D. Plaintiffs Have Stated a Claim for Third-Party Beneficiary Breach of Contract.

The Citco Administrators and Custodians assert that Plaintiffs' third-party beneficiary claim should be dismissed because neither the Administration Agreements with the Citco Administrators nor the Custody Agreements with the Citco Custodians indicate an intent to benefit the Funds' investors, and because the contracts' non-assignment clauses preclude third party beneficiary claims. (Adm. Br. at 13-15; Cust. Br. at 13-15.) To the contrary, the Custody and Administration Agreements were intended to benefit Plaintiffs as investors in the funds, and the contracts' non-assignment clauses are no bar to Plaintiffs' third party beneficiary claims.[26]

The parties agree that New York law may be applied to this claim.[27] (Adm. Br. at 13 n. 7, Cust. Br. at 15 n.6.) To assert rights under a contract, a non-party must show that (1) a valid contract existed, (2) it was intended for the third party's benefit, and (3) that benefit was sufficiently immediate, rather than incidental. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 251-52 (2d Cir. 2006). The Citco Defendants focus on the second prong, whether the contracts were intended for the benefit of the investors. (Adm. Br. at 13-14; Cust. Br. at 13-15.) However, "[d]etermining intent is necessarily a factual endeavor," and thus, "third-party

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[26] The notice pleading standard of Rule 8(a) governs Plaintiffs' claims for third-party breach of contract. *Caudle v. Tower & Perrin, Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 284 (S.D.N.Y. 2008). The SCAC merely has to allege facts that would be 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 (2007)).

[27] Because the Citco Custodians concede New York law may be applied (at 15 n.6), their declaration on Dutch law is irrelevant. Furthermore, it is not persuasive. Michel Decker, argues that the plain meaning of the contracts prevents plaintiffs' third-party beneficiary status, and in support, cites *Meyer v. PontMeyer* (2007). (Michel Deckers Decl. ¶¶ 10, 14-15.) However, Deckers' own publication of only five months ago contradict his current reading of the case he cites. *See* Michel Deckers, Opzegging van Non-Bancair Krediet, 6 Tijdschrift Financiering, Zekerheden en Insolventierechtspraak 172 -73 & n.9 (September 2009), *available at* www.boekeldeneree.com/images/pub/Deckers%20Opzegging%20sep%2009.pdf (stating that subsequent cases do not support the view that *Meyer v. PontMeyer*'s plain meaning rule has "strictly limited" "the role of reasonableness and fairness in interpreting commercial loan agreements," and that Dutch law commercial loan agreements are "always" governed by "reasonableness and fairness").

beneficiary status is a question of fact." *Debary v. Harrah's Operating Co., Inc.*, 465 F. Supp. 2d 250, 261 (S.D.N.Y. 2006). Hence, where there is any ambiguity in the contractual language, courts typically refuse – even on summary judgment motions – to decide the issue of whether the contract intended to confer third-party beneficiary status. *See, e.g., Barry v. Atkinson*, 1998 WL 255431, *3 (S.D.N.Y. May 19, 1998) (finding agreement ambiguous as to the rights of alleged third-party beneficiaries due to "the absence of any language in the agreement affirmatively bestowing such a right").

While the contracts at issue here do not expressly bestow a right of enforcement on Plaintiffs, the contracts as a whole and the extrinsic evidence surrounding the contracts do evince an intent to benefit Plaintiffs. The objective of the Funds was to obtain capital appreciation of shareholder investments principally through a "split-strike conversion" strategy, including purchases of securities, sale of call options, and purchase of equivalent put options through the funds' broker, Madoff. (SCAC ¶ 184.) The Citco Administrators and Custodians were retained in furtherance of this objective.[28] The purpose of the Funds using Citco to perform financial services was – as Citco trumpeted on its website – to "***safeguard the interests of investors***." (*Id.* ¶ 325.) In short, Citco was retained by the funds for the purpose of providing services ***independent*** from the fund and its broker, to protect ***investor*** interests.

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[28] Simply stated, and as set forth in more detail above (*see* Point IB1, *supra*), the fund administrators were hired to independently calculate the funds' NAVs (i.e., the total value of investors' assets), reconcile the funds' financial information, and directly communicate with the funds' investors. (SCAC ¶ 327.) The fund custodians were hired to hold and safeguard investors' assets in the funds, and to monitor the performance of others holding the fund's assets, including Madoff. Specifically, the Citco Custodians were responsible for taking "due care . . . on the selection and ongoing . . . level of monitoring of any . . . sub-custodian" appointed by the funds, including BMIS. (SCAC ¶ 330, citing Sentry 2006 Cust. Agr. § 4.3, Sentry 2003 Cust. Agr. § 4.3 & Sigma 2003 Cust. Agr. § 5.2.) The custodian was also obligated to "to keep the securities in the custody of the Custodian or procure that they are kept in the custody of any sub-custodian," (SCAC ¶ 330, citing Sentry 2006 Cust. Agr. § 6.1.1, Sentry 2003 Cust. Agr. § 6.1.1 & Sigma 2003 Cust. Agr. § 7.1), and record any securities held at any one time by the Custodian or any sub-custodian, (SCAC ¶ 330, citing Sentry 2006 Cust. Agr. § 6.2, Sentry 2003 Cust. Agr. § 6.2 & Sigma 2003 Cust. Agr. § 7.2).

In recognition of the important role Citco played in protecting investor interests, and the assurance Citco's involvement gave investors (SCAC ¶ 333), the Funds' private placement memoranda gave investors detailed information about the services Citco was to provide, and made the contracts themselves available to investors. (*See, e.g.*, F. Sentry PPM 08/06 at 17, 35 (Dkt. 331-6); F. Sentry PPM 10/04, at 14-16 (Dkt. 363-9); F. Sigma PPM, 02/06 at 15-17 (Dkt. 369-16); GS COM-8/06 at 40 (Dkt. 363-3)). The investors, who all received the Funds' private placement memoranda, were reasonably relying on Citco to perform these services for their benefit. (SCAC ¶ 335.) Indeed, there is no one else but the investors who would benefit from these services. These manifestations of intent to benefit Plaintiffs, both in the contracts and in the parties' conduct, preclude dismissal. *See, e.g., Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 597, 600 (2d Cir. 1991); *Finch, Pruyn & Co. v. M. Wilson Control Servs.*, 658 N.Y.S.2d 496, 497-98 (App. Div. 3d Dep't 1997).

It is of no import that Plaintiffs are not expressly named in the contracts as third party beneficiaries. An "intention to benefit a third party may be gleaned from the contract as a whole and the party need not be named specifically as a beneficiary." *Owens v. Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979) (*citing Newin Corp. v. Hartford Accident & Indem. Co.*, 371 N.Y.S.2d 884 (N.Y. 1975); *see also Fen X. Chen v. Street Beat Sportswear, Inc.*, 226 F. Supp. 2d 355, 365 (E.D.N.Y. 2002); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 482 (S.D.N.Y. 1996) (intent to benefit a third party need not be expressly stated in the contract or its identity even known at the time the contract is signed) (*see also* PwC Opp. Br. at Point IIC). Similarly, *Air Atlanta Aero Engineering Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185 (S.D.N.Y. 2009) (Adm. Br. at 13; Cust. Br. at 13), recognizes that the contract need not expressly mention the beneficiary. *Id.* at 191.

