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: *Lou-Martinez* v. *Standard Chartered Bank International (Americas) Ltd., et al.*, No. 10-CV-8272; *Almiron* v. *Standard Chartered Bank International (Americas) Ltd., et al.*, No. 10-CV-6186; and *Carrillo* v. *Standard Chartered Bank International (Americas) Ltd., et al.*, No. 10-CV-6187.

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

REPLY MEMORANDUM OF LAW OF STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LTD., STANDARD CHARTERED PLC AND STANCHART SECURITIES INTERNATIONAL, INC. IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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June 6, 2011

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Standard Chartered Bank International (Americas) Ltd. ("SCBI"), Standard Chartered PLC ("SC PLC") and StanChart Securities Inc. ("StanChart") (collectively, "Standard Chartered") respectfully submit this unified reply memorandum of law in further support of their unified motion to dismiss the complaints in *Lou-Martinez* v. *Standard Chartered Bank International (Americas) Ltd.* ("*Lou-Martinez*"), *Almiron* v. *Standard Chartered Bank International (Americas) Limited* ("*Almiron*") and *Carrillo* v. *Standard Chartered Bank International (Americas) Limited* ("*Carrillo*").

PRELIMINARY STATEMENT

On March 21, 2011, Standard Chartered filed a unified motion to dismiss the complaints in *Lou-Martinez, Almiron* and *Carrillo*. Rather than filing a unified response, as contemplated under the Second Amended Scheduling Order Regarding Standard Chartered Cases, entered on February 4, 2011 (ECF No. 602) (the "Scheduling Order"), plaintiffs in these cases filed separate responses.[1] Nonetheless, plaintiffs' opposition papers share a unifying theme: they do not address, much less explain away, the fatal flaws in their pleadings. The Lou-Martinezes have made allegations that are (1) irreconcilable with their contemporaneous allegations in *Anwar* v. *Fairfield Greenwich Ltd.* ("*Anwar*"); and (2) contradicted by more than three years' of account statements. The Lou-Martinezes make no meaningful counter to the arguments advanced by Standard Chartered because none exist. Almiron and Carrillo similarly fail to refute the deficiencies of their allegations under Rule 9(b), including their failure to plead particularized facts or a strong inference of scienter.

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[1] Under the Scheduling Order, plaintiffs were required to file a unified opposition brief on or before May 6, 2011. Instead, plaintiffs in *Lou-Martinez* (the "Lou-Martinezes") filed an opposition brief on April 11, 2011 (the "LM Opp."), while the plaintiffs in *Almiron* and *Carrillo* served a joint opposition brief on May 7, 2011 (the "AC Opp."), and filed it with the Court on May 27, 2011.

The arguments raised in each of the opposition briefs are addressed *seriatim* below. For the reasons stated below and in Standard Chartered's Memorandum of Law In Support of Its Unified Motion to Dismiss Plaintiffs' Complaints ("Defs.' Mem."), the complaints in *Lou-Martinez, Almiron* and *Carrillo* should be dismissed in their entirety.

I. THE LOU-MARTINEZES' LEGAL ARGUMENTS PROVIDE NO BASIS FOR MAINTAINING THEIR COMPLAINT.

In their opposition papers, the Lou-Martinezes do not contest that (1) they do not allege any wrongdoing against StanChart or SC PLC; (2) they have not adequately pleaded a fraudulent omission, (3) their gross negligence claim is barred by the economic loss rule, and (4) their unjust enrichment claim fails because their relationship with Standard Chartered was governed by written account agreements. Instead, they attempt to deflect review by advancing peripherally relevant responses to Standard Chartered's arguments. In the end, however, the Lou-Martinezes have served a fatal blow upon themselves. Their complaint rests on allegations that they did not authorize or even know about their investment in Sentry until January 2009. Those allegations are demonstrably false, and thus, even under the standard of review applicable on a motion to dismiss, are insufficient to support the claims for conversion or unauthorized investment. In all events, the Lou-Martinezes plainly do not allege that Standard Chartered recommended Sentry to them, precluding their claim based on an alleged duty to conduct due diligence on the fund.

A. The Lou-Martinezes Cannot Explain Away the Deficiencies in Their Claims for Conversion and Breach of Fiduciary Duty Based on an Allegedly Unauthorized Investment.

The Lou-Martinezes' claims for conversion and breach of fiduciary duty are premised on the allegation that Standard Chartered misappropriated $500,000 from their investment account in September 2005 and did not inform them until January 2009 that it had invested their money in Sentry. (*Lou-Martinez* Am. Compl. ¶¶ 36-46.) This allegation cannot be

reconciled with the Lou-Martinezes' monthly account statements, which show their investment in Sentry dating back to September 2005. Under well-settled law, the Court can consider the monthly account statements even in the context of Standard Chartered's motion to dismiss. Plaintiffs' claims also are barred by Florida's four-year statute of limitations because the alleged injury occurred in September 2005, not, as plaintiffs argue, in December 2008 or January 2009. Plaintiffs' alleged ignorance of their Sentry investment also directly conflicts with Mr. Lou-Martinez's allegations in the *Anwar* Second Consolidated Amended Complaint ("SCAC"). Finally, the Lou-Martinezes cannot sidestep that it was Bernard Madoff, not Standard Chartered, that deprived them of their assets.

1. The Court May Consider the Lou-Martinezes' Account Statements, Which Fatally Undermine Plaintiffs' Alleged Ignorance of Their Fairfield Sentry Investment.

Between September 2005 and January 2009, the Lou-Martinezes received thirty-eight monthly account statements showing their investment in Fairfield Sentry. This is fatal to their claims that Standard Chartered wrongfully "converted" their money without their knowledge and in so doing breached its fiduciary duty to them. (*Lou-Martinez* Am. Compl. ¶¶ 36-46.) In response, the Lou-Martinezes contend that this Court should not consider the account statements on the grounds that they are not integral to the complaint, not authenticated, and not relevant. (LM Opp. at 8-9.) The law does not permit such a head-in-the-sand review of plaintiffs' allegations.

