UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MASTER NO. 09-cv-118 (VM) (THK)

PASHA ANWAR, et al.,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, et al.,

Defendants.

This filing relates to *Maridom Ltd., et al., v. Standard Chartered Bank International (Americas), Ltd.*

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REPLY BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

This is the *Maridom* Plaintiffs' Reply Brief in Support of Motion for Leave to File Second Amended Complaint ("Motion").

The cases establish that a motion for leave to amend must be granted in the absence of a compelling reason to do so, such as undue delay, bad faith, futility of the amendment, coupled with resulting prejudice to the opposing party. *See* Motion at 5-6 (citing cases). In their Opposition, the Standard Chartered Defendants do not deny that this is the applicable standard.

In their Motion, the *Maridom* Plaintiffs made an overwhelming showing that it should be granted, because:

- they have not engaged in dilatory conduct; together with the other Plaintiffs, they have pursued discovery diligently;
- the motion was not filed after a deadline established in a scheduling order; in fact, there is no such deadline;
- there is no trial date scheduled;
- no motion for summary judgment has been filed;
- the two parties sought to be added are already defendants in other *Standard Chartered* cases;
- the additional factual allegations will not require any additional discovery; and
- the claim under the Florida Blue Sky Act will not require any additional discovery.

The Defendants do not and cannot dispute these basic facts. Rather, they advance a pastiche of arguments, one weaker than the next. Although many of their specific arguments are made without citation to any authority, the cases they do cite are plainly distinguishable. And they make an especially weak case for the existence of prejudice, a requisite element of a successful argument that leave to amend should be denied.

The Court should grant the Motion for Leave to Amend and direct a prompt response.

REPLY TO THE DEFENDANTS' ARGUMENTS

The Defendants make three basic arguments -- timeliness, "disruption" of the schedule, and futility -- and they claim they would be prejudiced were the Motion granted. None of their arguments can stand up to scrutiny. The *Maridom* Plaintiffs reply to each of these arguments in turn.

1. Timeliness/Delay

a. Repleading the Affirmative Misrepresentation Claim

The Defendants' principal argument relates to Judge Marrero's decision dated October 4, 2010, when, in *Anwar v. Fairfield Greenwich Ltd.,* 745 F. Supp. 2d 360, 372, (S.D.N.Y. 2010*)* ("*Standard Chartered"),* he upheld the *Maridom* Plaintiffs' claims of breach of fiduciary duty and fraud and negligent misrepresentation by *omission*, but held that the *affirmative misrepresentation* claims ("premised on SCBI's falsely stating that Fairfield Sentry itself, rather than another entity, would manage the Maridom Plaintiffs' investments") did not comply with Rule 9(b) because they did not "specify the speaker of these statements, or where and when these statements were made to each of the three Maridom Plaintiffs." The Court gave the *Maridom* Plaintiffs and the other Plaintiffs twenty-one days to submit "an application plausibly showing how such repleading would correct the deficiencies identified in the Court's findings discussed above, and thus

would not be futile." *Id.* at 379. The *Maridom* Plaintiffs did not do so at that time.[1]

The Defendants seize on this fact to argue that the entire proposed Second Amended Complaint should not be permitted to be filed. In other words, the *Maridom* Plaintiffs should be forever barred from seeking to amend their complaint *in any respect* -- even in ways wholly unrelated to this single pleading deficiency. There is no authority of which we are aware for this truly radical proposition, which would stand Rules 15(a) and 21(a) on their head. The cases they cite say or even imply no such thing. Nor do their cases support even the more limited proposition that the *Maridom* Plaintiffs should not be permitted, under the present circumstances, to cure the one pleading deficiency just because they did not seek to replead within twenty-one days of the order in *Standard Chartered*.

