts to bring their relationship with Defendants within the purview of Section 517.211.

Section 517.301 operates in conjunction with section 517.211. Fla. Stat. § 517.211(2); *see Rousseff*, 867 F.2d at 1283. In particular, Section 517.211 provides the remedy for the violation of Section 517.301 and a plaintiff must allege the defendant falls within the class of individuals identified in Section 517.211. In relevant part, Section 517.211 provides:

> Any person purchasing or selling a security in violation of s. 517.301, and every director, officer, partner, or agent of or for the purchaser or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person selling the security to or purchasing the security from such person in an action for rescission, if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security.

Fla. Stat. § 517.211(2).

Defendants assert they do not fall within the class of individuals identified in that section because they were not the seller of the securities, nor were they an agent of the seller, whom they contend was Fairfield Sentry Limited. Essentially, they contend strict buyer/seller privity is necessary for the remedies of Section 517.211 to apply. Defendants explain "a defendant is in buyer/seller privity with the plaintiff when he is the seller of the securities or the 'agent of such a seller who has solicited the sale of the securities on his own behalf or on behalf of the seller.'" (Mot. 30). Thus, Defendants' theory is that a buyer can only bring an action under 517.211 against the entity that sold him the securities. This is plainly wrong.

Courts interpreting Section 517.211 have held that a broker serving as an agent for investors in the sale and purchase of securities falls within designated class of individuals that can be held liable for violation of Section 517.211. *See First Union Discount Brokerage Services, Inc.*, 744 F. Supp. at 1155 (collecting cases); *see also Rubin v. Gabay*, 979 So. 2d 988, 990 (Fla. 4th DCA 2008). In order for investors to recover from a broker for alleged misrepresentations under Section 517.301, investors are only required to prove agency between themselves and broker; strict buyer/seller privity is not required. *See First Union*, 744 F. Supp. at 1155.

In light of this standard, Plaintiffs have made sufficient allegations in their Complaints to bring their relationship with Defendants within the purview of Section 517.211. First, Plaintiffs allege they entered into a business relationship as a customer of Standard Chartered Americas, a wholly-owned SEC-registered broker-dealer, on or about November 2006, and purchased and sold securities at their recommendation. (*See* Almiron Compl. ¶ 26; Carrillo Compl. ¶ 26). Second, Plaintiffs allege they lacked the expertise necessary to evaluate investment strategies for

themselves, and as such, relied on the expertise of Mr. Garcia-Adanaz and Standard Chartered Americas' investment specialists to provide guidance and advice as to his investments. (*See* Almiron Compl. ¶¶ 29, 30, 32; Carrillo Compl. ¶¶ 29-31). Finally, during this time of reliance on Standard Chartered Americas, Standard Chartered Americas' investment specialists, Mr. Garcia-Adanez, and the aforementioned individuals made various material misrepresentations and omissions resulting in substantial losses to Plaintiff. (*See* Almiron Compl. ¶¶ 35-48; Carrillo Compl. ¶¶ 37-50).

These allegations establish Defendants were brokers serving as agents for Plaintiffs in the purchase of securities, thus placing them within the class of individuals to whom Section 517.211 applies. Moreover, the question of whether an agency relationship exists is usually a question of fact that should not be decided on a motion to dismiss. *See Serefex Corp. v. Hickman Holdings, LP*, 695 F. Supp. 2d 1331, 1343 (M.D. Fla. 2010); *see also Rubin*, 979 So. 2d at 990. Therefore, Count I should not be dismissed.

E. Count I meets the pleading standards required by Section 9(b) of the Federal Rules of Civil Procedure.

Finally, to state a claim for the violation of Section 517.301, Plaintiffs must meet the pleading requirements set forth in Rule 9(b). Pursuant to Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). To satisfy 9(b), a securities fraud complaint based on misstatements must: (1) specify the statements the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). Allegations that are conclusory or unsupported by factual assertions are insufficient. *Id.*

Essentially, Plaintiffs are required to plead securities fraud claims with particularity in order to "provide a defendant in a securities fraud case with fair notice of a plaintiff's claim, safeguard his reputation from improvident charges of wrongdoing, and protect him against strike suits." *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 158 (S.D.N.Y. 2008) (quoting *ATSI Commc'ns, Inc.*, 493 F.3d at 99). This is in accord with the primary purpose of Rule 9(b), which "is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based." *Ross*, 904 F.2d at 823 (2d Cir. 1990).