According to the Lou-Martinezes, the account statements are not integral to their complaint because "there is not even any reference to any account documents" therein. (LM Opp. at 8.) The account statements need not be referenced in the complaint for the Court to consider them. As this Court has explained, "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit may be considered," even if never

referenced in the complaint. *Anwar* v. *Fairfield Greenwich, Ltd.*, 745 F. Supp. 2d 360, 366 (S.D.N.Y. 2010) ("*Anwar-SCBI*") (quoting *Chambers* v. *Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (internal quotation marks omitted). Here, the declaration submitted by counsel for the Lou-Martinezes accompanying their opposition brief acknowledges that the Lou-Martinezes possessed the account statements prior to filing this lawsuit. (Declaration of Laurence E. Curran III ("Curran Decl.") Ex. 1).[2] Plaintiffs cannot avoid these documents now simply because they have realized the documents defeat the allegations upon which they rest their claims. *See RBS Holdings, Inc.* v. *Wells Fargo Century, Inc.*, 485 F. Supp. 2d 472, 477 (S.D.N.Y. 2007) (Marrero, J.) ("RBS clearly had actual notice of the Consent and Release when the Amended Complaint was drafted; it cannot avoid the Court's consideration of this document simply by failing to explicitly reference it in the Amended Complaint." (citation omitted)).

The Lou-Martinezes next argue that the Court should not consider the account statements because Standard Chartered authenticated the statements through its attorney who "does not purport to speak with personal knowledge." (LM Opp. at 9.) But "'[a]uthentication need not . . . be by someone with personal knowledge of the underlying events described in the document, the substance or accuracy of the document, and the methods of calculation. . . . [A]uthentication only requires a showing that the document is what it purports to be.'" *Anwar* v. *Fairfield Greenwich Ltd.*, 742 F. Supp. 2d 367, 372 n.3 (S.D.N.Y. 2010) (Marrero, J.) (quoting *In re Worldcom Inc.*, 357 B.R. 223, 229 (S.D.N.Y. 2006)) (alterations in original). The Lou-Martinezes do not raise any legitimate question of the account statements' authenticity.

[2] In the June 1, 2010 letter that plaintiffs' counsel attaches to his declaration, Standard Chartered's counsel enclosed copies of, among other documents, "account statements that were provided to Mr. Martinez on a monthly basis following his investment in Fairfield Sentry in September 2005," each of which "reflects that Mr. Martinez was invested in Sentry." (*See* Curran Decl. Ex. 1.)

The Lou-Martinezes finally argue that "there is a serious issue of relevance of the proffered Account Statements as they do not offer any proof that Standard Chartered actually made the alleged investment in the Fairfield Sentry Fund." (LM Opp. at 9.) This argument borders on frivolous.[3] Because the Lou-Martinezes contend that they did not make, or were unaware of, their investment in Fairfield Sentry, it is of course relevant that dozens of their own account statements show the presence of a Sentry investment in their account for over three years.[4]

2. The Lou-Martinezes' Claims for Conversion and Breach of Fiduciary Duty are Untimely, Implausible and Inadequately Pleaded.

Even if the Lou-Martinezes' account statements did not defeat their claims for conversion and breach of fiduciary duty for unauthorized investment, these claims should be dismissed because they are (1) untimely under Florida's four-year statute of limitations because they accrued in September 2005; (2) implausible because they rest on factual allegations that Mr. Lou-Martinez has disavowed in *Anwar*; and (3) inadequately pleaded because the Lou-Martinezes do not adequately allege that Standard Chartered deprived (or intended to deprive)

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[3] The argument is not supported by *Faulkner* v. *Beer*, 463 F.3d 130 (2d Cir. 2006), the case relied on by the Lou-Martinezes. (LM Opp. at 8, 10-11.) In *Faulkner*, the Second Circuit vacated a dismissal order because the district court considered various extrinsic documents without conducting any analysis "of which plaintiffs had received which documents," notwithstanding that many plaintiffs likely did not receive each document. 463 F.3d at 134-35. No such difficulties exist here. The Lou-Martinezes' do not allege or otherwise argue that they did not receive the account statements or that the statements were somehow inaccurate or untimely.

[4] Standard Chartered's motion to dismiss should not be converted to one for summary judgment if the Court decides to consider the account statements. (LM Opp. at 11-13.) "Where [a] plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." *Cortec Indus., Inc.* v. *Sum Holdings L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). That is true here. More than three months before the Lou-Martinezes initiated this action, Standard Chartered provided them with copies of their account statements and explained that the statements evidenced that the Lou-Martinezes had authorized and confirmed their investment in Sentry. (Curran Decl. Ex. 1.)

them of their assets. (Defs.' Mem. at 18-21.) The Lou-Martinezes' attempts to refute these arguments all fall short.

First, the Lou-Martinezes contend that their claims accrued either on December 11, 2008, the date Madoff's fraud was exposed, or January 2009, the date they allegedly learned about their Sentry investment. (LM Opp. at 19-20.) Their conversion and fiduciary duty claims, however, are premised on the alleged injury that occurred when Standard Chartered allegedly withdrew funds from their account without authorization. (*Lou-Martinez* Am. Compl. ¶¶ 37, 44.) The claims thus accrued on the date of the allegedly unauthorized withdrawal, not the date the Madoff fraud was exposed or the date they supposedly learned of the investments. *E.g.*, *Kelly* v. *Lodwick*, --- So. 3d ----, 2011 WL 2031331, at *3 (Fla. Dist. Ct. App. May 25, 2011) (statute of limitations for breach of fiduciary duty attaches at time of the initial injury, even if damages not fully realized at time); *Gomez* v. *BankUnited*, No. 10-CV-21707, 2011 WL 114066, at *5 (S.D. Fla. Jan. 13, 2011) (statute of limitations for conversion began to run when defendant wrongfully deposited checks into own account, not where plaintiff discovered the money was stolen).[5] That withdrawal occurred in September 2005. (*See Lou-Martinez* Am. Compl. ¶¶ 22-23; *Anwar* SCAC ¶ 60; Berarducci Decl. Ex. G.) The Lou-Martinezes' conversion and breach of fiduciary duty claims are therefore time barred.[6]

[5] *See also Valentino* v. *Bond*, No. 06-CV-504, 2008 WL 3889603, at *8 (N.D. Fla. Aug. 19, 2008) (statute of limitations for breach of fiduciary duty claim began to run at the time defendants allegedly released plaintiffs' money from an escrow account improperly); *Allen* v. *Gordon*, 429 So.2d 369, 371 (Fla. Dist. Ct. App. 1983) ("The conversion took place . . . upon appellant taking money from the accounts.").