The cases cited by the Standard Chartered Defendants surely involve courts' finding undue delay and prejudice, but obviously all leave to amend decisions are fact-specific, and not a single case cited by the Defendants remotely involves the facts at hand: no trial date, no summary judgment filed, discovery not complete, no additional discovery required by the

[1] The *Maridom* Plaintiffs have cured this pleading deficiency in the proposed Second Amended Complaint, at Paragraph 81, by identifying these things.

proposed amendment, no lateness under a scheduling order, and addition of proposed allegations unrelated to the pleading deficiency found by the Court. Rather, the cases cited by the Defendants involve far more extreme factual situations, all absent in this case:

- multiple failures to cure defects in plaintiff's complaint and

failure, in the proposed amended pleading, to cure the defects or to show facts that could be alleged to cure the defects (here, at most, the *Maridom* Plaintiffs did not cure the one pleading deficiency found by the Court within the time permitted, but do cure the deficiency in the proposed SAC, and add many additional allegations learned during discovery);[2]

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[2] *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222 (S.D.N.Y. 2005), *adhered to on reconsideration*, 403 F. Supp. 2d 310 (S.D.N.Y. 2005) *aff'd sub nom. Bellikoff v. Eaton Vance Corp.,* 481 F.3d 110 (2d Cir. 2007) (two waived opportunities to cure defects in their complaints, including being given notice of defects in the Consolidated Amended Complaint; "strong argument that amendment would be futile"); *Payne v. Malemathew*, No. 09-CV-1634 CS, 2011 WL 3043920 (S.D.N.Y. July 22, 2011) (denying leave to file fourth pleading after plaintiff had "repeatedly failed to cure the defects in his claims despite having received detailed instructions and despite the bases of the dismissals having been specified in advance, and he has not identified any additional facts he could advance now that would address these defects"); *Berman v. Morgan Keegan & Co., Inc.*, No. 10-cv-5866, 2011 WL 1002684 (S.D.N.Y. Mar. 24, 2011), *aff'd*, 11-2725-CV, 2012 WL 147907 (2d Cir. Jan. 19, 2012) (denying leave "[b]ecause plaintiffs have already been afforded an opportunity to amend when they had knowledge of Morgan Keegan's perceived deficiencies and because they have failed to set forth any additional facts indicating how the pleading deficiencies would be cured by amending the Complaint").

- seeking amendment after the discovery deadline in a scheduling order (here, there is no such deadline in any existing order);[3]

- failure to explain or justify substantial delay (here, there was no "delay," because the amendment was filed shortly after learning the facts giving rise to the amended allegations in the proposed pleading);[4]

- seeking leave to amend after discovery was concluded (here, the motion was filed before the deadline for conducting discovery and after the parties had already agreed among themselves to seek an extension of the discovery deadline);[5]

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[3] *380544 Canada, Inc. v. Aspen Tech., Inc.*, No. 07 CIV. 1204 JFK, 2011 WL 4089876 (S.D.N.Y. Sept. 14, 2011) (seeking leave to amend securities fraud claim to add allegations of misrepresentations in meetings prior to purchase; good cause not found for filing after deadline for amended pleading; filing made after close of fact discovery without explaining delay; plaintiffs had learned facts giving rise to new claim shortly after going to work at company years before filing complaint); *Sly Magazine, LLC v. Weider Publications L.L.C.*, 241 F.R.D. 527 (S.D.N.Y. 2007) (motion, seeking leave to add twelve new defendants unaffiliated with existing defendant, filed seven months after the deadline for seeking to file amended pleadings established in the parties, discovery schedule, after discovery was closed; "undue delay" in pursuing relevant discovery; "undue prejudice" to the defendants through additional costs because of the additional required discovery and "significant further delays").

[4] *380544 Canada*, *supra*; *Sly Magazine*, *supra*.