The intent of the Administration Agreement to benefit Plaintiffs is further demonstrated by the fact that the agreement requires the Citco Administrators to render performance directly to Plaintiffs by requiring the Citco Administrators to communicate directly with Plaintiffs and process their investments.[29] (SCAC ¶¶ 157, 328, 477, 479.) Similarly, in its custodian role, Citco was to "safeguard the assets that were entrusted to it" before passing them on to Madoff as sub-custodian. (SCAC ¶ 339.) *See Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir. 2005) ("a contractual requirement that the promisor render performance directly to the third party shows an intent to benefit the party"). In fact, where "the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract contemplates a benefit to that third person, and this is ordinarily sufficient to justify third-party-beneficiary enforcement of the contract, even though the contract also works to the advantage of the immediate parties thereto." 22 N.Y. Jur.2d Contracts § 304.[30]

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[29] Specifically, the Citco Administrators' duties included processing payments for subscriptions and redemptions of shares in the funds, issuing and canceling share certificates, addressing all "communications in relation to the subscription, redemption and transfer of shares, dispatching to shareholders notices . . . in connection with the holding of meetings of shareholders, . . . dispatching to shareholders . . . audited financial statements, . . . maintaining . . . records of . . . meetings of shareholders, . . . [and] [c]onduct[ing] annual meetings of . . . shareholders . . . and solicit[ing] shareholder proxies in connection therewith." (F. Sigma 2003 Admin. Agr., Sched. 2, Pt. 2 & 3 (Dkt. 331-3); see also F. Sentry 2003 Admin. Agr., Sched. 2, Pt. Pt. 2 & 3 (Dkt. 116-25.) In addition, Plaintiffs sent their subscription agreements and investment funds directly to the Citco Administrators, which provided them with investment confirmations. (*Id.*; GS COM- 8/06 at 41 (Dkt. 363-3); GSP COM- 08/06 at 39-40 (Dkt. 116-4); Admin. Agr. between Greenwich Sentry, L.P. and Citco Fund Services, Aug. 10, 2006 ("G. Sentry 2006 Admin. Agr."), at 6 (Dkt. 331-4).)

[30] *See also Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 597, 600 (2d Cir. 1991) ("[w]here performance is to be rendered directly to a third party under the terms of an agreement, that party must be considered an intended beneficiary," in the context of a brokerage firm that was retained to provide clearing services for a broker's clients, and registered securities for plaintiff, shipped securities to plaintiff, and sent periodic activity statements to plaintiff); *Finch, Pruyn & Co. v. M. Wilson Control Servs.*, 658 N.Y.S.2d 496, 497-98 (App. Div. 3d Dep't 1997) (plaintiff manufacturer who hired an electrician to perform services at the plaintiff's power plant was a third-party beneficiary to a subcontract between electrician and mason, because "subcontract necessarily required [mason] to directly perform services at plaintiff's facility . . . in order to satisfy . . . obligations to plaintiff."); *Richards v. City of New York*, 433 F. Supp. 2d 404, 430 (S.D.N.Y. 2006) (children were third-party beneficiaries of a contract

Defendants make much of the non-assignment/inurement clause in the Administration Agreements, but in fact, such provisions do not preclude a finding of third party beneficiary status where other aspects of the contract – such as third-party indemnification clauses – evince a contrary intent to benefit third parties. *See, e.g., De Lage Landen Fin. Servs. v. Rasa Floors, LP*, 2009 WL 884114, at **8-9 (E.D. Pa. Apr. 1, 2009) (applying New York law) (declining to dismiss third-party beneficiary claims where the agreements at issue contained a non-assignment clause and an inurement clause, where they also provided indemnification by the contracting parties in case of third-party claims). Here, the agreements provide that the Funds agreed to indemnify Citco for claims asserted against it in connection with services provided under the agreements, which supports a finding of intent to benefit Plaintiffs.[31] The other evidence discussed above also evinces an intent to benefit Plaintiffs. At the least, the presence of such "conflicting evidence" necessitates that the court have the "benefit of discovery and development of the factual record to aid in construing the contracts and discerning the parties' intent." *De Lage*, 2009 WL 884114, at **8-9. In the case cited by Defendants on this point, *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F.Supp.2d 157, 164 (S.D.N.Y. 1998) (Adm. Br. at 15; Cust. Br. at 14), there was no conflicting evidence of intent to benefit the plaintiff in the contract at issue.[32]

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between the Administration for Children's Services and an agency licensing the children's foster care providers because "they are the people for whom the delegated services are to be provided").

[31] G. Sentry 2006 Admin. Agr. § 7 (Dkt. 331-4); F. Sentry 2003 Admin. Agr. § 7.1 (Dkt. 116-25); F. Sentry 2006 Cust. Agr. §§ 8.6, 8.9 (Dkt. 116-26); F. Sigma 2003 Admin. Agr. § 7.1 (Dkt. 331-3); F. Sigma 2003 Cust. Agr. §§ 10.6, 10.9 (Dkt. 342-3); GS COM 08/06 at 12 (Dkt. 363-3).)

[32] The other cases on which Defendants rely involve markedly different factual scenarios. For instance, in *Banco Espirito Santo de Investimento v. Citibank, N.A.*, 2003 WL 23018888 (S.D.N.Y. Dec. 22, 2003) (Adm. Br. at 15; Cust. Br. at 14), the contract at issue listed a single, specific duty to the alleged beneficiaries that was not directly related to the action at issue. In contrast, here the services that are alleged to be for the benefit of the Plaintiffs – such as independently calculating the NAV, communicating with Plaintiffs, and monitoring Madoff as sub-custodian – are precisely those contractual obligations that Plaintiffs contend were breached. (SCAC ¶¶ 336-39.) In another case cited by Defendants, *Consol. Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005) (Adm. Br. at 13), the

Furthermore, unlike the Administration Agreements, the Custody Agreements contain only a non-assignment clause and not an inurement clause. Contrary to the Citco Custodians' assertion (Cust. Br. at 14.), the case law is clear that non-assignment clauses alone are not sufficient to foreclose third party beneficiary status, because "it is possible for parties to intend that a third party enjoy enforceable rights while at the same time intending to limit or preclude assignments." *Piccoli*, 19 F. Supp. 2d at 164. *See also Woolard v. JLG Indus.*, 210 F.3d 1158, 1170 (10th Cir. 2000) ("Although the assignment of a contract will confer rights and obligations upon a third-party, the assignment is unrelated to one's status as a third-party beneficiary. The non-assignment clause serves to protect . . . successors from . . . unauthorized transfer of rights and obligations and does not speak to the intended third-party beneficiary status . . ."). Likewise, the other provisions of the Custody Agreement (Cust. Br. at 13-14), which provide that certain services would be undertaken for the benefit of the Fund, do not foreclose that such services would also be for the benefit of Plaintiffs.