[6] At most, the Lou-Martinezes could argue that until December 2008 or January 2009 they were unaware of the injury they had incurred in September 2005. But they do not argue for the application of Florida's delayed discovery rule, and that rule plainly would not apply if they had. The Lou-Martinezes "should have discovered" long before January 2009 "with the exercise of due diligence" that an unauthorized investment in Sentry was made in their account, Fla. Stat. Ann. § 95.031(2)(a), and, in any event, the Florida Supreme Court has held that the delayed

Second, the Lou-Martinezes argue that their respective allegations in this case and *Anwar* do not conflict because Standard Chartered has not provided them with "written proof" of their Sentry investment. (LM Opp. at 2-3.) This argument makes no sense. Irrespective of what proof of the investment exists, the Lou-Martinezes allege in one case that they did not authorize or know about the Sentry investment, and allege in another case that they did. In particular, the Lou-Martinezes allege in this case that "they did not authorize AEBI to withdraw any funds for an investment in the Fairfield Sentry Fund in September 2005 or at anytime," (Am. Compl. ¶ 30) and that they "were never informed by the [Bank] prior to January 2009 that $500,000 of their funds had been invested from their account at [SCBI] (formerly AEBI) in the Fairfield Sentry Fund," (Am. Compl. ¶ 31.) In the *Anwar* case, Mr. Lou-Martinez, a named plaintiff, alleges that he "invested assets in Fairfield Sentry in approximately September 2005," (SCAC ¶ 60), and that he "justifiably relied upon the false representations made by [Fairfield] by investing [his] assets in the Fund" (SCAC ¶ 358). Although a party may plead "inconsistent theories or statements of a claim, there is no authority for the proposition that . . . a party may assert as fact two assertions that directly contradict each other." *Nat'l Western Life Ins. Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp. 2d 489, 492 (S.D.N.Y. 2000) (Marrero, J.) Because the Lou-Martinezes' conversion and breach of fiduciary duty claims rely entirely on such clashing factual allegations, they should be dismissed.[7] *Id.*

Third, the Lou-Martinezes do not dispute that they must plead that Standard Chartered deprived, and intended to deprive, them of their assets—both necessary elements for a

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discovery doctrine does not apply to causes of action for conversion and breach of fiduciary duty, *Davis* v. *Monahan*, 832 So. 2d 708, 709-12 (Fla. 2002).

[7] On May 10, 2011, Standard Chartered served on counsel for the Lou-Martinezes six Requests for Admissions pursuant to Rule 36 in an effort to resolve these conflicts. (Ex. A to Supplemental Declaration of Patrick B. Berarducci.) Standard Chartered has not heard from the Lou-Martinezes or their counsel; their responses are due on June 9.

conversion claim under Florida law, *Small Bus. Admin.* v. *Echevarria*, 864 F. Supp. 1254, 1262-63 (S.D. Fla. 1994). In response to Standard Chartered's argument that Bernard Madoff, not Standard Chartered, deprived them of their assets (Defs.' Mem. at 20-21), the Lou-Martinezes say only that they "have been deprived of their $500,000 by Standard Chartered because if Plaintiffs were not so deprived, they would not have had to bring the lawsuit to recover their missing $500,000," (LM Opp. at 18). They also contend that their allegation "that AEBI invested their $500,000 without their authorization, if in fact Standard Chartered did invest it in the Sentry Fund" is adequate to show an intent to deprive. (LM Opp. at 18.) Whatever these statements mean, they do not show deprivation or intent by Standard Chartered. Indeed, Standard Chartered could not have deprived, or intended to deprive, the Lou-Martinezes of their assets merely by purchasing shares of Sentry on their behalf because, as even the Lou-Martinezes recognize, they were able to redeem those shares for more than three years following the alleged conversion. (LM Opp. at 5.)

B. This Court's Opinion in *Anwar-SCBI* Does Not Support the Lou-Martinezes' Claims for Breach of Duty of Care or Gross Negligence.

Relying on this Court's opinion in *Anwar-SCBI*, the Lou-Martinezes argue that their fiduciary duty and gross negligence claims against Standard Chartered should survive dismissal because this Court previously declined to dismiss similarly-styled claims in other actions. (LM Opp. at 15-17, 21.) The Lou-Martinezes ignore, however, that their factual allegations are fundamentally different from the allegations previously considered by this Court. In *Anwar-SCBI*, this Court held that the plaintiffs had adequately pleaded a duty to conduct due diligence by alleging that Standard Chartered recommended Sentry to them, and a duty to monitor plaintiffs' accounts because plaintiffs alleged facts indicating that Standard Chartered undertook an extensive advisory relationship with plaintiffs. 745 F. Supp. 2d at 376-77. By contrast, here, the Lou-Martinezes allege that Standard Chartered did *not* recommend Sentry to

them at all, and they do not allege that Standard Chartered performed any advisory functions for them.

C. The Lou-Martinezes' Failure To Respond to Standard Chartered's Other Arguments Is an Abandonment of Their Claims.

"This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." *Lipton* v. *Cnty. of Orange*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004). The Lou-Martinezes fail to respond to the arguments advanced by Standard Chartered with respect to plaintiffs' claims for fraud, gross negligence and unjust enrichment:

- The Lou-Martinezes fail to respond to Standard Chartered's argument that they have not adequately pleaded their fraud claim, which alleges that Standard Chartered failed to disclose that Sentry was a feeder fund to BLMIS. (*See* Defs.' Mem. at 24.)
- The Lou-Martinezes fail to respond to Standard Chartered's argument that their gross negligence claim should be barred by Florida's economic loss rule. (*See* Defs.' Mem. at 33-34.)
- The Lou-Martinezes also do not respond to Standard Chartered's argument that their unjust enrichment claim should be dismissed. (*See* Defs.' Mem. at 35-36.)