[5] *Leber v. Citigroup, Inc.*, No. 07 Civ. 9329(SHS), 2011 WL 5428784 (S.D.N.Y. Nov. 8, 2011) (proposed filing of new claim with "minimal factual overlap with plaintiffs' previous allegations—almost three years after they filed their original complaint, two years after amending that complaint, and on the eve of defendants' motion for summary judgment"; plaintiffs on notice

- seeking leave to amend to add new factual allegations requiring substantial new discovery (here, there are no allegations requiring additional discovery);[6]

- seeking leave to add parties independent of the existing defendants, thus requiring substantial new discovery (here, the proposed additional defendants are affiliates of the one defendant in the Maridom Amended Complaint, and are already named as defendants in the other Standard Chartered Cases).[7]

Inexplicably, having cited no cases that support their basic argument, the Defendants do not address, not to mention distinguish, cases cited by the *Maridom* Plaintiffs that affirmatively support their entitlement to amend. These cases include, most notably, *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 248 F.R.D. 408, 412 (S.D.N.Y. 2008) (Marrero, J.) (granting motion for leave to amend after deadline for amending; "federal courts have consistently granted motions to amend where, as here, 'it appears that new

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of facts giving rise to new claim almost two-and-one-half years before filing complaint; prejudice to defendants, where prior discovery been limited to limitations issues, discovery closed, defendants had moved for summary judgment on timeliness grounds and new claim would require additional discovery into when plaintiffs had become aware of facts giving rise to new claim); *380544 Canada*, *supra*; *Sly Magazine*, *supra*.

6 *Sly Magazine*, *supra*; *Leber*, *supra*.

7 *Sly Magazine*, *supra*.

facts and allegations were developed during discovery, are closely related to the original claim, and are foreshadowed in earlier pleadings.'") (citation omitted); and *State Teachers Ret. Bd. v. Fluor*, 654 F.2d 843, 856 (2d Cir. 1981) (reversing denial of leave to amend filed promptly after learning new facts, where "no trial date had been set by the court and no motion for summary judgment had yet been filed by the defendants," and where "the amendment will not involve a great deal of additional discovery").

b. Other "Delay" Arguments

The Defendants proceed to make additional arguments without even citing any legal authority, inapposite or otherwise.

They argue that "the proposed Second Amended Complaint adds few substantive allegations in support of Maridom plaintiffs' claims that were not available to them in October 2010 when the Court first granted leave to amend." Opp., 11. One must wonder whether Standard Chartered must have been reading a different proposed Second Amended Complaint than the one filed, since in making this argument they ignore the page upon page of factual allegations gathered during discovery, none of which was available before this discovery was obtained -- the many ways that the "due diligence" of Fairfield Sentry violated their own standards, the knowledge of these deficiencies on the part from the very outset on the part of senior Standard Chartered officials, the involvement and knowledge of SCB after the

acquisition, the refusal by senior Standard Chartered management to recommend Fairfield Sentry to its clients without first negotiating a secret "trailer fee" (kickback) from Fairfield, etc. These allegations form the basis of the allegations that the Defendants violated their fiduciary duty by making recommendations to invest in Fairfield Sentry without having a proper basis to do so.

Obviously seeking to avoid the weight of such allegations, the Defendants use a basic sleight of hand to try to make them go away. The sleight of hand consists of recasting the *Maridom* Plaintiffs' claims as solely ones for misrepresentations and omissions. Opp., 11-12. Yes, there are such claims, but, as described above, there are also detailed allegations concerning the precise ways in which the Defendants' due diligence on Fairfield Sentry woefully failed to meet their own internal standards, as well as applicable industry standards, thus amounting to a breach of fiduciary duty *independent* of the Defendants' material omissions and misrepresentations. These allegations the Defendants choose totally to ignore.

Even aside from that tactic, the Defendants suggest, Opp., 11-12, that, before discovery, the *Maridom* Plaintiffs possessed information concerning all but a "few" of the misrepresentations and omissions made to them is fully rebutted on the face of the proposed pleading. This argument is plainly inaccurate. One example is the kickback/"trailer fee" from Fairfield, which

the *Maridom* Plaintiffs allege was never disclosed before discovery commenced.[8] Another is the inadequate due diligence and Standard Chartered's failure to disclose how it conflicted with their own internal standards. None of these sets of allegations could have been made before discovery was obtained.