E. Plaintiffs Have Brought Valid "Holder" Claims.

The SCAC alleges that Citco's breach of fiduciary duty injured Plaintiffs as "holders" of Funds' shares. (SCAC (¶¶ 340, 498.) Suffice it to say that Plaintiffs would have rapidly redeemed their shares had they been informed of the lack of reasonable basis for Citco's NAV calculations, or Citco's inability to confirm the existence of the assets entrusted to Madoff or to monitor his performance as subcustodian. (*Id.*) *See Basic, Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988) ("[w]ho would knowingly roll the dice in a crooked crap game?") (citation omitted).

Defendants do not dispute that such holder claims are valid. *See, e.g., Pension Comm.*, 446 F. Supp. 2d at 204-05 ("New York recognizes a claim of fraud where investors were induced

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contract at issue expressly stated that, except for specified provisions, it was not intended to confer any rights upon any third parties. There is no such express limitation here.

to retain securities in reliance on a defendant's misrepresentations."). Rather, the Citco Administrators argue that Plaintiffs have failed to "demonstrate [] that holders of the Fairfield Funds' shares would have been in a better position ... had Madoff's fraud been discovered earlier." (Adm. Br. at 22-23.)

That argument is contradicted by allegations that, during the summer of 2008, BMIS had more than $5.5 billion in cash in a bank account at JPMorgan Chase (SCAC ¶ 175), as well as that "[i]f Citco had not breached its duties [] Plaintiffs would ... have redeemed their investments . . . during the many years in which the Funds were making redemptions...." (SCAC ¶ 340.) Even if earlier disclosure of the Madoff fraud "would have caused the same run on the Funds that occurred when the fraud was revealed in December 2008," there was substantially more "money in the till" at those earlier times than in December 2008, so holders still suffered massive losses as a result of retaining their investments.[33]

Plaintiffs' injuries as holders of Funds' shares are further supported by allegations that the Citco Administrators held Plaintiffs' cash investments prior to transferring them to BMIS. (SCAC ¶¶ 159-160.) Had Defendants properly discharged their duties prior to transferring the money into Madoff's Ponzi scheme, the investments would have been preserved.

Plaintiffs also sufficiently allege reliance in connection with the holder claims. In making "decisions to invest additional funds, and decisions to maintain the investments over

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[33] The Citco Administrators rely on summary judgment decisions where plaintiffs had completed merits and expert discovery and failed to proffer any evidence in support of loss causation. *See* Adm. Br. at 22-23, citing *Pension Comm.*, 592 F. Supp. 2d at 615 (granting summary judgment after weighing competing expert reports); *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 684 F. Supp. 27, 28 (S.D.N.Y. 1988) ("no reasonable jury could find a casual connection between Merrill's failure . . . and Redco's loss.")

time.... Plaintiffs necessarily relied on Citco's NAV calculations." (SCAC ¶ 335.) *Pension Comm.*, 446 F. Supp. 2d at 204-205 (upholding holder fraud claims against Citco).[34]

F. Plaintiffs' Tort Claims Are Not Barred by the Economic Loss Rule.

The Citco Administrators and Custodians err when they suggest that, simply because of similarity between the contractual duties owed by Defendants to the duties Plaintiffs allege were breached, Plaintiffs' tort claims must be barred by the economic loss rule. (Adm. Br. at 15-17; Cust. Br. at 17-19.) "[I]t is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." *Fraternity Fund*, 376 F. Supp. 2d at 408.[35]

While the relationship between Plaintiffs and the Citco Administrators and Custodians arose out of the Administration and Custody Agreements, the nature of their relationship and the services provided was such that it gave rise to an independent duty of care (as set forth in Points

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[34] Defendants cite *Hunt v. Enzo Biochem, Inc.* ("*Hunt I*"), 451 F. Supp. 2d 390 (S.D.N.Y. Dec. 11, 2006) (Scheindlin, J.), and *Hunt v. Enzo Biochem, Inc.* ("*Hunt II*"), 530 F. Supp. 2d 580 (S.D.N.Y Jan. 8, 2008) (Scheindlin, J.), to argue that "plaintiffs must plead when they would have sold the investment at issue, [and] how much of the investment they would have sold." (Adm. Br. at 23.) *Hunt I* held that plaintiffs had not sufficiently pleaded their holder claims, but that "it is a simple matter for plaintiffs to amend their Complaints to add this information." 471 F. Supp. 2d at 414. *Hunt II* determined that plaintiffs' holder claims, as amended, were sufficiently pleaded. 530 F. Supp. 2d at 600. As in *Hunt*, Plaintiffs would have sold all their shares if Citco had revealed the truth. (SCAC ¶¶ 340, 498.)

[35] *See also Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 553 (N.Y. 1992) (recognizing that tort claim may exist where the parties' relationship initially is formed by contract, and holding that owner of a skyscraper could bring negligence claims against a fire-alarm company that had negligently handled an emergency service call, even though a contract existed between them); *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315 (N.Y. 1995) ("defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations," because a "tort obligation is a duty imposed by law . . . 'apart from and independent of promises made and therefore apart from the manifested intention of the parties to a contract"); *Mandelblatt*, 521 N.Y.S. 2d at 676 (the "same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself"); *Bullmore v. Ernst & Young Cayman Is.*, 846 N.Y.S.2d 145, 147 (App. Div. 1st Dep't 2007) (same, and therefore permitting claims for breach of fiduciary duty and breach of the duty of care brought by fund liquidators against the fund's former manager).

IA and IB, *supra*). The Citco Defendants then breached both their agreements and their independent duties to Plaintiffs. Similarly, in *Fraternity Fund*, 376 F. Supp. 2d at 408, the court held that tort claims by a fund's limited partners against the fund's general partner were not barred by the economic loss rule, notwithstanding the contracts between the general and limited partners, and even though the tort claims and contract claim were "based on the same underlying conduct, *i.e.*, that Defendants misrepresented NAVs." The court reasoned that "the allegations are sufficient to show a relationship of trust and confidence that flows from, but is independent of, the agreement." *Id.*

Robehr Films, Inc. v. American Airlines, Inc., 1989 WL 111079, at *4 (S.D.N.Y. 1989), (Cust. Br. at 18), is readily distinguishable. In *Robehr Films*, the plaintiff alleged that American Airlines had breached its agreement to play his travel videos on their flights. Because American owed plaintiff no independent legal duty beyond the contract, plaintiff's negligence claim was barred by the economic loss rule. *Id.* at **13-14. Obviously, the relationship between the parties and the nature of the services provided in *Robehr Films*, as compared to this case, is vastly different. The Citco Defendants were in a relationship of trust and confidence with Plaintiffs as investors in the Funds, due to the discretionary nature of their services and their superior position, which established a duty of care independent of the contracts. *See* Points IB1 & IB2, *supra*.[36]

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[36] The other cases cited by Defendants are similarly inapposite. In *Long Island Lighting Co. v. Stone & Webster Eng'g Corp.*, 839 F. Supp. 183, 187 (E.D.N.Y. 1993) (Adm. Br. at 15), a contract term between the parties specifically exempted defendant from liability for a variety of economic losses in connection with the project, after noting that plaintiff "cannot avoid the clear and unambiguous contractual limitations of liability simply by casting ... contract claims in tort garb." In *Iconix Brand Group, Inc. v. Bongo Apparel, Inc.*, 2008 WL2695090, at *4 (S.D.N.Y. July 8, 2008) (Cust. Br. at 17), the alleged breach was covered by a specific term in an agreement between the parties and plaintiffs did not identify any potential source of a legal duty independent of that contract.

