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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: All Actions

Master File No. 09-cv-118 (VM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO GLOBEOP FINANCIAL SERVICES MOTION TO DISMISS

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Plaintiffs hereby file their response in opposition to the motion to dismiss filed by Defendant GlobeOp Financial Services LLC ("GlobeOp") (D.E. 328).

PRELIMINARY STATEMENT

From 2004 to 2006, a time during which millions of Plaintiffs' investment dollars were invested and held in Greenwich Sentry, L.P. ("Greenwich Sentry" or the "Fund"), Defendant GlobeOp Financial Services LLC ("GlobeOp") served as the Fund's administrator. As administrator, GlobeOp took on the responsibility of independently calculating the Fund's net asset value ("NAV"), and independently preparing and distributing monthly reports of net assets, distributions, and fees and expenses to limited partners of the Fund. (SCAC ¶¶ 165, 345.)

Naturally, Plaintiffs trusted GlobeOp as the Fund administrator, and relied on GlobeOp's NAV statements and monthly reports when making their investment decisions. (SCAC ¶¶ 346, 544, 551, 555.) This was no surprise to GlobeOp. GlobeOp knew its NAV values were provided both to prospective and current investors in the Fund, and expected investors to rely on its services. (*Id.* ¶¶ 544, 551, 555.) Indeed, GlobeOp touts that its "independence, technology leadership and deep knowledge of complex financial instruments uniquely positions us to provide truly independently derived net-asset-value ('NAV') reports and best-practice administration support for domestic and offshore finds." (*Id.* ¶ 344.)

The services that GlobeOp actually provided fell far short of what it represented and what it was obligated to do. When preparing the Fund's NAV for Plaintiffs, GlobeOp recklessly disregarded whether the NAV calculation was supported by reliable information or indeed, any assets at all. In fact, the information provided to GlobeOp to calculate the NAV was contradicted by obvious red flags that should have alerted GlobeOp to the fact that the

information was fraudulent. Because of GlobeOp's failure to fulfill its duties to Plaintiffs, Plaintiffs' investments were lost in the Bernard Madoff Ponzi scheme. Plaintiffs' claims against GlobeOp for Breach of Fiduciary Duty (Count 29), Gross Negligence (Count 30), and Negligence (Count 31) should be sustained, and GlobeOp's motion to dismiss denied.[1]

ARGUMENT

Plaintiffs' common law claims are, as GlobeOp concedes (GlobeOp. Br. at 6), governed by the pleading standard of Fed. R. Civ. P. 8. The SCAC must allege facts sufficient "to raise a right to relief above the speculative level." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIMS AGAINST GLOBEOP

GlobeOp contends that Plaintiffs' claims are derivative and belong to Greenwich Sentry, not to individual investors (GlobeOp Br. at 7-11). To the contrary, Plaintiffs have standing to assert these claims against GlobeOp, because the direct claims are not derivative and cannot be brought by Greenwich Sentry. *See* Plaintiffs' Consolidated Opposition to the Fairfield Greenwich Defendants' Motions to Dismiss ("FGG Opp. Br.") at Section II.F.[2] Furthermore, several cases in this District have recognized that fund investors hold direct claims against fund service providers. *See, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 205 (S.D.N.Y. 2006); *Pension Comm. the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp 2d 608 (S.D.N.Y. 2009); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452 (2001) (*see* Plaintiffs' Memorandum in Opposition to

[1] Plaintiffs are voluntarily dismissing without prejudice their claim for unjust enrichment against GlobeOp.

[2] Plaintiffs incorporate herein by reference all applicable arguments in the FGG Opposition Brief and the Consolidated Citco Opposition Brief.

Motion to Dismiss by the Citco Defendants, Pilgrim, and Francoeur ("Citco Opp. Br.") at 4, 6-7, 43).

GlobeOp's additional authority cited in arguing that Plaintiffs' claims are derivative is inapposite. GlobeOp cites *In re Ionosphere Clubs, Inc.*, 17 F.3d 600 (2d Cir. 1994) (GlobeOp Br. at 10-11), to contend that shareholders can sue directly only if they had an independent injury, but that case predates the controlling decision of the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). *See* FGG Opp. Br. at Section IIF.[3] Indeed, the *Ionosphere* court relied on *Lewis v. Spender*, 577 A.2d 753 (Del. 1990), as the "most recent" formulation of the difference between derivative and direct claims. *Ionosphere,* 17 F.3d at 606. Moreover, *Ionosphere* concerned rights of minority shareholders suing former insiders for diversion of corporate assets, *id.* at 600, 606. These asserted rights and claims differ sharply from Plaintiffs' claims here.