Plaintiffs' allegations provide Defendants with fair notice of the nature and factual grounds upon which the claim is based. First, Plaintiffs expressly identify the statements they contend are fraudulent. For example, Plaintiffs allege Defendants misrepresented extensive due diligence had been done on Fairfield Sentry Ltd. before Defendants recommended it to Plaintiffs, when in fact none had been done. (*See* Almiron Compl. ¶ 43; Carrillo Compl. ¶ 43). Indeed, as Plaintiffs point out, a high-ranking executive in the employment of Defendants admitted, "[Defendants] in recommending Fairfield Sentry Ltd. as an investment, had done none of [their] own due diligence or investigations with respect to Fairfield Sentry Ltd., but instead had relied wholly upon representations made by promoters of Fairfield Sentry Ltd." (Almiron Compl. ¶ 58; Carrillo Compl. ¶ 60). Plaintiffs also allege Defendants "did not disclose the structure of Fairfield Sentry Ltd. or the inherent risks in such a structure to its customers." (Almiron Compl. ¶ 39; Carrillo Compl. ¶ 41).

Second, Plaintiffs identify the speaker of these statements. For instance, Plaintiffs allege "[a]t all relevant times, the account was managed by [Defendants] through it's designated relationship manager, Mr. Antonio Garcia-Adanez, through it Miami office." (Almiron Compl. ¶ 26; Carrillo Compl. ¶ 27). Then, Plaintiffs' Complaint includes references to representations

made by Mr. Garcia-Adanez and the other Defendants to Plaintiffs about Fairfield Sentry Ltd. (*See* Almiron Compl. ¶¶ 27, 29, 32, 33; Carrillo Compl. ¶¶ 28, 30, 34, 35).

Third, Plaintiffs identify when the statements were made. For example, Carrillo alleges "[i]n approximately September 2008, STANDARD CHARTERED AMERICAS through its designated relationship manager and investment specialists, recommended purchasing shares in the Fairfield Sentry Ltd. to Plaintiff. STANDARD CHATERED AMERICAS and Mr. Garcia-Adanez represented that FSL was a bona fide investment product." (Carrillo Compl. ¶ 30). Similarly, Almiron alleges "[i]n approximately late-November or early-December 2008, STANDARD CHARTERED AMERICAS through its designated relationship manager and investment specialists, recommended purchasing shares in the Fairfield Sentry Ltd. to Plaintiff.[4]

Lastly, Plaintiffs indicate how the Defendants' allegations are fraudulent. Specifically, Plaintiffs identify misrepresentations and omissions made by Defendants that were clearly false and misleading. *See* Section I.A., *supra*. Plaintiffs state that "in ignorance of the false and misleading statements set forth above and the deceptive and manipulative devices and contrivances employed by the Defendants, [Plaintiffs] relied to his detriment on such misleading statements and omissions by investing in Fidelity Sentry Ltd." (Almiron ¶ 67; Carrillo Compl. ¶ 69).

In sum, Plaintiffs do not merely plead a haphazard set of allegations meant to launch full-scale discovery in the hope of uncovering a "smoking-gun" or a strike suit. To the contrary, Plaintiffs' Complaints are clear and concise, and consistent with the purpose of Rule 9(b). Accordingly, Defendants are fully aware of the nature of the allegations, the parties involved,

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[4] Shockingly, "the 'Trade Date' of this transaction that appears on the [Almiron's] account statement is December 12, 2008, one day after Bernard L. Madoff was charged with securities fraud by both the SEC and the U.S. District Attorney's Office." (*Id.*)

and the time frame implicated. There are no improvident charges of wrongdoing.. Thus, Plaintiffs' allegations are consistent with the intent of Rule 9(b).

As previously stated, the requisite scienter requirement for a cause of action brought under Section 517.301 is mere negligence. Plaintiffs have sufficiently met this threshold in pleading this scienter requirement, and satisfy the requirements of Rule 9(b).

II. PLAINTIFFS STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY

Plaintiffs have adequately alleged a breach of fiduciary duty in their Complaints. Under Florida law, "[t]he elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damage." *Gracy v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). A fiduciary relationship arises where "a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial." *Doe v. Egans*, 814 So. 2d 370, 374 (Fla. 2002) (quoting *Quinn v. Phipps*, 113 So. 419, 421 (Fla. 1927)) (emphasis removed). Additionally, a fiduciary relationship may be implied by law. *See id*. When fiduciary relationships are implied in law, they are premised upon the specific factual situation surrounding the transaction and the relationship of the parties. *See id*.; *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 518 (Fla. 3d DCA 1994); *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 207-08 (Fla. 3d DCA 2003).