G. SLUSA Does Not Bar Plaintiffs' State Law Claims.

Plaintiffs' state-law claims are not barred by SLUSA. *See* FGG Opp. Br. at Point VIA.

H. The Martin Act Does Not Bar Plaintiffs' State Law Claims.

For the reasons stated in Plaintiffs' Memorandum In Opposition to the FGG Defendants' Motion to Dismiss (at Point VIB), the Martin Act does not preempt Plaintiffs' state law claims against the Citco Defendants, contrary to their arguments (Cust. Br. at 15-17; Adm. Br. at 17; Citco Ber. Br. at 10; Francoeur Br. at 5).[37]

In addition, while New York substantive law governs this case by virtue of the significant contacts with New York and the state's great interest in this litigation (*see infra* at Point IB3a), by its terms the Martin Act does not apply because the Funds shares that Plaintiffs acquired were not sold "within or from" New York, as the Act requires. *See* N.Y. Gen. Bus. Law § 352-(c)(1)(c). The Citco Defendants are not alleged to have issued, sold, or distributed shares of the Funds within or from New York. Indeed, all of Citco's operations involved in this case were run from outside the United States. The Funds are BVI corporations (*see* SCAC ¶¶170-71), and Delaware limited partnerships. Since the Fairfield Sentry and Sigma Funds were marketed and sold to foreign investors, communications with them were received outside New York. (*See* SCAC at 3-18); *Pension Committee*, 592 F. Supp. 2d at 639-40; *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 410 (S.D.N.Y. 2005).

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[37] In *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp 2d 155, 181 (S.D.N.Y. 2009) (Cust. Br. at 15), "plaintiffs concede[d] that '[t]he majority of the conduct alleged . . . occurred in New York.'" *Pro Bono Invs., Inc. v. Gerry*, 2005 WL 2429787, at *16 (S.D.N.Y. Sept. 30, 2005) (Cust. Br. at 15), did not discuss the merits or facts but merely misread *CPC Int'l Inc. v. McKesson*, 70 N.Y.2d 268 (N.Y. 1987), following the line of interpretation of *Rego Park*, *Horn*, and *Eagle Tenants*, questioned in FGG Opp. Br. at Point VIB1.

II. PLAINTIFFS HAVE STATED SECTION 10(B) AND RULE 10B-5 CLAIMS.

In addition to the state-law claims, Plaintiffs have brought Section 10(b) and Rule 10b-5 federal securities fraud claims against the Citco Administrators. The Citco Administrators contest whether Plaintiffs' allegations establish the scienter and reliance elements of these claims.

Contrary to the Citco Administrators' argument Plaintiffs adequately allege scienter. (Adm. Br. at 7-11; Citco Group Br. at 7.) Plaintiffs allege that the Citco Administrators, when issuing false statements with inflated NAV calculations and account balance information, "acted recklessly because they knew or had access to information suggesting that their public statements were not accurate, including that the values and profits reported to Plaintiffs were not attainable under the circumstances." (SCAC ¶ 523.) Specifically, the red flags that surrounded Madoff's operations and results (FGG Opp. Br. at Points IA2-3; SCAC ¶¶ 217-24, 524), and the FGG Defendants' failure to conduct any of the due diligence that was represented (FGG Opp. Br. at Point IB3; SCAC ¶¶ 182-83, 193-216), contradicted the information they were representing to Plaintiffs. This information was plainly available to them as administrators and through the other Citco Defendants' extensive involvement with the Funds. (SCAC ¶¶ 327, 337, 338, 341.)

These allegations establish scienter. "Sufficient evidence of recklessness exists if the factual allegations demonstrate that defendants (1) possessed knowledge of facts or access to information contradicting their public statements or (2) failed to review or check information that they had a duty to monitor or ignored obvious signs of fraud." *Cornwell v. Credit Suisse Group*, 2010 WL 537593, at *6 (S.D.N.Y. Feb. 11, 2010) (Marrero, J.). Allegations "constituting strong circumstantial evidence of conscious misbehavior or recklessness" are sufficient to establish scienter. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). *See also* FGG

Opp. Br. at Point IB. Similarly, recklessness is sufficiently alleged where the danger was "so obvious that the defendant must have been aware of it." *ECA v. JP Morgan Chase Co.*, 553 F.3d 187,198 (2d Cir. 2009) (quotation omitted). The inference of "scienter need not be irrefutable . . . or even the 'most plausible of competing inferences.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). The Court must "accept all factual allegations in the complaint as true" and evaluate them "collectively." *Id.* at 317.

Defendants claim that Plaintiffs must allege that the Citco Administrators "knowingly transmitted false information," (Br. at 9-11), but this is not necessary. *See, e.g., Novak*, 216 F. 3d 300, 311(2d Cir. 2000) (strong inference of scienter may be satisfied by alleging that defendants "had access to information suggesting that their public statements were not accurate . . . or . . . failed to check information they had a duty to monitor"); *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). *See also In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 480-81 (S.D.N.Y. 2006).[38]

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[38] *South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98, 113-15 (2d Cir. 2009), *ECA*, 553 F.3d at 198, and *Shields*, 25 F.3d at 1129 (Adm. Br. at 7-10), are not to the contrary because plaintiffs there did not alleged any red flags or any other facts that should have put the defendants on alert that fraud was being committed.

Defendants do not provide a plausible competing inference sufficient to defeat the strong inference of scienter established by the Plaintiffs. *See Tellabs*, 551 U.S. at 324. In fact, Defendants do not provide any competing inference, arguing only that Plaintiffs have not alleged "any facts that would support an inference" of recklessness. (Adm. Br. at 8.) For the reasons discussed above, this is wrong.

The Citco Administrators (at 8) also argue that they were entitled to rely on the authenticity of BMIS's statements and had no obligation to verify the existence of the underlying securities. To the contrary, the Citco Administrators agreed to act in good faith in the performance of their duties as the Funds' administrators, and were permitted to rely on the information they received from the Funds and BMIS only in the "absence of manifest error." (SCAC ¶¶ 327, 329 (citing Sentry Adm. Agr. § 6.2 & Sigma Adm. Agr. § 6.2(c)).) The red flags alleged in the complaint are sufficient to establish "manifest error."