In addition, all of the Lou-Martinezes' claims against StanChart (SCBI's affiliate) and SC PLC (SCBI's ultimate parent) should be dismissed because the Lou-Martinezes do not respond at all to Standard Chartered's argument that they failed to plead any allegations of wrongdoing against these particular defendants.[8] (*See* Defs.' Mem. at 36-37.)

II. ALMIRON AND CARRILLO'S LEGAL ARGUMENTS PROVIDE NO BASIS FOR MAINTAINING THEIR COMPLAINT.

In their joint opposition, Almiron and Carrillo repeatedly seek to avoid or dilute the heightened pleading requirements of Rule 9(b). Despite basing each of their claims on

[8] The Lou-Martinezes also do not even mention Rule 9(b) in their opposition brief, much less argue that they have met its requirements. (*See* Defs.' Mem. at 12-17.) Because the requirements of Rule 9(b) apply to all of the Lou-Martinezes' claims (*id.*), the Lou-Martinezes' failure to respond to this argument is, by itself, sufficient to dismiss their entire complaint.

allegations of fraud, they contend that Rule 9(b) applies only to their Section 517.301 claims and does not require that they plead a strong inference of scienter. They also assert that "fair notice" satisfies the particularity requirements of Rule 9(b). These arguments are contrary to settled law. Separately, because plaintiffs' purchase of Sentry was their first and only transaction with SCBI, they cannot point to any allegations of a comprehensive advisory relationship with SCBI that could give rise to ongoing duties to monitor their accounts, thus defeating their negligence and breach of fiduciary duty claims to the extent they are based on such duties. Moreover, because securities brokers are not "professionals" under Florida law, plaintiffs' effort to invoke the so-called "professional services" exception to the economic loss rule fails. Finally, plaintiffs' unjust enrichment claims fail because, among other reasons, they do not dispute that their relationship with SCBI was governed by written agreements.

A. Plaintiffs Fail To Plead a Strong Inference of Scienter Under Rule 9(b).

Under Rule 9(b), "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Lerner* v. *Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (quotations and citation omitted). Almiron and Carrillo concede that their Section 517.301 claims are subject to Rule 9(b) (*e.g.*, AC Opp. at 26), but claim they can evade its requirement to plead a strong inference of scienter because liability under Section 517.301 may be established by a showing of negligence. (AC Opp. at 11-12, 17.) Their argument fails. The heightened pleading requirements of Rule 9(b) apply equally to all claims based on allegations of fraud regardless of the showing necessary to establish liability. *See Rombach* v. *Chang*, 355 F.3d 164, 170-71 (2d Cir. 2004) (liability under Section 11 and Section 12(a)(2) of Securities Act of 1933 requires negligence, but Rule 9(b) applies to the extent such claims are based on allegations of fraud). Thus, their failure to plead a strong inference of scienter is fatal to their Section 517.301 claims. *See Henneberry* v. *Sumitomo Corp. of Am.*, 532 F. Supp. 2d 523, 541-43 (S.D.N.Y. 2007)

(dismissing negligent misrepresentation claim for failure to plead strong inference of scienter under Rule 9(b)).

The same failure defeats Almiron's and Carrillo's claims for breach of fiduciary duty, negligence, negligent misrepresentation and unjust enrichment. (Defs.' Mem. at 12-14.) Almiron and Carrillo argue that, unlike in *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402 (S.D.N.Y. 2005) (Marrero, J.), this case does not involve "broad and overarching allegations of fraud" that would justify applying Rule 9(b) to each claim. (AC Opp. at 26-27.) As this Court previously explained, however, "'Rule 9(b)'s pleading requirements apply to actions involving claims for negligent misrepresentation' under Florida law because such actions sound in fraud." *Anwar*, 745 F. Supp. at 372 (quoting *Johnson* v. *Amerus Life Ins. Co.*, No. 05-CV-61363, 2006 WL 3826774, at *4 (S.D. Fla. Dec. 27, 2006)). Indeed, Rule 9(b) applies to causes of action that are premised on allegations of fraud, *Rombach*, 355 F.3d at 171, not just claims that are premised on "broad and overarching allegations of fraud."[9]

Each of Almiron's and Carrillo's claims "reallege[s] and incorporate[s] by reference[]" the same allegations of fraudulent conduct that plaintiffs concede trigger application of Rule 9(b) to their Section 517.301 claims. *See In re Parmalat Sec. Litig.*, 479 F. Supp. 2d 332, 340 n.30 (S.D.N.Y. 2007) (claim for negligent misrepresentation that "realleges and incorporates by reference all prior allegations, including those alleging fraud . . . , alleges intentional, not negligent, misrepresentation and is subject to Rule 9(b)." (internal citation and

[9] It is plain, in any event, that Almiron's and Carrillo's allegations of fraud were intended to encompass the entirety of SCBI's alleged wrongdoing. They characterize, for example, their factual allegations as describing that SCBI engaged both in "false and misleading statements . . . and . . . deceptive and manipulative devices and contrivances." (*Almiron* Compl. ¶ 67; *Carrillo* Compl. ¶ 69.)

quotations omitted)).[10] Moreover, their respective negligence and breach of fiduciary duty claims allege that SCBI failed to conduct due diligence sufficient to uncover Madoff's fraud through misconduct that was "akin to fraud." (*Almiron* Compl. ¶ 77; *Carrillo* Compl. ¶¶ 79.) This is not mere semantics. It is one thing for a customer to allege that SCBI was negligent in recommending Sentry as an investment without uncovering Bernard Madoff's Ponzi scheme; it is quite another to allege, as Almiron and Carrillo do here, that SCBI defrauded its customers by recommending Sentry. Rule 9(b) is intended "to safeguard a defendant's reputation from [such] improvident charges of wrongdoing." *Shields* v. *Citytrust Bancorp.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (quoting *O'Brien* v. *Nat'l Prop. Analysis Partners*, 936 F.2d 674, 676 (2d Cir. 1991)); *Rombach*, 355 F.3d at 171 (same).

B. The Arguments Raised by Almiron and Carrillo Do Not Save Their Claims for Negligent Misrepresentation or Violation of Section 517.301.