Furthermore, Florida has adopted section 874 of the Restatement (Second) of Torts, which provides that a breach of a fiduciary relationship "'is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the

relation.'" *Id.* (quoting Restatement (Second) of Torts § 874 cmt. B (1979)). Succinctly, "[t]he term 'fiduciary or confidential relation' is a very broad one. It exists . . . in all cases in which influence has been acquired and abused, and all in which confidence has been reposed and betrayed." *Atl. Nat'l Bank of Fla. v. Vest*, 480 So. 2d 1332, 1332 (Fla. 2d DCA1985).

Defendants contend that because Plaintiffs' accounts were nondiscretionary — meaning Plaintiffs had the final word on what investments to make — Defendants owed only a limited set of duties to Plaintiffs. (Mot. 32). However, as this Court held previously, "even nondiscretionary broker-dealers have a duty to 'recommend [investments] only after studying [them] sufficiently to become informed as to [their] nature, price, and financial prognosis.'" *Anwar v. Fairfield Greenwich Ltd.*, 745 F. Supp. 2d 360, 376 (S.D.N.Y 2010) (Case 1:09-cv-00118-VM-THK, ECF Doc. No. 543) (quoting *Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1147 (Fla. 3d DCA 2001)) (first alteration in original).

Moreover, in Florida, "if the relationship between the parties develops beyond a nondiscretionary one — if, for example, one party begins giving investment advice — the duties increase. *Id*. For example, in *Ward*, the Third District Court of Appeals of Florida held the defendant owed the plaintiff a general fiduciary duty of loyalty and care where defendant was giving the plaintiff investment advice. *Ward*, 777 So. 2d 1144, 1147. In particular, the court concluded that once the defendant bank contacted the plaintiff stockholder on its own initiative and advised the stockholder not to sell his shares those duties were invoked. *Id*.

In the instant case, Plaintiffs have sufficiently alleged both the existence and breach of fiduciary duties. Indeed, in a recent order issued by this Court, very similar factual allegations were analyzed and this Court found the allegations regarding breach of fiduciary duty were sufficient to withstand a motion to dismiss. *See Anwar*, 745 F. Supp. 2d at 376-77 (ECF Doc.

No. 543). In sum, the pleadings considered alleged, as here, (1) that Standard Chartered's recommendation that they invest in the Fairfield Funds without conducting proper diligence was a breach of fiduciary duty; (2) that a high ranking Standard Chartered executive admitted that no diligence had been done on the Fairfield Funds; and (3) that no diligence was actually performed. *Id*. at 377 (ECF Doc. No. 543).

Here, Plaintiffs make very similar, if not identical, allegations to those made by the *Anwar* plaintiffs. *See, e.g.* Almiron Compl. ¶ 35, 41, and 58; Carrillo Compl. ¶ 37, 43, and 60. Accordingly, here, as in *Anwar*, "Standard Chartered had a duty to [study the investment] before recommending Fairfield Sentry [to the plaintiff]," *Anwar*, 745 F. Supp. 2d at 377 (ECF Doc. No. 543), and the Plaintiffs' allegations are sufficient to set forth a claim for breach of fiduciary duty.

III. PLAINTIFFS STATE A CLAIM FOR NEGLIGENCE

To maintain a negligence action under Florida law, a plaintiff must "establish that the defendant owed a duty, that the defendant breached that duty, and that this breach caused the plaintiff damages." *Abril*, 969 So. 2d at 204. Plaintiffs have presented sufficient factual allegations to support each of these elements.

A. Existence and Breach of Duty

The law is clear that a broker owes a fiduciary duty of care and loyalty to a securities investor. *See Thompson v. Smith Barney, Harris Upham & Co., Inc.*, 709 F.2d 1413, 1418 (11th Cir. 1983); *Dupuy v. Dupuy*, 551 F.2d 1005, 1015 (5th Cir. 1977)[5]; *Abril*, 969 So. 2d at 204; *see also* Rest. (2d) of Agency § 425 (agents employed to make, manage, or advise on investments have fiduciary obligation). Furthermore, the Eleventh Circuit has held that an investment broker

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

owes certain duties when in a nondiscretionary investment advising position. *See Gochnauer*, 810 F.2d at 1049, *supra*.