II. BECAUSE PLAINTIFFS' CLAIMS ARE DIRECT, THERE IS NO DEMAND REQUIREMENT

As demonstrated above, Plaintiffs' claims against GlobeOp are solely direct claims. Contrary to GlobeOp's suggestion (Br. at 11), Plaintiffs have not, and do not purport to, bring derivative claims against GlobeOp on behalf of Greenwich Sentry. Rather, Plaintiffs themselves would be the beneficiaries of their claims – not Greenwich Sentry. Therefore, Plaintiffs have no obligation to make any demand upon Greenwich Sentry or its general partner to bring suit.

For the same reason, the arbitration agreement discussed by GlobeOp (Br. at 14) is inapplicable. There is no arbitration agreement between Plaintiffs and GlobeOp, and GlobeOp does not suggest Plaintiffs' *direct* claims would be impacted by an arbitration clause between

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[3] Other cases cited by GlobeOp (Br. at 9-10) also predate *Tooley* and are similarly no longer good law on the relevant issue. *See Kramer v. W. Pac. Indus. Inc.*, 546 A.2d 348, 353 (Del. 1988); *Norberg v. Lord, Day & Lord*, 107 F.R.D. 692, 698 (S.D.N.Y. 1985); *Primavera Familienstiftung v. Askin*, 1996 WL 49404 (S.D.N.Y. Aug. 30, 1996).

other parties. A dispute is arbitrable only if the parties contractually bind themselves to arbitrate it. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[T]he arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute.").

III. THE MARTIN ACT DOES NOT PREEMPT PLAINTIFFS' CLAIMS AGAINST GLOBEOP

GlobeOp contends (Br. at 14) that Plaintiffs' common law claims against it are preempted by the Martin Act. To the contrary, as demonstrated in opposition to the Fairfield Defendants' argument on this issue, the Martin Act does not preempt these claims. *See* FGG Opp. Br. Section VIB.

IV. PLAINTIFFS' ALLEGATIONS ESTABLISH THAT GLOBEOP OWED PLAINTIFFS A FIDUCIARY DUTY AND DUTY OF CARE

GlobeOp contends (Br. at 17) that Plaintiffs' claims for breach of fiduciary duty, gross negligence and negligence should be dismissed because Plaintiffs have failed to establish that GlobeOp owed Plaintiffs any duty, fiduciary or otherwise. To the contrary, for the same reasons demonstrated with respect to Citco as administrator, GlobeOp's discretionary duties and near-privity relationship with Plaintiffs in its capacity as administrator of the Fund establish both a fiduciary duty and duty of care. (*See* Citco Opp. Br. Point I.A.1, I.B.1).

GlobeOp's effort (Br. at 18) to distinguish itself from the Citco administrator in *Pension Committee*, 446 F. Supp. 2d 163, is unavailing. Like the administrator in *Pension Committee*, Plaintiffs allege that GlobeOp was responsible for independently preparing the NAV and distributing its NAV reports to Plaintiffs, who relied on the NAV reports, and that GlobeOp assumed significant discretionary responsibilities. (SCAC ¶¶ 345, 551, 552, 555, 556.) Furthermore, as in *Pension Committee*, GlobeOp's marketing materials, which tout GlobeOp's

independence and specialized experience in calculating NAVs, corroborate these allegations. (*Id.* ¶ 344.)

GlobeOp's denial (Br. at 19) that it had any discretionary duties, in the face of Plaintiffs' allegations and its own marketing materials, is unavailing. GlobeOp now claims that its duty was simply "fulfilling administrative tasks of putting together and distributing statements containing the value of the fund's portfolio based on information provided to GlobeOp." (*Id.*) In other words, GlobeOp portrays itself as an expensive corporate calculator whose only role was to blindly process the information provided to it. This characterization of its duties flies in the face of its own admissions elsewhere. For example, on its website, GlobeOp touts its "***independence***," and claims that it is "uniquely position[ed] to provide ***truly independently derived net-asset-value ('NAV') reports*** and best-practice administration support for domestic and offshore finds." (SCAC ¶ 344.)[4] GlobeOp's portrayal of its duties is also inconsistent with Plaintiffs' allegation that "GlobeOp undertook significant discretionary responsibilities," and that "GlobeOp was obligated to scrutinize and verify independently the information it was provided in calculating the NAV." (*Id.* ¶¶ 345, 552.) These allegations must be accepted as true on a motion to dismiss. *Twombly*, 550 U.S. at 555-56.