Almiron and Carrillo argue that they have pleaded misrepresentation claims with particularity by providing "fair notice" of an unspecified number of alleged misrepresentations and omissions that misled them into investing in Sentry. They claim certain of these representations were material because they concerned "pivotal facts" about an investment recommendation. Yet they are unable to point to a single non-conclusory allegation indicating that they might have evaluated the Sentry fund differently had SCBI presented its alleged recommendation differently. In fact, they allege quite the opposite: that they "lacked the expertise to evaluate investment strategies for [themselves]." They also assert that Section 507.211(2) provides for liability against securities brokers such as SCBI even where the broker and purchaser are not in buyer/seller privity. None of these arguments are correct.

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[10] *See also OSRecovery, Inc.* v. *One Groupe Int'l, Inc.*, No. 02-CV-8993, 2004 WL 238035, at *1 (S.D.N.Y. Feb. 9, 2004) (finding negligent misrepresentation claim subject to Rule 9(b) because it incorporated fraud claim by reference and "thus also sound[ed] in fraud").

1. "Fair Notice" Is Not the Pleading Standard Under Rule 9(b).

Almiron and Carrillo argue that they have met Rule 9(b)'s heightened pleading requirements by providing SCBI with "fair notice" of the nature of their claims.[11] (AC Opp. at 14-17.) Providing "fair notice" is a primary goal of Rule 9(b). *Ross* v. *Bolton*, 904 F.2d 819, 823 (2d Cir. 1990). But "fair notice" is not all the rule requires. Rather, in addition to providing "fair notice" of a claim, Rule 9(b), requires a plaintiff asserting a claim for material misrepresentation to "(1) specify the statements that the plaintiff[s] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach*, 355 F.3d at 170 (citation and quotation marks omitted). For alleged omissions, a plaintiff must allege "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd.* v. *Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). This is far more than simply "fair notice" and far more than Almiron and Carrillo have alleged in their complaints.

Despite arguing to the contrary (AC Opp. at 15), Almiron and Carrillo have not identified with particularity the actual statements or omissions that they contend were fraudulent. In pleading their Section 517.301 claims in their respective complaints, Almiron and Carrillo simply reference "misleading statements set forth above" without further identification of the statements. (*Almiron* Compl. ¶ 67; *Carrillo* Compl. ¶ 69.) Later in their respective complaints,

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[11] In their opposition, Almiron and Carrillo address the particularity requirements of Rule 9(b) only as to their Section 517.301 claims (AC Opp. at 14-16), not their negligent misrepresentation claims (AC Opp. at 23-24). Because Rule 9(b) applies to both sets of claims (*supra* at 10-12), and because Almiron and Carrillo argue that they have adequately pleaded their negligent misrepresentation claims for the same reasons as their Section 517.301 claims (AC Opp. at 23-24), SCBI will address both sets of claims under Rule 9(b) in this memorandum.

Almiron and Carrillo assert claims for negligent misrepresentation based on the following alleged representations and omissions:[12]

- that SCBI represented Sentry as a "safe, low-risk investment with steady returns." (*Almiron* Compl. ¶ 93(a); *Carrillo* Compl. ¶ 94(a).)

- that SCBI did not disclose that Sentry "was a Madoff-feeder fund that merely funneled the funds it raised to BLMIS." (*Almiron* Compl. ¶ 93(b); *Carrillo* Compl. ¶ 94(b).)

- "[t]hat the private placement memorandum issued by [Sentry] and distributed to the Plaintiff[s] by [SCBI] was misleading and falsely stated 'affiliated investment manager' of [Sentry] was managing [Sentry]'s assets, never disclosing the identity of BLMIS, an unknown third-party." (*Almiron* Compl. ¶ 93(c); *Carrillo* Compl. ¶ 94(c).)

Even if the Court might otherwise infer that Almiron's and Carrillo's Section 517.301 claims are based on this same list, Almiron and Carrillo assert that the challenged representations "includ[e], but [are] not limited to" those listed. (*Almiron* Compl. ¶ 93; *Carrillo* Compl. ¶ 94.) Thus, it is unclear from their respective complaints which representations and omissions Almiron and Carrillo purport to challenge. Plaintiffs confuse matters further by identifying three different, allegedly false representations in their joint opposition:

- SCBI's alleged representation that "extensive" due diligence had been conducted on Sentry;

- SCBI's alleged misrepresentation "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";[13] and

- SCBI's alleged failure to disclose that "the funds Plaintiffs thought were being controlled by Fairfield Sentry Ltd., were in fact turned over to BLMIS."

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[12] Of course, Almiron and Carrillo also prefaced that list with the proviso that the challenged representations "includ[e], but [are] not limited to" those listed. (*Almiron* Compl. ¶ 93; *Carrillo* Compl. ¶ 94.)

[13] Almiron and Carrillo do not plead this omission, or any facts relating to this omission, in their complaints.

(AC Opp. at 7.)[14] Plaintiffs' failure to "state anywhere exactly which of the allegations . . . are actually the specific [challenged] misrepresentations" itself violates Rule 9(b). *See Henneberry*, 532 F. Supp. 2d at 541.

Moreover, even if any challenged representations are adequately identified, they are not pleaded with the requisite particularity. Almiron and Carrillo fail to plead the location of any alleged misrepresentations and the context of any alleged omissions, including the location and frequency of their contacts with SCBI (Defs' Mem. at 24-25), yet they ignore these failures in their opposition papers (*see* AC Opp. at 14-17). Nor do Almiron and Carrillo's allegations that SCBI recommended Sentry to them in "approximately September 2008" or "late-November or early-December 2008" (AC Opp. at 16) state with sufficient particularity when the alleged misrepresentations occurred. *See Jeff Isaac Rare Coins, Inc.* v. *Yaffe*, 792 F. Supp. 13, 15 (E.D.N.Y. 1992) (dismissing allegations that misstatements occurred "in early January of 1991" as not sufficiently particular under Rule 9(b)).

2. The Fact That SCBI's Alleged Misrepresentations and Omissions Arose in an Investment Recommendation Does Not Make Them Material.

Almiron and Carrillo do not refute SCBI's argument that none of the particular misrepresentations or omissions plaintiffs purport to challenge had an impact on their decision to invest in Sentry. (*See* Defs.' Mem. at 26-27.) Instead, they broadly contend that *any* facts "concerning the advisability of an investment" are material and actionable. (AC Opp. at 4-7.)