Moreover, the *Maridom* Plaintiffs' not attempting to cure the one, isolated pleading deficiency in 2010 did not in any way cause a change in the discovery "as framed by that complaint." Opp., 5. The allegation in the Amended Complaint that the Defendants falsely stated that the securities trading was conducted by Fairfield was matched by the allegation in that same pleading of failure to disclose the role of Madoff. Therefore, Defendants' claim that their discovery strategy was adversely affected by the failure to cure the fraud allegation deficiency is wholly spurious. It need not detain the Court.

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[8] The desperation of the Defendants is illustrated by their pointing, Opp., 12, to a vague reference in another Plaintiff's complaint to "commissions' received from FGG, which, according to the Defendants, told them all they needed to know to allege the existence of the kickbacks/"trailer fees" in their original pleadings. Even assuming, *arguendo*, that what another independent plaintiff alleged before the cases were consolidated has any relevance, this passing reference did not remotely put anyone on notice of what the Plaintiffs have learned in discovery: that Standard CharteredI bargained hard with Fairfield for a 0.5% per annum kickback/"trailer fee" from Fairfield before finally agreeing to distribute Fairfield Sentry to Standard CharteredI's private banking clients.

The Defendants next argue that there was "delay" in naming SCBI's parent and Standard Chartered Bank as defendants. Opp., 12. The basis of this baseless argument is that *other* Standard Chartered Plaintiffs had named these parties as defendants. Suffice it to say that the *Maridom* Plaintiffs waited until they and their counsel were satisfied that there was a proper basis to bring in such defendants. They should not be penalized because other unrelated parties and their counsel apparently reached that conclusion earlier.

c. Prejudice

On page 12 of their Opposition, the Defendants finally get around to arguing prejudice. Naturally, given the patent lack of prejudice that granting this Motion would cause them, the Defendants are required to make short shrift of this important point. Their attempts to show prejudice include the irrelevant -- that proceedings will be delayed if they are forced to consider and file motions to dismiss, etc. -- and the even-more-irrelevant -- that *other* plaintiffs might follow suit if the Court grants leave to amend to *these* Plaintiffs. Importantly, they do not argue that there will be additional discovery required if the motion is granted, nor do they allege there will be a delay in trying the cases. All they allege is the possibility of delay in completing discovery caused by *their* motion practice. (They ignore the

question of whether *every* complaint needs to be greeted by a motion to dismiss.)

Their prejudice arguments are as baseless as their claims of undue delay. Granting leave to amend *always* results in some delay. It is only "undue" delay that causes prejudice that matters; prejudice is measured by whether a proposed amendment "significantly" adds to the defendant's discovery burden or "significantly" delays the case. *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 248 F.R.D. 408, 414 (S.D.N.Y. 2008) (citing cases). There is no dispute that neither is present here. Moreover, while the Standard Chartered Plaintiffs are joined in this case for pretrial purposes, they are not consolidated for trial and each complaint stands alone. *Each Plaintiff must be given his, her or its own opportunity to state their claims*. Thus, if other Plaintiffs seek leave to amend, their entitlement to do so should be independently examined by the Court and the filing of other motions for leave to amend should have no bearing on the *Maridom* Plaintiffs' right to do so.[9]

[9] Moreover, the Court has ample authority to impose deadlines for amending pleadings or otherwise limit the burden imposed by hypothetical requests to amend by other plaintiffs.

2. Alleged Futility

The Defendants next argue that the proposed amendments are futile. It is the arguments, not the claims, that are futile.[10]

a. Rule 9(b)

The Defendants argue that the fraud-based claim (which, by definition, does not include the negligent misrepresentation claim or the Florida Blue Sky Act claim),[11] fail under Rule 9(b) by failing to allege fraud with sufficient particularity. It is nigh unto risible to argue that, this long into this case, the Defendants are not on notice of what they are accused of doing and not doing. And the weakness of their "Hail Mary" 9(b) arguments demonstrates this fact.