Nor has GlobeOp offered any basis to discount Plaintiffs' allegations regarding the discretionary nature of its duties. The May 2006 Greenwich Sentry Offering Memorandum (D.E. 333-2) ("GS COM-5/06") (GlobeOp Br. at 19-20), in fact confirms that GlobeOp is responsible for preparing monthly reports containing the amount of Greenwich Sentry's net

[4] GlobeOp argues (Br. at 19) that its website is somehow irrelevant because it was accessed by Plaintiffs in 2009 when they were preparing the SCAC. On the contrary, GlobeOp's website marketing is indicative of how GlobeOp viewed its own duties and how it represented itself to investors. *See Pension Comm.*, 446 F. Supp. 2d at 199-200. Although Plaintiffs gave the date that the website was last accessed, in accordance with common citation rules (The Bluebook: A Uniform System of Citation 158 (Columbia Law Review Ass'n et al., eds., 18th ed. 2005)), the reasonable inference is that Citco's self-description and its marketing materials were similar in prior years.

assets. (GS COM-5/06 at 10.) The portion of the memorandum cited by GlobeOp for the proposition that the Fund's general partner and not GlobeOp was responsible for calculating the NAV is the section that outlines the partnership agreement. However, this section only indicates that, in a dispute between the limited partners (the investors) and the general partner, the general partner has the final and conclusive right to determine valuation of the Fund's assets. (*Id.* at 33.) This language does not in any way diminish GlobeOp's duty to independently prepare the NAV.

Indeed, the offering memorandum language cited by GlobeOp is a far cry from the language at issue in *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, 376 F. Supp. 2d 443 (S.D.N.Y. 2005) (GlobeOp Br. at 20), where, throughout the offering memorandum, investors were told it was the general partner, as opposed to the administrator, that was responsible for calculating the NAV, and were warned of the resulting conflict of interest. *Id.* at 447-48. In contrast, while Plaintiffs here were warned of other conflicts of interest (GS COM-5/06 at 5, 19-20), the Fund's offering memorandum never informed Plaintiffs of any conflict of interest in the Fund's NAV calculations. This further confirms Plaintiffs' allegations that it was GlobeOp, as the ***independent*** party, that was responsible for determining the Fund's NAV. [5]

GlobeOp attaches the administration agreement between GlobeOp and Greenwich Sentry, but has redacted all portions of it other than the arbitration clause. Therefore, GlobeOp cannot rely on this document to dispute Plaintiffs' allegations. Indeed, according to the Offering Memorandum, the administration agreement allows GlobeOp to be held liable to the Fund's partners for its negligence (which is alleged in Count 31) in connection with the performance of its duties and obligations under the Administration Agreement. (GS COM-5/06 at 11.) In the

[5] GlobeOp's reliance on *Scionti v. First Trust Corp.*, No. 95 Civ. 5493, 1999 U.S. Dist. LEXIS 23253, at **131-32 (S.D. Tex. June 23, 1999) (GlobeOp Br. at 20), is also misplaced. In that case, the court granted summary judgment because the defendant investment advisor had "provided evidence that its role was ministerial and nondiscretionary in merely administering the account and providing quarterly statements," while plaintiff had failed to present any admissible evidence regarding the alleged fiduciary relationship. *Id.* at *131.

event GlobeOp obtains an order allowing it to disclose the unredacted agreement (GlobeOp Br. at 4 n.2), Plaintiffs respectfully request leave to submit additional briefing based on the terms of the Agreement.

Finally, GlobeOp's contention (Br. at 19) that Plaintiffs cannot have relied on GlobeOp's NAV statements because certain Plaintiffs invested before GlobeOp became administrator in 2004, and remained invested after 2006 when GlobeOp was replaced makes no sense. For example, each Plaintiff that made an investment in the Fund during the two-year period of 2004-06, or that remained invested in the Fund during this period, relied on GlobeOp's NAV calculations and other representations in making and retaining those investments. (SCAC ¶¶ 544, 551, 555.) The fact that, after this period, Plaintiffs relied on the new administrator in continuing to retain their investments does not absolve GlobeOp of its culpability during the period it was serving as administrator. If GlobeOp had performed its duties properly in this two-year period, Plaintiffs would not have invested or held their Fund shares. (SCAC ¶ 340; *see also id.* ¶¶ 335, 525-26.) *See* Citco Opp. Br. Point II.