[14] Elsewhere in their opposition, Almiron and Carrillo provide excerpts from their complaints, some of which reference alleged representations or omissions by Standard Chartered. (*See* AC Opp. at 5-6.) It is not clear whether Almiron and Carrillo contend these excerpts identify additional misrepresentations. For example, the excerpts contain references to Standard Chartered allegedly characterizing Sentry as a "low-risk, long-term investment that could generate steady returns." (AC Opp. at 5.) As Standard Chartered explained in its opening brief, such a characterization of Sentry would not have been false when made. (Defs.' Mem. at 25-26.) Almiron and Carrillo never respond to this argument and do not list the characterization as among those that were false when made. (AC Opp. at 7.)

This proposed standard is unsupported by the two cases on which Almiron and Carrillo rely, *Azar* v. *Richardson Greenshields Secur., Inc.*, 528 So. 2d 1266 (Fla. Dist. Ct. App. 1988) and *Carran* v. *Morgan*, 510 F. Supp. 2d 1053 (S.D. Fla. 2007). *Azar* is inapposite. The plaintiff-investor there identified particular information that the defendant misrepresented, namely, the existence of a recommendational report relating to a proposed stock purchase, upon which plaintiff-investor had historically relied on in making investment decisions. *See* 528 So. 2d at 1268. *Carran* is inapposite for the same reason. The plaintiff-investor there identified particular information that the defendant-broker misrepresented, namely, that the broker would invest (rather than convert) the plaintiff's money, that the plaintiff likewise had relied on in making investment decisions for a long period of time.[15] 510 F. Supp. 2d at 1058-56. By contrast, here, Almiron and Carrillo point to conclusory allegations, not particular facts, to support their argument that any challenged representation was material.

For example, Almiron and Carrillo argue that SCBI's alleged failure to disclose that Madoff managed Sentry's assets was material because it was a "pivotal fact[] regarding where and how Plaintiffs' money was going to be invested."[16] (AC Opp. at 7.) Almiron and Carrillo, however, must allege facts to demonstrate why Madoff's involvement in Sentry would have been a "pivotal fact" to them. *See Kalil* v. *Blue Heron Beach Resort Developer, LLC*, 720 F. Supp. 2d 1335, 1345 (M.D. Fla. 2010) (plaintiffs' bare statements that they would not have entered into a transaction "had they known the truth" not sufficient to render the allegedly omitted fact material); *Atl. Nat'l Bank* v. *Vest*, 480 So. 2d 1328, 1332 (Fla. Dist. Ct. App. 1985) (alleged misrepresentation not material where plaintiff would have completed the transaction

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[15] The defendant also held himself out as a licensed investment advisor, yet he allegedly had no such license. 510 F. Supp. 2d at 1059.

[16] Almiron and Carrillo do not allege that Standard Chartered made any representations concerning the identity of the custodian or investment manager of the Sentry fund.

with or without the alleged misrepresentation).[17] They have not. Rather, Almiron's and Carrillo's allegations suggest the opposite. Both allege (and emphasize in their opposition) that they "'lacked the expertise to evaluate investment strategies for [themselves].'" (AC Opp. at 8 (quoting Almiron Compl. ¶ 28; Carrillo Compl. ¶ 29).) It is thus implausible that Almiron and Carrillo would have disregarded SCBI's recommendation if only they had known that Madoff managed Sentry's assets.

Almiron and Carrillo also allege no facts particular to their case that would make SCBI's vague representation that "extensive" due diligence had been conducted on Sentry material to their decision to invest in Sentry.[18] (*supra* at 13-15; AC Opp. at 7.) Even if false or misleading (it was not),[19] the concept of due diligence includes a vast spectrum of activities, from making specific inquiries and conducting investigations to "simply the exercise of due

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[17] Even under Rule 8, 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." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 554 (2007).

[18] Standard Chartered did not address this representation in its opening brief because Almiron and Carrillo did not identify it as one of the challenged misrepresentations in their complaints. (*See supra* at 13-14.) This Court should, therefore, consider the arguments raised herein by Standard Chartered because they are in direct response to Almiron's and Carrillo's opposition brief. *See Nova Info. Sys.* v. *Premier Operations, Ltd. (In re Premier Operations)*, 294 B.R. 213, 218 (S.D.N.Y. 2003) (Marrero, J.) (considering arguments raised for first time in reply brief that responded to arguments raised in opposition brief).

[19] The factual allegations do not evidence that SCBI made a false statement, much less a materially false statement. Almiron and Carrillo allege as follows: SCBI "advised the Plaintiff[s] that extensive due diligence had been done on Fairfield Sentry Ltd. before recommending it" (Almiron Compl. ¶ 29; Carrillo Compl. ¶ 31); Fairfield "consistently misrepresented . . . that it conducted extensive due diligence" on the Sentry fund (Almiron Compl. ¶ 43; Carrillo Compl. ¶ 45); then, after Madoff's fraud was exposed, an executive from Standard Chartered stated that Standard Chartered "had done none of [its] own due diligence or investigations with respect to Fairfield Sentry Ltd., but instead had relied wholly upon representations made by promoters of Fairfield Sentry" (AC Opp. at 7 (quoting Almiron Compl. ¶ 58; Carrillo Compl. ¶ 60)). Even taken as true, these allegations do not "affirmatively create an impression that was materially different from the truth" because SCBI's alleged representation that due diligence had been performed on Sentry was not inconsistent with a later statement that SCBI's due diligence relied on information obtained from Fairfield. *Hoffman* v. *UBS-AG*, 591 F. Supp. 2d 522, 535 (S.D.N.Y. 2008).

care." *Eisenstadt* v. *Centel Corp.*, 113 F.3d 738, 741 (7th Cir. 1997). Thus, without more information concerning what constitutes "extensive" due diligence, "[n]o investor would take such statements seriously in assessing a potential investment, for the simple fact that almost every . . . bank makes these statements." *ECA & Local 134 IBEW Joint Pension Trust* v. *JP Morgan Chase Co.*, 553 F.3d 187, 197-98, 205-06 (2d Cir. 2009) (statement regarding bank's "highly disciplined" risk management procedures not material where plaintiffs alleged that poor discipline led to bank's involvement in Enron and Worldcom scandals).[20]

3. Almiron's and Carrillo's Conclusory Allegations That They Lacked Sophistication Are Not Sufficient To Plead Actual and Justified Reliance.