It is undisputed that Plaintiffs and Defendants entered into an investor-broker relationship. As a result, Defendants owed Plaintiffs the abovementioned duties. Additionally, Plaintiffs make various allegations in the Complaint regarding Defendants' breach of those duties, cited herein. *See* Almiron Compl. ¶ 35, 39, 41, and 87; Carrillo Compl. ¶ 37, 41, 43, and 88. Therefore, Plaintiffs adequately allege Defendants breached the duties of care and loyalty owed to Plaintiffs.

Moreover, Plaintiffs also allege sufficient facts to give rise to a fiduciary duty to monitor. Although Plaintiffs' Complaint emphasizes Defendants' breach of their duty of care in recommending investments to Plaintiffs, Defendants' Motion focuses solely on Plaintiffs' additional allegation that "Defendants had a duty to monitor and manage the investments with reasonable care." (Almiron Compl. ¶ 81, 85; Carrillo Compl. ¶¶ 83, 86). Defendants assert, "it is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis." (Mot. 32) (citing *De Kwiatkowski v. Bear Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002). Despite Defendants' assertion, ongoing duties, such as a duty to monitor accounts, may arise for a nondiscretionary broker if the broker, "notwithstanding its limited contractual duties, undertook a substantial and comprehensive advisory role." *Id*. at 1307.

In fact, this Court found that certain allegations similar to those in the instant case, sufficiently alleged facts that could give rise to a duty to continue monitoring the investment. *See Anwar* 745 F. Supp. 2d at 377. Specifically, the court found the plaintiffs' claim of negligence for breach of the duty to monitor was sufficiently alleged by the following assertions:

> [Plaintiff] alleges she was 'assured … that [Standard Chartered was] in the business of advising and protecting investors" and that Standard Chartered became her "investment guide for making investments in the United States." (Valladolid Complaint ¶ 9.) Such assurances came in the form of Valladolid's "relationship manager" "boast[ing]…of the care [Standard Chartered] took in evaluating investments for its customers…[and] boast[ing] about the performance of various investment funds, singling out [Fairfield Sentry] as particularly impressive given its long term success.' (*Id.* ¶ 41.)

Id. The court emphasized that the allegations that defendant had marketed an investment and represented it was in the business of advising as to such investments could support a claim that the broker had taken on "more than a passive role taking orders." *Id.* As a result, the Court found the allegations sufficiently alleged facts that could give rise to a duty to monitor. Likewise, here, Plaintiffs have plead facts that could give rise to a duty to monitor.

Plaintiffs Almiron and Carrillo's allegations that they "relied on representations" and "lacked the expertise to evaluate investment strategies" (Almiron Compl. ¶¶ 32, 33, and 35; Carrillo Compl. ¶¶ 34, 35, and 37) are very similar to those where this Court previously found a duty to monitor could arise. *See Anwar*, 745 F. Supp. 2d at 377. Consequently, Plaintiffs' pleadings contain sufficient factual allegations to give rise to a duty to monitor.

B. Florida's economic loss rule

Defendants contend Plaintiffs' negligence claim should be dismissed under Florida's economic loss rule because the claim relates to matters governed by a related contract. However, the economic loss rule is not an applicable bar to Plaintiffs' negligence claim.

"The Florida Supreme Court has 'clearly stated' that Florida's economic loss rule is limited to two situations: '(1) where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract, or (2) where the defendant is a manufacturer or distributor of a defective product which damages itself but does not cause

personal injury or damage to any other property.'" *Anwar*, 745 F. Supp. 2d at 374 (quoting *Curd v. Mosaic Fertilizer, LLC*, 39 So. 2d 1216, 1223 (Fla. 2010)). This learned Court previously presented a thorough explanation of the applicability and limitations of Florida's economic loss rule, stating:

> The Florida Supreme Court's most recent examination of the economic loss rule is found in *Indemnity Insurance Company of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) ("*American Aviation*"). Prior to *American Aviation* and another case, *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999), the rule had been "subject to some debate" and "ill-defined" "application and parameters." *Moransais*, 744 So. 2d at 979. Indeed, the Florida Supreme Court's own "pronouncements on the rule have not always been clear" and, in the past, the court's "holdings have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond [the court's] original intent." *Id*. at 980.
>
> Given the conflicting interpretations of the economic loss rule in Florida's lower courts, the Florida Supreme Court "expressly limited" it in *American Aviation*, 891 So. 2d. at 542 . . . As part of its limiting doctrine, the Florida Supreme Court [] listed exceptions to the newly-narrowed rule that applied even to parties to a contract, including "professional malpractice, fraudulent inducement, and negligent misrepresentations, or freestanding statutory causes of action." *Id*. at 543. The court also noted, without either obvious approval or disapproval, that some courts in Florida recognized other exceptions to the rule, namely "causes of action for breach of fiduciary duty, even if there was an underlying oral or written contract." *Id*. at 542 (*citing Invo Fla., Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263, 1266 (Fla. 4th D.C.A. 2000); *Performance Paint Yacht Refinishing, Inc. v. Haines*, 190 F.R.D. 699, 701 (S.D. Fla. 1999).