V. PLAINTIFFS STATE A CLAIM FOR GROSS NEGLIGENCE

GlobeOp contends (Br. at 20-21) that Plaintiffs' allegations do not support an inference that GlobeOp acted recklessly, and therefore, that the gross negligence claim must be dismissed. To the contrary, Plaintiffs' allegations establish sufficient recklessness by GlobeOp to sustain the gross negligence claim. *See* Citco Opp. Br. Point I.A.3.

Plaintiffs allege that GlobeOp "relied recklessly and blindly on information provided by BMIS in calculating the NAV, and relayed such fictitious information to Plaintiffs, without scrutiny or verification of the information" – despite its obligation to do so. (SCAC ¶ 552.) GlobeOp's reliance on such information was reckless because it did nothing to verify its accuracy; "because of the red flags surrounding BMIS, the consolidation of the roles of

investment manager, custodian and execution agent in BMIS;" and because such information was "manifestly incorrect." (*Id.*; see also *id.* ¶ 347.) This is sufficient to establish recklessness. *See Bruhl v. PricewaterhouseCoopers Int'l*, 2007 WL 983263, at *4 (S.D. Fla. Mar. 27, 2007) (red flags inconsistent with investment strategy support strong inference of severe recklessness); *In re Comverse Tech., Inc. Sec. Litig.*, 543 F. Supp. 2d 134, 142-45 (E.D.N.Y. 2008) (finding scienter where the red flags were so obvious that defendants "must have been aware" of the alleged fraud); *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 649 (S.D.N.Y. 2007); *Anderson v. Transglobe Energy Corp.*, 35 F. Supp. 2d 1363, 1368-69 (M.D. Fla. 1999) (allegations that defendant was reckless in overstating the potential and status of a business venture were sufficient to allege scienter).

GlobeOp's only excuse (Br. at 21), is that Plaintiffs do not explain why GlobeOp would have been aware of the red flags. GlobeOp overlooks that many of the red flags were self-evident from the very information that GlobeOp received to prepare its NAV, such as Madoff's paper trading records (SCAC ¶ 223) and the impossible consistency of Madoff's reported results (*id.* ¶¶ 223-24). In addition, the suspicious consolidation of important functions in Madoff (*id.* ¶ 221) was set out in the offering memorandum, which stated at the top: "Greenwich Sentry, L.P. c/o GlobeOp Financial Services, LLC." (GS COM-5/06 at iv.) Furthermore, because of their obligation to prepare the NAV independently, they should have investigated the red flags Plaintiffs have alleged; indeed, GlobeOp was "obligated to scrutinize and verify independently the information it was provided in calculating the NAV, but grossly failed to do so." (SCAC ¶ 552.) Thus, Plaintiffs' allegation that GlobeOp was not entitled to rely on the information it was provided because of the red flags surrounding BMIS must be accepted as true.[6]

[6] GlobeOp's reliance (Br. at 21 n. 21) on *Baker v. Andover Assocs. Mgmt. Corp.*, No. 6179/09, slip op. (N.Y. Sup. Ct. Nov. 30, 2009), is misplaced. In that case, the allegations of recklessness were

VI. THE ECONOMIC LOSS RULE IS NO BAR TO PLAINTIFFS' CLAIMS

GlobeOp argues (Br. at 21-22) that Plaintiffs may not press their tort claims because they "only seek a remedy for economic loss." Plaintiffs' claims are not barred by the economic loss rule, however, because the nature of their relationship and the services provided by GlobeOp gave rise to an independent duty of care. *See* Citco Opp. Br. Point IF. *Long Island Lighting Co v. Stone & Webster Engineering Corp.*, 839 F. Supp. 183, 187 (E.D.N.Y. 1993) (Br. at 15), is inapposite, in that it involved a contract between the parties that specifically exempted defendant from liability for a variety of economic losses in connection with the project.