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[10] The Plaintiffs acknowledge that Judge Marrero, in *Almiron*, held that those plaintiffs' negligence claims are barred by the Florida economic loss doctrine. Respectfully, we disagree with that ruling. We will not burden the Court with a full explanation of why the claim should be upheld, other than to state that the negligence claim does not arise out of a customer agreement. Irrespective of any customer agreement, the Defendants owed the *Maridom* Plaintiffs at least a duty of ordinary care. For this reason, the economic loss doctrine does not apply. *See Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.,* 891 So. 2d 532, 537 (Fla. 2004) ("courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract").

[11] The Defendants argue that all of the claims are "fraud-based," thus subjecting them to Rule 9(b). Opp., 7-8. To the contrary, the negligent misrepresentation and Florida Blue Sky Act claims do not allege knowing misrepresentations or omissions and thus do not sound in fraud; Rule 9(b) does not apply.

They first argue that the proposed Second Amended Complaint

> does not allege with particularity the circumstances surrounding SCBI's alleged recommendations of Sentry to each *Maridom* plaintiff. Instead, the Second Amended Complaint merely lists the dates and amounts of *Maridom* plaintiffs' Sentry purchases, and alleges that three SCBI employees made recommendations. (Second Am. Compl. ¶¶ 78-81.) Nor does the Second Amended Complaint identify the person(s) responsible for any alleged failures to disclose information about Sentry. (*Id.*) In fact, *Maridom* plaintiffs do not allege with particularity any single interaction between them and representatives of SCBI, SCI or SCB, and thus have not even attempted to plead the context in which any alleged omissions occurred or the manner in which they were misled by alleged omissions at the time they decided to purchase Sentry. (*Id.*)

Opp. at 15-16.

It is noteworthy that the Standard Chartered Defendants cite no case in support of their 9(b) argument, least of all one that requires anything more than what is alleged in the proposed pleading. Indeed, with this argument, the Defendants outdo themselves in ignoring what the *Maridom* Plaintiffs actually *do* allege. First, as to the identity of the persons who made the representations and recommendations, they allege that the

> representations and recommendations were made in writing by SCI, and were also orally communicated by one or more of the following SCBI employees: Gregorio Echevarria, Rudolfo ('Rudy') Pages, and John Dutkwoski. Most often, the recommendations and representations were communicated in person to the Plaintiffs in Santo Domingo, D.R., but sometimes they were communicated in person in Miami, Florida.

Prop. SAC, ¶ 81.[12] Moreover, the "context" of these representations and recommendations was amply alleged: Standard Chartered acted as their private bankers and periodically made investment recommendations. To fill out the picture, the *Maridom* Plaintiffs allege the organizational structure of Standard Chartered, including the role of "GIG". They allege the details of the internal standards governing approval and ongoing monitoring of recommended investments. They allege the specific deficiencies in the due diligence procedures that were followed and the important elements of proper due diligence that were not. They allege the identity of the person responsible for conducting due diligence of Fairfield Sentry. They allege the identity of the person in charge of GIG. They allege the identities of the salesmen ("Relationship Managers" and "Investment Specialists") who made the specific recommendations to the *Maridom* Plaintiffs. There is no need to

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[12] As for the argument that the *Maridom* Plaintiffs fail to "identify the person(s) responsible for any alleged failures to disclose information about Sentry," the Defendants, inexplicably, do not inform the Court that Judge Marrero specifically rejected this very argument in *Standard Chartered*, 745 F.Supp. 2d at 372-73: "Though the Maridom Plaintiffs have not specified by name the particular SCBI employees who failed to disclose this information, this is not fatal to their claims, particularly because SCBI should know which of their agents interacted with the Maridom Plaintiffs." Further, Judge Marrero stated that it was "not inclined to require the Maridom Plaintiffs to list every SCBI employee who, during the course of a multi-year relationship, may have been in the position to tell them information concerning Fairfield Sentry." *Id.* at 373. The *Maridom* Plaintiffs have done so, in the Proposed Second Amended Complaint, to cure the deficiency in the affirmative misrepresentation claim.

allege the specifics of one particular interaction, when the Plaintiffs, among them, made five different investments in Fairfield Sentry over a five-year period. There is nothing else the *Maridom* Plaintiffs must allege about the context in which these recommendations and representations occurred to provide adequate notice to these Defendants and their counsel.