Anwar, 745 F. Supp. 2d at 375 (ECF Doc. No. 543).

One of the exceptions to the economic loss rule recognized by the Florida Supreme Court involves "neglect in providing professional services." *Moransais*, 744 So. 2d at 983. In *Moransais*, the Florida Supreme Court emphasized

> that by recognizing that the economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action, such as those for neglect in providing professional services. Rather, the rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. We hesitate to speculate further on situations not actually before us. The rule, in any case, should not be invoked to bar well-established causes of actions in tort, such as professional malpractice.

Id. The exception described by the court in *Moransais* is applicable to Plaintiffs' negligence claim in the instant case. This is because Plaintiffs present factual allegations asserting they entered into a professional relationship with Defendants. Specifically, Plaintiffs allege Defendants functioned as an investment advisor. *See* Almiron Compl. ¶ 28; Carrillo Compl. ¶ 30. In their capacity as investment advisor, Defendants made numerous misrepresentations and omissions, and as a result of Defendants' misrepresentations and omissions, Plaintiffs suffered damages. (*See* Almiron Compl. ¶ 41; Carrillo Compl. ¶ 43). These allegations clearly relate to Defendants' neglect in providing professional investment services, in a manner akin to professional malpractice. Consequently, the negligence claim falls into one of the recognized exceptions to the economic loss rule.

III. PLAINTIFFS STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION

To state a cause of action for negligent misrepresentation, a plaintiff must allege the following: (1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely . . . on the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation. *See Romo v. Amedex Ins. Co.*, 930 So. 2d 643,

652 (Fla. 3d DCA 2006); *Simon v. Celebration Co.*, 883 So. 2d 826, 832 (Fla. 5th DCA 2004) (*citing Johnson v. Davis*, 480 So. 2d 625 (Fla.1985)); *see also Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 337–38 (Fla.1997); *Ragsdale v. Mount Sinai Med. Ctr. of Miami*, 770 So. 2d 167, 169 (Fla. 3d DCA 2000).

As evinced by the facts and law already discussed in this Response, Plaintiffs have properly identified misrepresentations of material fact made by Defendants, which Defendants knew to be false, and upon which Plaintiffs relied to their detriment. As a result, Plaintiffs have properly pleaded a cause of action for negligent misrepresentation.

IV. PLAINTIFFS STATE A CLAIM FOR UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

Plaintiffs also adequately allege a claim for unjust enrichment. To state a claim for unjust enrichment, "a plaintiff must plead the following elements: 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." *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006). Plaintiffs establish each of these elements. In particular, Plaintiffs conferred a benefit on Defendants by using their investment services and paying them fees and commissions for these services, Defendants had knowledge of and accepted these benefits, and in light of Defendants conduct, it would be inequitable for Defendants to retain the benefit. *See* Almiron Compl., Count V; Carrillo Compl., Count V.

Nevertheless, Defendants contend that because there is an adequate legal remedy the Court should dismiss Count V of the Complaint. Essentially, Defendants assert that because reference has been made, either directly or indirectly, in the Complaint to a contract, Plaintiffs cannot bring an equitable claim for unjust enrichment. However, under Florida law, a plaintiff is

not barred from asserting an unjust enrichment claim, even in cases where a breach of contract has been plead.

Under Florida law, the doctrine cited by Defendant — that if the complaint on its face shows that adequate legal remedies exist, equitable remedies are not available — does ***not*** apply to claims for unjust enrichment. *See Mobil Corp. v. Dade Cnty. Esoil Mgmt Co., Inc.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997). In fact, Florida courts have consistently held that, "until an express contract is proven, a motion to dismiss a claim for . . . unjust enrichment on these grounds is premature." *Sierra Equity Grp, Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1229 (S.D. Fla. 2009) (quoting *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. 5th DCA 1998)).