VII. MADOFF'S ACTS WERE NOT A SUPERVENING CAUSE OF PLAINTIFFS' INJURIES

GlobeOp contends that Plaintiffs' state law tort claims should be dismissed because Madoff and BMIS's intentional criminal acts were a supervening cause of Plaintiffs' injuries. (GlobeOp Br. at 22.) GlobeOp's misconduct is not excused by Madoff's criminal acts, however, because the original negligent actor (in this case, GlobeOp) is liable if the intervening act was foreseeable. *See Derdiarian v. Felix Contracting Corp.*, 434 N.Y.S.2d 166, 169-70 (N.Y. 1980); *Kush v. City of Buffalo*, 462 N.Y.S.2d 831, 835 (N.Y. 1983); *Nallan v. Helmsley-Spear, Inc.*, 429 N.Y.S.2d 606, 614 (N.Y. 1980).

The analysis of the foreseeability of an intervening act is necessarily fact-intensive. Thus, courts typically find that the foreseeability inquiry is "a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003). Discovery to develop a factual record is appropriate. *See, e.g., McCarthy v. Sturm, Ruger, & Co.*, 916 F. Supp. 366, 372 (S.D.N.Y.

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conclusory. In contrast, here Plaintiffs have identified GlobeOp's failures and the red flags in detail. Furthermore, the court considered the issue as if the claim had been brought by the fund, as opposed to here where it is brought by the investors.

1996) ("whether an intervening act severs the chain of causation depends on the foreseeability of the intervening act and should be determined by the finder of fact."); *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 302 (S.D.N.Y. 2003) (discovery necessary to asses which acts of terrorism broke causation between loss of lives due to fire and property owners who did not have adequate fireproofing); *Mason v. U.E.S.S. Leasing Corp.*, 730 N.Y.S.2d 770, 772 (N.Y. 2001) (discovery necessary to determine the foreseeability of an intruder's assault within an apartment complex).

Because fraud is a foreseeable risk in the investment management industry, GlobeOp's independent misconduct was a proximate case of Plaintiffs' loss. *See In re Bennett Funding Group*, 1997 Bankr. LEXIS 2366, 55-56 (Bankr. N.D.N.Y. Dec. 19, 1997) ("[T]he liability of the defendant 'turns upon whether the intervening [criminal] act is a [] foreseeable consequence of the situation created by the defendant's negligence.'").

Criminal activity conducted by parties "involved in a Ponzi scheme is not uncommon and may be foreseeable." *In re Bennett Funding Group,* 1997 Bankr. LEXIS 2366, at *56. "It is noteworthy that in cases . . . involving claims for aiding and abetting a Ponzi scheme, such claims are not found to suffer from a lack of proximate causation." *Id.* (*citing In re Granite Partners*, L.P., 194 B.R. 318 (Bankr. S.D.N.Y. 1996)); *In re Plaza Mortgage & Fin. Corp.*, 187 B.R. 37 (Bankr. N.D. Ga. 1995); *In re Latin Inv. Corp.*, 168 B.R. 1 (Bankr. D.D.C. 1993).

GlobeOp's reliance on *Ward v. State*, 366 N.Y.S.2d 800, 807 (N.Y. Ct. Cl. 1975) (GlobeOp Br. at 22) is misplaced. In *Ward*, a state-run hospital was held not liable for injuries sustained by policemen who were called to the hospital after a gunman appeared as a guest at a hospital party. *Id.* at 803. The risk was not foreseeable because the gunman was the spouse of a hospital employee and outside the hospital's control. *Id.* at 806-07. Similarly, in *Henry v. Merck & Co.*, 877 F.2d 1489, 1492 (10th Cir. 1989) (applying Oklahoma law) (Br. at 22), plaintiffs' unforeseeable injury was caused by an employee who stole chemicals from the defendant's

premises and threw them in the plaintiff's face, but the plaintiff had no prior relationship with the defendant. *Id.* at 1491. In contrast to these cases, Plaintiffs here allege a relationship of trust with GlobeOp. It was entirely foreseeable both that Plaintiffs would rely on GlobeOp to perform its duties to enable them to make informed investment decisions, and that there was a risk of fraud inherent in the relationship with Madoff as an investment manager, broker and custodian. (*See* SCAC ¶¶ 165, 344-46.)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motion to dismiss filed by GlobeOp.[7]

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[7] If the Court were to deem the SCAC allegations insufficient, Plaintiffs request leave to amend. *See* FGG Opp. Br. Point VIII.

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