Furthermore, contrary to the Citco Administrators' argument, Plaintiffs' allegations establish reliance. (Adm. Br. at 11-12; Citco Group Br. at 7.) The SCAC alleges that Plaintiffs "relied, to their detriment," on Citco Administrators' "false statements and omissions . . . by making their initial investments in the Funds, and (where applicable) making additional investments in the Funds." (SCAC ¶ 526; *see also id.* ¶¶ 333, 335.) Furthermore, "[i]f Citco had not breached its duties as set forth above, Plaintiffs would not have invested in the Funds." (*Id.* ¶ 340; *see also id.* ¶¶ 335, 525-26.) Plaintiffs "necessarily relied on Citco's NAV calculations" when making investments in the Funds. (*Id.* ¶ 335.) The number of shares that Plaintiffs received in exchange for their investment amounts, both in their initial investments and subsequent investments, depended directly on Citco's NAV calculations, as did the profits

reported to Plaintiffs who retained their investments. (*Id.*) "If Citco had not breached its duties . . . , Plaintiffs would not have invested in the Funds. . . ." (SCAC ¶ 340.)

These allegations are sufficient to establish reliance. *See, e.g.*, *Cromer*, 137 F. Supp. 2d at 464 & 481 (allegations that investors relied on fictitious reports from auditors and would have not purchased or maintained their investments in the fund had they known that the NAV statements were inaccurate were sufficient to show reliance because plaintiffs had alleged that they had "relied upon" the NAV statements "in their investment decisions regarding the Fund"). Reliance "requires only an allegation that 'but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction.'" *Marsh*, 501 F. Supp. 2d at 489-90 (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005)); *see also Transit Rail, LLC v. Marsala*, 2007 WL 2089273, at *7 (W.D.N.Y. July 20, 2007) ("it is generally accepted that at the pleading stage, the plaintiff must simply allege that it relied on the defendant's statements or omissions made in connection with the purchase or sale of securities, and that this reliance was the proximate cause of the injury suffered"). *See also* FGG Opp. Br. at Point ID.

It is nonsensical for Defendants to contend that Plaintiffs have not alleged that they were not provided NAV calculations before their investments in the Funds (Adm. Br. at 11). Plaintiffs allege that they relied on such information and it is clear that, before investing, Plaintiffs were provided with private placement memoranda, which provided the historic values of the Funds that had been calculated by the Citco Administrators. (SCAC ¶ 335; GS COM-94-98 at 15-17 (Dkt. 363-7); F. Sentry PPM 10/03 at 23-27 (Dkt. 363-8); F. Sentry PPM 10/04 at 21-25 (Dkt. 363-9).)

III. PLAINTIFFS HAVE STATED A SECTION 20(A) CLAIM AGAINST CITCO GROUP.

Citco Group contends that the SCAC fails to state a Section 20(a) claim against it because Plaintiffs have failed to adequately plead the elements of control and culpable participation. (Citco Group Br. at 6-12.) The SCAC sufficiently alleges a "control person" claim against Citco Group for the securities fraud the Citco Administrators committed. Section 20(a) of the Exchange Act makes a defendant derivatively liable for the securities violations of ***a party*** that it controlled. *See* 15 U.S.C. § 78t(a). The plain text of the statute sets forth two elements for a §20(a) claim: (1) a primary violation by the controlled person; and (2) control of the primary violator by the Section 20(a) defendant. *Id. See also Pension Comm.*, 446 F. Supp. 2d at 190. As stated *supra*, the SCAC pleads primary § 10(b) claims against the Citco Administrators. The SCAC also alleges sufficient facts demonstrating Citco Group's control of the Citco Admninistrators and moreover, that Citco Group was a "culpable participant" in their securities violations.

A. The SCAC Has Adequately Alleged Citco Group's Control.

As this Court has recognized, a section 20(a) claim's allegations as to control are evaluated pursuant to Rule 8(a). *Varghese v. China Shenghuo Pharmaceutical Holdings, Inc.*, 2009 WL 4668579 at *11 (S.D.N.Y. Dec. 9, 2009) (Marrero, J.); *Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 235 (S.D.N.Y. 2008) (denying motion to dismiss). Moreover, "[w]hether a person is a 'controlling person' is a fact-intensive inquiry, and generally should not be resolved on a motion to dismiss." *Katz v. Image Innovations Holdings, Inc.*, 542 F. Supp.2d 269, 276 (S.D.N.Y. 2008); *see also Alstom*, 406 F. Supp.2d at 487 (determining issues of control "involves an individualized, fact-sensitive" analysis). Here, the SCAC

sufficiently alleges facts showing Citco Group exercised actual control over the Citco Administrators in connection with their audits of the Funds.

Control is "the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 456 (S.D.N.Y. 2009); *In re Initial Pub. Offering Secs. Litig.*, 241 F. Supp. 2d 281, 393 (S.D.N.Y. 2003); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 486 (S.D.N.Y. 2005) (Marrero, J.). *See also* 17 C.F.R. §240.12b-2 (2003). The plain language of the statute requires that "control" be over the person liable, not the transaction at issue. *See, e.g., Parmalat*, 594 F. Supp. at 456 ("the plain language of Section 20(a), requires control only of a person or entity . . . not of the transaction constituting the violation, and "only the ability to direct the actions of the controlled person and not the active exercise thereof" is required); *Compudyne Corp*, 453 F. Supp. 2d at 829 (same).

Citco Group has already been held to have sufficient control over its administrator entities for purposes of a control-person claim, based on similar allegations, and an undeniably similar relation as to the Citco Administrators here. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2006 WL 708470, at **5-6 (S.D.N.Y. March 20, 2006). *See also Bruhl v. PricewaterhouseCoopers*, 2008 WL 899253, at *3 (S.D. Fla. March 31, 2008) (holding that it was possible to infer that Citco Group had the power to control the general affairs of the Citco administrator defendant based on allegations of the integrated operations and of Citco Group's structure).

Plaintiffs allege that "Citco Group directly controls the conduct of each of" the other Citco Defendants, including the Citco Administrators, pursuant to agreements between them. (SCAC ¶ 156.) Specifically, Citco Group "had the power to influence and control . . . directly or

indirectly, the decision-making of" the Citco Administrators, "including the content and dissemination of the statements that were false and misleading." (*Id.* ¶ 528.) "Citco Group had direct and supervisory involvement and control in the day-to-day operations" of Citco Fund Services and Citco Canada, and thus "is presumed to have had the power to control or influence the false statements giving rise to the [primary] securities violations here." (*Id.* ¶ 529.) As in *Pension Committee*, 446 F. Supp. 2d 163, and *Bruhl*, Plaintiffs allege that the individual Citco entities function as mere "divisions" of Citco Group, and are subject to its control. (*Id.* ¶¶ 319-23.) Citco Group advertises: "The executive committee of Citco Group hires division directors to oversee the daily operations of its divisions, and reviews the directors' performance." (*Id.* ¶ 320.) These allegations are sufficient to establish control.