The Defendants also argue, Opp. 16, that the proposed Pleading fails to allege how the Defendants obtained from the alleged fraud. Their brief in this respect is singularly misleading. They cite *Anwar v. Fairfield Greenwich Ltd.* No. 09 CIV. 0118 VM, 2011 WL 5282684, *5 (S.D.N.Y. Nov. 2, 2011) *("Almiron"),* where Judge Marrero found a failure to comply with Rule 9(b) where the plaintiffs in that case alleged that "'[u]pon information and belief,' SCBI charged an annual fee to clients investing in Fairfield Sentry, but '[a]t this time it is unknown whether [Almiron and Carrillo were] charged this fee.'" *Id.* at *5. Of course, in this case, the *Maridom* Plaintiffs allege not only Standard Chartered's receipt of the annual fee charged to its clients -- which, unlike in *Almiron*, is affirmatively alleged to have been occurred, Prop. SAC, ¶ 46 -- but also the secret undisclosed kickback/"trailer fee" Standard Chartered negotiated to receive from Fairfield. The existence of that "fee" is not referred to in *Almiron*. Citing the *Almiron* decision on this point is therefore wholly unconvincing, to put it in the most decorous terms.

b. Materiality of Alleged Immaterial Omissions and Misrepresentations

The Defendants follow with another baseless argument -- that the alleged misrepresentations and omissions are not material. First they argue, again without citation to any authority, that amendment would be futile because the *Maridom* Plaintiffs have not alleged facts that would "support an inference that *Maridom* plaintiffs would have disregarded SCBI's alleged recommendation to invest in Sentry if they had known of Madoff's involvement in the fund." Opp., 17. They have cited no authority to support the argument that such an allegation is required under Rule 9(b), because there is none. Moreover, in seeking to dismiss the *Maridom* Amended Complaint, the Defendants did not argue that these facts (whether stated as an omission or a misrepresentation) were immaterial. Judge Marrero has already held that these same basic allegations satisfy Rule 9(b). *Standard Chartered*, 745 F.Supp. 2d at 373-73. They should not be entitled to relitigate this issue.

Even if the Defendants are given a second bite at the apple, their arguments are singularly meritless. A lack of materiality is not properly found at the pleading stage except where, unlike here, the misrepresentations or omissions "are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of

their importance." *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 717 (2d Cir.), *cert. denied*, 132 S. Ct. 242, 181 L. Ed. 2d 138 (2011). The Defendants do not even approach the foothills of that mountain.

For the Defendants to prevail on this point, the Court would have to conclude that no reasonable juror could conclude that the purchaser of a security would find it important the promoter had falsely disclosed that it was executing the transactions, when, in fact, a third party, which just happened to have custody of 95% of the assets, was doing the trading. The Plaintiff allege that had this been disclosed to them, they would not have invested. If this fact is not deemed material as a matter of law, then it is for the jury to decide whether the information is material, and it is the Defendants' argument, not the allegation, that severely strains credulity. Moreover, Judge Marrero has already upheld these claims against the Defendants' motion to dismiss. *Standard Chartered*. *Accord People ex rel. Cuomo v. Merkin*, 26 Misc. 3d 1237(A), 907 N.Y.S.2d 439 (Sup. Ct. 2010) ("With respect to Merkin's alleged omissions in failing to reveal Madoff's actual role, and the actual investment strategy being employed, the complaint sufficiently pleads that these omitted facts are material, that is, that there is a substantial likelihood that disclosure of these facts would have been viewed by the reasonable investor as having significantly altered the total mix of information made available"). *See* 6 Bromberg & Lowenfels on

Securities Fraud § 19:18 (2d ed.). *See also In re Beacon Associates Litig.*,745 F. Supp. 2d 386, 412 (S.D.N.Y. 2010), *reconsideration denied* (Dec. 7, 2010) (upholding claims under ERISA for arising from Madoff fraud).