Moreover, dismissing a claim for unjust enrichment at this stage is premature when a defendant has not conceded a plaintiff is entitled to recovery under the contract, because it is possible that, if the contractual claim fails, the plaintiff may still be entitled to recovery under an unjust enrichment theory. *See Tracfone Wireless, Inc. v. Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1366 (S.D. Fla. 2009) ("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."); *Manicini Enters. v. Am. Express Co.*, 236 F.R.D. 695, 699 (S.D. Fla. 2006) ("[T]he court finds that plaintiff should be permitted to plead alternative equitable claims for relief as the existence of express contracts between the Parties has yet to be proven."); *Mobil Oil Corp. v. Dade Cnty. Esoil Mgmt. Co.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) ("Until an express contract is proven, a motion to dismiss a claim for promissory estoppel or unjust enrichment on these grounds is premature.").

For these reasons, Count V should not be dismissed.

V. COUNT II, III, IV, and V ARE NOT PREDICATED ON FRAUD AND THEREFORE NOT SUBJECT TO RULE 9(b) PLEADING REQUIREMENTS.

Defendants assert that, because Plaintiffs allege one count of fraud in the Complaint — Count I — all of the other counts should be treated as fraud claims as well, and are subject to the pleading requirements of Federal Rule of Civil Procedure 9(b). While it is true that Rule 9(b) pleading requirements will apply to any claim that sounds in fraud, the court must review each count individually, and treat each count differently if it has been meaningfully distinguished. *See Matsumura v. Benihana Nat'l Corp.*, 543 F. Supp. 2d 245, 254 (S.D.N.Y. 2008).

For example, in *In re Alstom SA*, the court held that where the allegations in the complaint are "permeated with allegations of fraudulent conduct on the part of the defendants" each of the claims are subject to the requirements of Rule 9(b). 406 F. Supp. 2d 402, 410 (S.D.N.Y. 2005). After a thorough analysis of the allegations, the *Alstom* court concluded that because the plaintiffs, "made . . . broad averments portraying a *pervasive* and *overarching* scheme of fraud, one that apparently *imbues all of the their specific causes of action* and attendant claims of losses," the plaintiffs could not "then attempt to retreat, apparently to escape the particularity requirement of [Rule 9(b)." *Id*. at 410 (emphasis added). In the instant case, Plaintiffs have made no such broad and overarching allegations of fraud. Indeed, careful review of the Complaint reveals that Plaintiffs do not allege broad averments portraying a pervasive and overarching scheme of fraud. With the exception of Count I, which satisfies the Rule 9(b) standards, Plaintiffs' Complaint does not allege fraud or fraudulent conduct.

Defendants' sole support for their argument that each of Plaintiffs' claims are interconnected with fraud is that Plaintiffs mention the word "fraud" twice in the Complaint. Specifically, Defendants rely on the following two allegations: (1) "Almiron and Carrillo allege

that SCBI 'engaged in a common plan, scheme, and unlawful course of conduct to defraud them into investing in Sentry" (Almiron Compl. ¶¶ 63-69; Carrillo Compl ¶¶ 65-71); and (2) "alleging SCBI failed to discover Madoff's fraud through conduct that was 'akin to fraud.' (Almiron Compl. ¶¶70-80; Carrillo Compl. ¶¶ 72-81). (Mot. 13). Yet that reliance is unfounded. Unlike the *Alstom* defendant, Defendants in the instant case offer no in-depth analysis or factual support for their contention. *See* Alstom, 406 F. Supp. 2d at 410. The Court should not allow the Defendants to dismiss sufficiently pleaded common-law claims merely because the Complaint contains an additional claim for fraud or mentions the word "fraud." Defendants do not make any arguments in their Motion that the substance of the Complaint is tainted with fraud; instead, they merely ask the Court to dismiss all claims because one claim "sounds in fraud." This is not a sufficient reason to subject the claims to the pleading requirements of Rule 9(b).[6]

VI. CONCLUSION

For the reasons set forth herein, Plaintiffs Ricardo Almiron and Carlos Carrillo have properly stated a claim upon which relief can be granted as to every count in their Complaints, and accordingly, the Defendants' motion to dismiss should be dismissed entirely.

[6] Notably, even if all claims were subject to the pleading requirements of Rule 9(b), they are sufficiently detailed to survive a motion to dismiss even under the heightened standard. As explained in Section I above, the allegations, which are incorporated into each count of the Complaint, identify all relevant facts with regard to misrepresentations made by Defendants.

Dated: May 6, 2011
Miami, Florida

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be served by email, in PDF format, upon the persons on the attached service list, this 6th day of May 2011.

_____/s/ Matthew L. Jones___________
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I hereby certify that on May 27, 2011. I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Southern District of New York by using the CM/ECF.

Dated: New York, New York
May 27, 2011

Respectfully submitted,

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