Citco Group erroneously argues that Plaintiffs have failed to allege that Citco Group asserted actual control over the transactions in questions. (Citco Group Br. at 10.) The SCAC contains sufficient allegations of Citco Group's actual control over the transactions at issue – Citco Group had the power to control and did control the "content and dissemination of the statements that were false and misleading," (SCAC ¶ 528), and Citco Group "is presumed to have had the power to control or influence the false statements giving rise to the securities violations" committed by the Citco Administrators (*id.* ¶ 529). Moreover, Citco Group erroneously focuses solely on the fact that Plaintiffs fail to allege that Citco Group participates directly in the preparation and dissemination of the NAV statements and reads this as a failure to allege control over the fraudulent primary acts in question. (Citco Group Br. at 10.) Such allegations would constitute primary liability, and are not necessary for Section 20(a) claims. "[A]ctual control requires only the ability to direct the actions of the controlled . . . [entity] and not the active exercise thereof." *Dietrich v. Bauer*, 126 F. Supp. 2d 759, 764 (S.D.N.Y. 2001).

In re Global Crossing Sec. Litig., 2005 WL 1907005, at *13 (Citco Group Br. at 9-10), which Defendants cite for the proposition that Plaintiffs have not sufficiently alleged *how* Citco Group controlled the Citco Administrators, is not to the contrary. In *Global Crossing*, the Court focused on the fact that a joint venturer's status as a minority shareholder is insufficient to permit an inference of actual control, and noted that "plaintiffs mention no power that" the alleged controlling entity had over directors after they had appointed them to the board of the allegedly controlled entity. *Id.* Likewise, *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 102 (2d Cir. 2001), and *In re Deutsche Telekom AG Sec. Litig.*, 2002 WL 244597, at *7 (S.D.N.Y. Feb. 20, 2002) (Citco Group Br. at 9), included markedly less detailed allegations of control than present here. *Alstom*, and *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 458-59 (S.D.N.Y. 2005) (Citco Group Br. at 10), addressed control by directors, not by affiliated entities, and also had markedly less detailed factual allegations.

B. The SCAC Sufficiently Alleges Citco Group's "Culpable Participation."

There is a vigorous debate in the district courts of the Second Circuit whether a plaintiff must plead "culpable participation" as a separate element of a §20(a) claim. *See Parmalat,* 375 F. Supp. 2d at 308; *In re IPO Sec. Litig.*, 241 F. Supp. 2d 281, 395 (S.D.N.Y. 2003). Plaintiffs respectfully submit that the Plaintiffs should not be required to plead culpable participation as an element of control person liability for the reasons set forth in FGG Opp. Br. at Point IF2.

Assuming *arguendo* that culpable participation must be pleaded, the SCAC alleges sufficient facts to demonstrate: (i) Citco Group's culpable participation in the primary securities violations by the Citco Administrators, and (ii) scienter. These allegations sufficiently demonstrate that Citco Group's conduct was highly unreasonable, and represented an extreme departure from standards of ordinary care. The Court has made clear that a plaintiff need not use

the words "culpable participation" in the Section 20(a) Count of the SCAC. *Alstom*, 406 F. Supp. 2d at 496 (holding that plaintiffs stated Section 20(a) claim despite failure to allege "culpable participation"); *Varghese*, 2009 WL 4668579 at *12 (holding that defendants were alleged culpable participants, based on allegations of control).

Plaintiffs' allegations establish culpable participation by Citco Group. Culpable participation is evident from the high level of control and supervision Citco Group exercised over its individual companies or "divisions," as well as the significant degree to which Citco Group and its companies were involved with the Funds. Five of Citco's purported individual entities were providing a variety of financial services for the Funds, and two employees were acting as directors of the Funds' manager/general partner. (SCAC ¶¶ 157-61, 163-64, 341-42.) Therefore, Plaintiffs have alleged more than that it is plausible that Citco Group culpably participated in the fraudulent acts of the Citco Administrators. *See Varghese v. China Shenghuo Pharm. Holdings*, 2009 WL 4668579, at *12 (S.D.N.Y. Dec. 9, 2009) (Marrero, J.) (applying the standard of "plausibility" to determine pleading sufficiency of both "control" and "culpable participation" prongs).

Culpable participation is also reinforced by the fact that the Citco Administrators were agents of Citco Group. (*See* Point II, *infra.*) *CompuDyne*, 453 F. Supp. 2d at 829 (*citing Suez Equity*, 250 F.3d at 101) ("Where a primary violator is an agent of the alleged control person, Section 20 liability stems from the actions and knowledge of its agent. A plaintiff, therefore, need only plead an agency relationship with the primary violator acting in the normal course of his or her duties in connection with the alleged fraud to adequately plead control person liability."); *Suez Equity*, 250 F.3d at 101 (control person liability sufficiently pled through allegations that an agent had participated in conveying doctored financial reports); *In re Blech*

Sec. Litig., 928 F. Supp. 1279, 1299-1300 (S.D.N.Y. 1996) (culpable participation adequately pleaded where primary liability was committed by an agent of the controlling person); *In re Motel 6 Sec. Litig.*, 161 F. Supp. 2d 227, 238-39 (S.D.N.Y. 2001) (quoting *Sloane Overseas Fund v. Sapiens Int'l Corp.*, 941 F. Supp. 1369, 1378 (S.D.N.Y. 1996)) (same); *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 563 (S.D.N.Y. 2003) (same). This makes sense because knowledge acquired by an agent acting within the scope of agency is imputed to the principal, even if the information was never communicated to the principal. *Id.* at 559.

IV. PLAINTIFFS HAVE PROPERLY ALLEGED AN ACTUAL AGENCY THEORY OF LIABILITY AGAINST THE CITCO DEFENDANTS.

The Citco Defendants challenge the sufficiency of Plaintiffs' allegations of agency. (Citco Group Br. at 14-21; Cust. Br. at 24-25; Citco Ber. Br. at 12-13, 16; Adm. Br. at 12, 24.) To establish a principal-agent relationship based on actual authority, plaintiff must allege: (1) the principal's manifestation that the agent shall act for him, (2) the agent's acceptance, and (3) an understanding between them that the principal is to control the undertaking. Restatement (Second) of Agency § 1 cmt. b (1958); *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 702 (2d Cir. 1990), *rev'd on other grounds*, 982 F.2d 765 (2d Cir. 1992). The "consent for actual authority may be either express or implied from the parties' words and conduct as construed in light of the surrounding circumstances." *Cromer Fin. Ltd. v. Berger*, 2002 WL 826847, at *4 (S.D.N.Y. May 2, 2002) (quotation omitted).