The Defendants also argue that Standard Chartered's failure to disclose its receipt of a kickback from Fairfield for each investment by its clients and its failure to disclose its inadequate due diligence are not material. Opp., 17. The Defendants do not come close to sustaining this argument.

The Proposed Second Amended Complaint alleges that "SCBI held itself out to its private banking clients, including the Plaintiffs, as an expert in the financial markets, including financial products such as hedge funds. In that connection, SCBI held out to its clients, including the Plaintiffs, that it based each investment recommendation on a comprehensive, careful and professional assessments of the risks and benefits of each investment product that it recommended." Prop. SAC, ¶ 22. It also alleges that SCBI failed to disclose, in connection with its recommendations and representations,

> the nature of the due diligence SCI performed on Sentry, and the fact that SCI failed to conduct due diligence procedures that their own guidelines required and that were necessary to perform reasonable a reasonable investigation of Sentry, including failing to visit BLMIS until the perfunctory visit in April 2008, failing to obtain audited financial statements of BLMIS before recommending an investment in Sentry, and failing to mitigate known or obvious risks associated with investing, through Sentry, in BLMIS.

Id., 84(e).

To sustain Standard Chartered's position on this point, the Court would have to be able to conclude that no one could rationally believe that a private bank client would care whether the private banker had bothered to follow standard due diligence procedures. The Defendants presumably know that they cannot make that showing, so they completely recast the allegation by eliminating its most important element -- describing the allegation as one of failure to disclose its due diligence standards, instead of failing to disclose that it had materially violated those standards ("*Maridom* plaintiffs do not plead any facts demonstrating that they would have disregarded SCBI's alleged recommendation if . . . they were aware of Standard Chartered's internal policies and procedures." Opp., 17.) There is a world of difference between the allegation and how Standard Chartered misleadingly describes it, and therein lies the materiality of the omission.[13]

As to the kickback/"trailer fee" non-disclosure, the Defendants' argument -- that it is immaterial as a matter of law that a private bank

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[13] The Defendants also make this illogical argument: "Indeed, they plead just the opposite—that they "justifiably accepted" statements of SCBI and 'relied on them because they were made by investment experts in whom they had placed their trust.'" Opp., 17. In other words, precisely because you placed trust in us, you cannot sue us (your fiduciary) for not being candid with you.

decided to recommend a particular investment to its client only after securing a healthy payment from the promoter of the security based on each successful recommendation -- is simply wrong-headed. That a fiduciary must disclose this type of inducement to his principal is so basic that there should be no need to cite case authority. A few such citations in the securities arena should suffice: *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 95 (2d Cir. 2010) ("defendant's misrepresentations were material because there exists a substantial likelihood that a reasonable investor would consider it important that her fiduciary was, in essence, receiving kickbacks"); *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 237 (D. Mass. 2004) (holding that failure to disclose that analyst's research report was issued in exchange for personal benefit constitutes omission of material fact); *United States v. Marchese*, 838 F. Supp. 1424, 1427 (D. Colo. 1993) (finding broker's failure to disclose kickbacks to promote stock recommended to investor was material omission).); *SEC v. Hasho*, 784 F.Supp. 1059, 1110 (S.D.N.Y. 1992) (holding that "the failure to disclose [receipt of] commissions deprives the customer of the knowledge that his registered representative might be recommending a security based upon the registered representative's own financial interest rather than the investment value of the recommended security" and "constitutes a violation of the anti-fraud provisions.").

c. Florida Blue Sky Act

Finally, the Defendants argue that amending to add the proposed Florida Blue Sky Act claim would be futile. Opp., 17-18. They make two arguments. Both are easily dismissed.