Almiron and Carrillo do not refute SCBI's argument that they have failed to plead actual reliance, which, under Florida law, requires "a plaintiff to establish that, but for the alleged misrepresentation or omission, the plaintiff would not have entered into the transaction at issue." *Tambourine Comercio Int'l S.A.* v. *Solowsky*, No. 06-CV-20682, 2007 WL 689466, at *6 (S.D. Fla. Mar. 4, 2007) (*See* AC Opp. at 7-11; Defs.' Mem. at 27-29.) Instead, they presume (without pointing to any allegations) that they have pleaded actual reliance, and then contend that their reliance was justified because they "'lacked the expertise to evaluate investment strategies for [themselves].'" (AC Opp. at 8 (quoting *Almiron* Compl. ¶ 28; *Carrillo* Compl. ¶ 29).)

Such contentions are directly contradicted by Almiron's and Carrillo's respective account agreements, in which Almiron and Carrillo agree they are sophisticated investors who will not rely on representations by SCBI:

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[20] *See also City of Monroe Emps. Ret. Sys.* v. *Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) (statement from company that it "employed [r]igorous testing under diverse conditions . . . [that] helps ensure reliable quality" not actionable under Section 10(b)); *In re Austl. & N.Z. Banking Grp. Ltd. Sec. Litig.*, No. 08-CV-11278, 2009 WL 4823923, at *12 (S.D.N.Y. Dec. 14, 2009) (bank's "generalized statements concerning the quality of its risk management practices and controls are not actionable" where plaintiffs alleged that bank's inadequate risk management led to heavy loan losses).

> [ALMIRON AND CARRILLO ARE] SOPHISTICATED INVESTOR[S] WHO WILL MAKE EACH INVESTMENT DECISION AFTER CONSIDERING ALL OF THE RISKS INVOLVED AND WILL NOT RELY ON ANY STATEMENT, REPRESENTATION, WARRANTY, INFORMATION, RECOMMENDATION, SUGGESTION, OPINION, OR ACTION, OR THE ABSENCE THEREOF, BY AEBI OR ITS REPRESENTATIONS.

(Berarducci Decl. Exs. C-D ¶ 11(c).) Almiron and Carrillo seek to evade this language, asserting it does not supplant a prior representation or directly contradict the substance of SCBI's alleged misrepresentation. (AC Opp. at 9-11.) This misses the point. Almiron and Carrillo cannot plead justifiable reliance by conclusorily alleging that they lack sophistication and are unable to evaluate investment decisions, because they both entered into written agreements representing that they were sophisticated investors and would not rely on representations from SCBI. *Matusovsky* v. *Merrill Lynch*, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (Marrero, J.) (allegations that are contradicted by other materials cannot survive a motion to dismiss). Almiron and Carrillo have not alleged any facts to demonstrate why they should not be held to the terms of their account agreements in executing their first and only transactions through their accounts.

Almiron and Carrillo also assert that their reliance on SCBI's alleged representations was justified under the seven factors set forth in *Bruschi* v. *Brown*, 876 F.2d 1526 (11th Cir. 1989):

> (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) [sic] the generality or specificity of the misrepresentations.

(AC Opp. at 8 (quoting *Bruschi*, 876 F.2d at 1529).) As an initial matter, the *Bruschi* court was applying these factors to Rule 10b-5, 876 F.2d at 1529, not, as Almiron and Carrillo claim, Florida law (AC Opp. at 8). In any event, the three factors Almiron and Carrillo claim support their reliance on SCBI do not. First, they point to their purported lack of investment sophistication. (AC Opp. at 8.) This assertion is contradicted by the clear representation in Almiron's and Carrillo's account agreements. (Berarducci Decl. Exs. C-D ¶ 11(c).) Next, Almiron and Carrillo argue that they have alleged a "long-standing business relationship" with AEBI/SCBI. (AC Opp. at 8.) Yet their business relationship consisted of opening investment accounts at AEBI (representing they were sophisticated investors who would not rely on AEBI/SCBI's representations), and then purchasing Sentry shares as their first and only transactions through those accounts. Finally, Almiron and Carrillo argue that they have alleged SCBI's misrepresentations with specificity (AC Opp. at 8), a claim SCBI refutes (*supra* at 13-15).

4. A Securities Broker Is Not Liable Under Section 517.211(2) Unless the Broker is Also the Seller of Securities or the Agent of the Seller.

The private right of action for claims under Section 517.301 is set forth in Section 517.211(2), which limits the liability of agents of purchasers, such as securities brokers, to only "the person [1] selling the security to or [2] purchasing the security from" the agent. Thus, a securities broker acting as an agent is liable only to those he sells to or purchases from—in other words, where buyer/seller privity exists. *Rushing* v. *Wells Fargo Bank, N.A.*, No. 10-CV-1572, 2010 WL 4639308, at *1261 (M.D. Fla. Nov. 8, 2010) (dismissing claim where plaintiffs failed to establish either buyer/seller privity or that defendant was the seller's agent). In response, Almiron and Carrillo rely on *Rubin* v. *Gabay*, 979 So. 2d 988 (Fla. Dist. Ct. App. 2008) and *First Union Discount Brokerage Servs., Inc.* v. *Milos*, 744 F. Supp. 1145 (S.D. Fla. 1990) ("*Milos*") to argue that Section 517.211(2) provides for liability of brokers in the absence

of privity. (AC Opp. at 13-14.) Both cases are inapposite. In *Rubin*, the court never analyzed whether a purchaser's agent could be liable in the absence of buyer/seller privity because it determined that "neither actual nor apparent agency was established" in the first place. 979 So. 2d at 990-91. In *Milos*, although the court stated that a stock broker could be liable to an investor under Section 517.211(2) in the absence of buyer/seller privity, 744 F. Supp. at 1154-55, the cases relied on by the *Milos* court were decided before the Florida Supreme Court in *E.F. Hutton & Co.* v. *Rousseff*, 537 So. 2d 978, 981 (Fla. 1989) clarified that buyer/seller privity is required under Section 517.211(2). In any event, the cases the *Milos* court relied on did not even contemplate or discuss the privity issue. *See* 744 F. Supp. at 1155.[21]

C. Because Securities Brokers Are Not "Professional Services Providers," Almiron's and Carrillo's Negligence Claims Are Not Exempt from the Economic Loss Rule.