Notably, the principal need not micro-manage the agent's every action. "[T]he control asserted need not 'include control at every moment; its exercise may be very attenuated . . . .'" *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (*quoting* Restatement (Second) of Agency § 14 cmt. a). Plaintiff need not allege that the principal "directed" or "specifically authorized in advance" its agent's actions at issue. *Compudyne Corp. v. Shane*, 453 F. Supp. 2d

807, 825 (S.D.N.Y. 2006). The principal merely must have the "right of control" over the agent. *See Crimson Semiconductor, Inc. v. Electronum*, 1990 WL 186867, at *2 (S.D.N.Y. Nov. 19, 1990). "[A]gency relationships exist that extend beyond exact instructions to agents by principals, *i.e.*, an agent can be actually authorized to undertake certain types of activities, which were not expressly authorized by the principal, but were authorized through the more general agency relationship." *Reiss v. Societe Centrale Du Groupe Des Assurs. Nationales*, 246 F. Supp. 2d 273, 281 (S.D.N.Y. 2003).

Agency issues demand highly factual and nuanced analysis. *See Caplaw Enters.*, 448 F.3d at 523. Therefore, questions regarding the scope and existence of agency are generally not properly the subject of a motion to dismiss. *Bangkok Crafts Corp. v. Capitolo di San Pietro in Vaticano*, 2006 WL 1997628, at *10 (S.D.N.Y. July 18, 2006) ("New York courts have held that 'where the circumstances alleged in the pleading raise the possibility of a principal-agency relationship' . . . questions as to the existence and scope of the agency are issues of fact and are not properly the basis of a motion to dismiss").[39]

The Citco Defendants' marketing materials, organization, and contracts with the Funds all reflect the Citco Defendants' manifestation and acceptance that they are acting for each other, and exert centralized control over the individual entities. Citco Group controlled the Citco Defendants in the performance of their duties. (SCAC ¶ 156.) Citco Group's executive committee hired directors of Citco Group's four divisions; those directors oversaw daily operations and acted on Citco Group's behalf; and the directors' performance was reviewed by

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[39] Because the question of agency is so fact-intensive, courts typically find – even on summary judgment motions – that "[u]nless the material facts from which agency is to be inferred are undisputed, the question of agency should be submitted to the jury." *Mouawad Nat'l Co. v. Lazare Kaplan Int'l Inc.*, 476 F. Supp. 2d 414, 421 (S.D.N.Y. 2007); *see also Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 735 (S.D.N.Y.1986).

Citco Group's executive committee. (*Id.* ¶¶ 320-21.) The Citco Defendants held themselves out as an integrated corporate group; no distinction was made among Citco Group and the individual Citco Defendants on their website "Citco.com." (*Id.* ¶ 322.) The website portrayed "Citco Fund Services" as a "division" of Citco and as a single worldwide unified administrator. (*Id.* ¶ 323.) It further stated that the division relies on a global team that transfers between "offices." (*Id.*) Consistent with that public representation, engagements with clients expressly provided that services may be provided by any Citco company, not just the nominal contracting entity. (*Id.*)

In *Pension Committee*, 2006 WL 708470, at **5-6 (S.D.N.Y. March 20, 2006), the court held under similar circumstances that fund investors had alleged an agency relationship between the Citco administrator defendant and Citco Group. Plaintiffs had alleged that each Citco "division" had a managing director who reported to a director who then reported to the executive committee of Citco Group, which the court determined indicated an overlap in worldwide oversight process despite the legal independence of the Citco entities. *Id.* at *25. The court also relied on touting by Citco of its integrated corporate structure when advertising to potential clients. *Id.* As in *Pension Committee*, Plaintiffs' allegations establish each element of agency.

To the same effect is *Cromer*, 2002 WL 826847, at *4. Deloitte & Touche had stated in its marketing materials that it was "a leading unified international professional services firm that delivers . . . services . . . around the globe" and that it conducts audits through its "internationally experienced professionals" whom it "deploy[s] . . . across borders to support clients' needs." *Id.* at *2. Therefore, Deloitte's contention that it was not a single international accounting firm did not foreclose the possibility of an agency relationship. *Id.* at *4. In finding the allegations sufficient to establish agency, the court concluded: "It is fair to infer, in the context of pleading

standards, that the representations made to third parties bore a relationship to the way Deloitte actually conducted its business." *Id.* at *5.

Plaintiffs' allegations are more detailed than those in *Parmalat*, 501 F. Supp. 2d at 589 (Citco Group Br. at 19-20), where the court held that mere allegations that a purported agent and a purported principal had management overlap and that the principal provided financing of some of the agent's operations were insufficient to withstand a motion to dismiss. Also unpersuasive is *Maung Ng We v. Merrill Lynch & Co., Inc.*, 2000 WL 1159835, at **7-8 (S.D.N.Y. Aug. 14, 2000) (Citco Group Br. at 19), where the allegations were merely that a subsidiary "consulted" with the principal, which "encouraged," "recommended," or "ratified" certain actions.[40]

V. PLAINTIFFS' ALLEGATIONS AGAINST THE CITCO DEFENDANTS PROVIDE DEFENDANTS WITH FAIR NOTICE OF THE CLAIMS AGAINST THEM.

Defendants contend that Plaintiffs' definition of "Citco" to include all Citco Defendants renders the SCAC unanswerable and violates the Rule 8 pleading standards. (Citco Group Br. at 12-14; Cust. Br. at 11-13; Citco Ber. Br. at 15-16.) However, dismissal for failure to comply with Rule 8 is "reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Rule 8 "does not demand that a complaint be a model of clarity or exhaustively present the facts alleged," as long as it gives each defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests." *Atuahene v. City of*

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[40] The other cases cited by Citco Group are no more compelling. *Nuevo Mundo Holdings v. PricewaterhouseCoopers LLP*, 2004 WL 112948, at *4 (S.D.N.Y. Jan. 22, 2004) (Citco Group Br. at 18-19), is distinguishable because the alleged expressions of agency were by the purported agent, not by the principal. *Coppola v. Bearn Sterns & Co., Inc.*, 2005 WL 2648033, at *11 (N.D.N.Y. Oct. 17, 2005) (Citco Group Br. at 20), is inapposite because it discussed "control" in the context of whether a creditor may be considered an employer for purposes of the WARN Act. *United States v. Bestfoods*, 524 U.S. 51, 69-70 (1998) (Citco Group Br. at 20), was decided under Michigan veil-piercing law and addressed the issue of whether a parent company was operating a subsidiary under CERLA.

Hartford, 10 Fed. App'x 33, 34 (2d Cir. 2001) (finding improper lumping where plaintiff lumped "*all* the defendants together in *each* claim and provid[ed] no factual basis to distinguish their conduct") (emphasis added) (Citco Group Br. at 14; Cust. Br. at 13). Lumping defendants together throughout a complaint is permissible if the complaint also contains "some specific allegations concerning the activities of, and relationships among, certain defendants" and some "evidence of an organization uniting *all* of the named defendants." *Nat'l Group for Communs. & Computers Ltd. v. Lucent Techs., Inc.*, 420 F. Supp. 2d 253, 272 n.32 (S.D.N.Y. 2006) (emphasis in original).