First, they argue that the Blue Sky Act claims fail under Rule 9(b). because of the same alleged deficiencies with respect to the fraud and negligent misrepresentation claims. Rule 9(b) does not apply, however, where, as here, there is no allegation in Count Six of fraud (meaning a knowing or severely reckless misrepresentation or omission). By contrast, while *Almiron* recognizes "that the scienter requirement under Florida law is satisfied by a showing of negligence," Judge Marrero applied Rule 9(b) because the plaintiffs' allegations were "based on fraud." *Almiron*, 2011 WL 5282684 at *4. *Cf. Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004) ("while a plaintiff need allege no more than negligence to proceed under Section 11 and Section 12(a)(2), claims that do rely upon averments of fraud are subject to the test of Rule 9(b)."). Here, the Blue Sky Act claim does not allege scienter. Even if Rule 9(b) applied, however, the argument fails for the same reasons discussed above.

Second, the Defendants argue that the *Maridom* Plaintiff have failed to allege, as required, that the sale of the securities occurred in Florida.

Judge Marrero held in *Almiron* that the Blue Sky Act claim failed because it did not allege that "the purchase/sale of Fairfield Sentry occurred in Florida." *Almiron*, at *7 n.4 ("Almiron and Carrillo's allegations that their investment accounts were located in Florida, without more, is [sic] insufficient to establish their claims"). By contrast, the *Maridom* Plaintiffs have satisfied the pleading requirement of showing connexity to Florida.

Perhaps this might not be the conclusion were one to rely on the Defendants' description of the actual allegations: the proposed "Second Amended Complaint asserts only that 'the sales of the shares of Sentry did not occur entirely outside the State of Florida.'" Opp., 18. Unfortunately, the misleading nature of that description is revealed by what actually is alleged:

> 120. The recommendations that each of the Plaintiffs make the investment in Sentry were formulated in Florida, in that SCBI employees responsible for formulating those recommendations operated out of SCBI's offices in Miami, Florida. SCBI met from time to time with representatives of the Plaintiffs to discuss their investments being managed by SCBI, including recommendations. SCBI employees made written communications to the Plaintiffs concerning the sales from SCBI's offices in Miami, Florida, including to addresses located in Florida. As a result, the sales of the shares of Sentry did not occur entirely outside the State of Florida, and the Act applies to these sales.

Proposed SAC, ¶ 120. It is also elsewhere alleged, and incorporated in Count Six, that meetings with the Plaintiffs occurred both in the D.R. and in Florida. Proposed SAC, ¶ 81. Thus, the *Maridom* Plaintiffs have

unquestionably alleged that substantial portions of the sale process occurred in Florida.

These allegations suffice under Florida law. The only state court decision on the subject holds that sales taking place entirely *outside* the state do not satisfy the requirements of s. 517.211(2), Fla.Stat. *Allen v. Oakbrook Sec. Corp.,* 763 So. 2d 1099, 1100 (Fla. Dist. Ct. App. 1999) (dismissing claim where "undisputed that the sales of the securities involved were not made in Florida. They occurred entirely in other states."). *Allen* thus stands for the proposition that the plaintiff must allege "*some* act in connection with the sale of a security that occurred in the State of Florida." *Jenkins v. Last Atlantis Partners, LLC*, No. 09 CV 3581, 2010 WL 3023490 (N.D. Ill. July 30, 2010) (emphasis added). This the *Maridom* Plaintiffs have done, and there is no "persuasive data"[14] that the Florida Supreme Court would interpret this statute differently. Instead, it is highly likely that that court would hold that where, as here, a private bank is located in Florida, is staffed with people from Florida, formulates investment recommendations in Florida, and meets with private banking clients in Florida, otherwise violative offers and sales of securities made by that bank to non-resident clients fall squarely within the protection of Florida's Securities and Investor Protection Act.

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14 *See Standard Chartered*, 745 F.Supp. 2d at 375 (quoting *New York v. Nat'l Serv. Indus.,* 460 F.3d 201, 211 (2d Cir.2006).

CONCLUSION

For the reasons set forth in the Motion for Leave to File Second Amended Complaint and this Reply Brief, the *Maridom* Plaintiffs -- Maridom Limited, Caribetrans, S.A. and Abbot Capital, Inc., respectfully request hat the Court grant their Motion and order a prompt response.

Dated: March 8, 2012

Respectfully submitted,

/s/ Richard E. Brodsky

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Richard E. Brodsky

Richard E. Brodsky