In response to SCBI's argument that Almiron's and Carrillo's negligence claims should be barred by the economic loss rule (Defs.' Mem. at 33-34), Almiron and Carrillo argue that their claims should survive because they involve "neglect in providing professional services," which is an exception to the economic loss rule. (AC Opp. at 22-23.) As explained by Almiron's and Carrillo's principal authority, *Moransais* v. *Heathman*, 744 So. 2d 973 (Fla. 1999), the so-called professional-services exception applies only to professions "'requiring at a minimum a four-year college degree before licensing is possible in Florida.'" 744 So. 2d at 976 (quoting *Garden* v. *Frier*, 602 So. 2d 1273, 1275 (Fla. 1992)). This exception, therefore, does

[21] Specifically, of the four cases relied upon in *Milos*, one court discussed the Section 517.301 claim only in the context of a motion to dismiss a counterclaim for lack of pendent jurisdiction, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Del Valle*, 528 F. Supp. 147, 151 (S.D. Fla. 1981), another involved the parties stipulating that the transaction at issue fell within the "orbit of Florida's Blue Sky Laws," *Merrill Lynch, Pierce, Fenner & Smith* v. *Byrne*, 320 So. 2d 436, 440 (Fla. Dist. Ct. App. 1975), and the two remaining cases simply do not discuss the privity issue, *Kasner* v. *H. Hentz & Co.*, 475 F.2d 119 (5th Cir. 1973); *Friedman* v. *Bache & Co.*, 321 F. Supp. 347 (S.D. Fla. 1970).

not help Almiron and Carrillo because Florida law is clear that a "securities broker is not a 'professional' for purposes of the economic loss rule because securities brokers are not required to obtain a four-year degree for licensing in Florida." *Warter* v. *Boston Secs. S.A.*, No. 03-CV-81026, 2004 WL 691787, at *12-13 (S.D. Fla. Mar. 22, 2004) (barring negligence claim against Edge Act bank and securities broker).

D. Conducting a Single Investment Transaction Is Not the Type of Extensive Advisory Relationship That Would Create Ongoing Duties for SCBI.

Almiron and Carrillo next assert that, although SCBI was a nondiscretionary broker, it "undertook a substantial and comprehensive advisory role" sufficient to create ongoing duties. (AC Opp. at 20-21.) They rely in particular on this Court's reasoning in *Anwar-SCBI*, which found that Maria Akriby Valladolid, a customer of SCBI, adequately pleaded an ongoing duty to monitor her account by alleging, among other things, that "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.'" 745 F. Supp. 2d at 377 (alterations in original). In this case, the only comparable allegations referenced by Almiron and Carrillo are that they "'relied on representations' [from SCBI] and 'lacked the expertise to evaluate investment strategies.'" (AC Opp. at 21.) Such allegations do not indicate that SCBI played a "substantial and comprehensive advisory role" for Almiron and Carrillo, each of whom made only a single transaction through SCBI.[22] (*Almiron* Compl. ¶ 25; *Carrillo* Compl. ¶ 26.)

[22] Almiron and Carrillo also argue that SCBI owed them a duty to recommend Sentry "only after studying [the fund] sufficiently to become informed as to [the fund's] nature, price, and financial prognosis." (AC Opp. at 17-19.) This is beside the point. SCBI does not dispute that, in light of this Court's ruling in *Anwar-SCBI,* Almiron and Carrillo plausibly could state claims for breach of fiduciary duty based on this duty. SCBI argues, however, that Almiron and Carrillo fail to allege such claims here because, as currently pleaded, the claims sound in fraud but fail to comply with Rule 9(b). (*Supra* at 10-12.) To the extent the claims survive Rule 9(b) analysis, however, SCBI does not dispute they should survive.

E. Almiron and Carrillo Do Not Contest Their Failure To Plead the Absence of an Adequate Legal Remedy or Challenge the Validity of Their Account Agreements, and Thus Cannot Maintain Their Unjust Enrichment Claims.

As SCBI explained in its opening brief, Almiron's and Carrillo's unjust enrichment claims fail, first, because they "have not explicitly alleged that an adequate remedy at law does not exist," and, second, because written agreements with SCBI govern the subject matter of their claims. (Defs.' Mem. at 35-36.) In response to the first argument, Almiron and Carrillo rely on *Mobil Corp.* v. *Dade Cnty. Esoil Mgmt. Co., Inc.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) to argue that claims for unjust enrichment are not precluded merely because the face of a complaint indicates an adequate legal remedy may exist. (AC Opp. at 25.) This fails to address SCBI's argument that Almiron and Carrillo have failed to plead the *absence* of an adequate legal remedy. *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1337 (S.D. Fla. 2002).

As to SCBI's second argument, Almiron and Carrillo rely on *Tracfone Wireless Inc.* v. *Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1366 (S.D. Fla. 2009) to argue that "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." (AC Opp. at 25.) This argument makes no sense. Almiron and Carrillo do not assert claims for breach of contract. In any event, Florida law precludes recovery for unjust enrichment "'if the subject matter of that claim is . . . covered by a valid and enforceable contract,'" *Anwar*, 745 F. Supp. 2d at 378 (quoting *In re Managed Care Litig.*, 185 F. Supp. 2d at 1337), not just where a right to contractual recovery is established beyond dispute. As *Tracfone Wireless Inc.* explains, where a contract governs the subject matter of an unjust enrichment claim, "recovery for unjust enrichment . . . cannot be permitted, even if the contract ultimately does not provide a recovery to Plaintiff." *TracFone Wireless, Inc.*, 642 F. Supp. 2d at 1365. Because Almiron and

Carrillo do not question the validity, scope or enforceability of their account agreements, their unjust enrichment claims must fail. *Anwar*, 745 F. Supp. 2d at 378.

CONCLUSION

SCBI, SC PLC and StanChart respectfully request that the Court dismiss with prejudice the operative complaints in *Lou-Martinez, Almiron* and *Carrillo*.

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