Likewise, even under the Rule 9 pleading standard, which applies to fraud-based claims, some lumping is appropriate. *See, e.g., In re Adelphia Communs. Corp. Sec. & Derivative Litig.*, 2007 WL 2615928, at *2 (S.D.N.Y. Sept. 7, 2007) (denying motions to dismiss securities fraud claims due to lumping under Rule 9(b) after noting that the "[p]laintiffs cannot be expected, prior to discovery, to allege the specific decisions, or interactions within groups, that led to the misstatements"); *see also Stratagem Dev. Corp. v. Heron Int'l N.V.*, 1992 WL 276844, at *7 (S.D.N.Y. Sept. 30, 1992) (lumping together all defendants may be permissible under Rule 9(b) where plaintiff advances some theory of joint liability).[41]

While some of Plaintiffs' allegations refer generally to "Citco" where appropriate, Plaintiffs have alleged in detail the specific duties and conduct of the individual Citco entities

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[41] *See also In re Columbia Sec. Litig.*, 747 F. Supp. 237, 244 (S.D.N.Y. 1990) (rejecting defendants' lumping argument where plaintiff had alleged facts supporting an agency relationship between the wrongdoers); *Dexia Credit Local v. Rogan*, 2003 WL 22349111, at *10 (N.D. Ill. Oct. 14, 2003) ("the crux of [the] . . . complaint is that all of the entities involved in this case are owned and controlled by one defendant . . . and that they are in essence all one entity under his complete dominance. If we assume that to be true (which, for the purposes of a motion to dismiss we must), then it is virtually impossible for . . . [plaintiff] to plead separate acts of each of the defendants . . ."); *Adelphia Recovery Trust v. Bank of Am., N.A.*, 624 F. Supp. 2d 292, 315 (S.D.N.Y. 2009); *Amakua Dev. LLC v. Warner*, 411 F. Supp. 2d 941, 953-54 (N.D. Ill. 2006); *Airlines Reporting Corp. v. Belfon*, 2004 WL 903800, at *3 (D.V.I. Apr. 26, 2004).

that give rise to liability. Paragraphs 157, 158, 327-29, 335-38 and 342 clearly set forth the duties and breaches of the Citco Administrators. The individual counts also set forth the specific duties and conduct of the Citco Administrators. (SCAC ¶¶ 478, 488, 489, 495, 522-26, 532-40.) Even where the term "Citco" is used, it is clear when the specific duties and breaches of the Administrator Defendants are being referenced. (*See, e.g., id.* ¶ 327.)

Similarly, paragraphs 159, 160, 330-31, 335, 339 and 342 clearly set forth the duties and breaches of the Citco Custodians. The individual counts also set forth the specific duties and conduct of the Custodian Defendants. (SCAC ¶¶ 480-83, 485, 490, 496.) Again, even where the term "Citco" is used, it is clear in these paragraphs when the specific duties and breaches of the Custodian Defendants are being referenced. (*See, e.g., id.* ¶ 330.)

Sufficiently specific allegations are also made against Citco Bermuda to support the respondeat superior claim in Count 32 - namely that it directed its employees to serve as directors of defendant FGBL, and that it was paid for the services of its employees to FGBL. (*Id.* ¶¶ 161, 163-64, 563, 564.) Paragraphs 156, 320-21, and 323 also clearly allege the role and involvement of the Citco Group, sufficient to establish the agency theory of liability.

Where the SCAC uses the term "Citco" without referencing specific duties and breaches of the individual Defendants, it is because the allegation refers to all the Defendants defined as "Citco." (*See, e.g., id.* ¶¶ 332-34.) Such collective references to "Citco" are based on Plaintiffs' agency theory of liability, how the Citco Defendants lump themselves together on the website "citco.com," and how they market themselves to potential clients. (SCAC ¶¶ 319, 321-26.)[42]

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[42] Defendants' cases on lumping are all distinguishable. *See Appalachian Enters., Inc. v. ePayment Solutions Ltd.*, 2004 WL 2813121, at *6 (S.D.N.Y. Dec. 8, 2004) (Citco Group Br. at 14) (plaintiff had "merely refer[ed] to the culpable acts committed by all seventeen defendants, without any attempt to differentiate which act was taken by which party, or how the parties are interrelated"); *Atuahene*, 10 Fed. App'x at 34 (Citco Group Br. at 14; Cust. Br. at 13) (plaintiff lumped all defendants - a city, several

VI. PLAINTIFFS HAVE STANDING.

Plaintiffs have standing to assert claims against Defendants. *See* FGG Opp. Br. at Point IIF. Furthermore, numerous cases, addressed in more detail above, have recognized that fund investors hold direct claims against fund service providers. *See, e.g., Pension Comm.*, 446 F. Supp. 2d 163; *Pension Comm.*, 592 F. Supp 2d 608; *Cromer*, 137 F. Supp. 2d 452.

VII. PLAINTIFFS' CLAIMS ARE NOT TIME BARRED.

The Citco Defendants raise a variety of statute of limitations arguments on Plaintiffs' claims, which are addressed herein. However, as an initial matter, Defendants use the wrong filing date for the complaint. The first complaint against Citco Fund Services (one of the Citco Administrators) and Citco Bank (one of the Citco Custodians) was filed on January 12, 2009,[43] and was consolidated into this action. That complaint was based on the same conduct, transactions and occurrences as are the basis for the federal securities claims and other claims against the Citco Defendants in the SCAC. Therefore, the operative complaint date for statute of limitations purposes is January 12, 2009. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 2005 WL 2148919, at *5 (S.D.N.Y. Sept. 6, 2005) ("Rule 15(c) provides for the relation back of an amendment of a pleading to the date of the original proceeding, for purposes of the statute of limitations, provided that the claim asserted in the amended complaint 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the

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companies, and several known and unknown individuals - together in each claim and provided not a single factual basis to distinguish their conduct); *Medina v. Bauer*, 2004 WL 136636, at * 6 (S.D.N.Y. Jan. 27, 2004) (Citco Group Br. at 14) (plaintiff did not allege any specific wrongful actions on the part of three lumped defendants - two individuals and one company - and did not even allege how they were related); *Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Young*, 1994 WL 88129, at *20 (S.D.N.Y. March15, 1994) (Citco Group Br. at 14) (dismissing counts where "no facts" were "stated which connect[ed] any particular defendant to any identified act").

[43] *Inter-American Trust v. Fairfield Greenwich Group*, S.D.N.Y. Civ. No. 09-00301 (Compl., Jan. 12, 2009).

original pleading.'") (*quoting* FED. R. CIV. P. 15(c)(2)); *Slayton v. Am. Express. Co.*, 460 F.3d 215, 228 (2d Cir. 2006) ("For a newly added action to relate back, the basic claim must have risen out of the conduct set forth in the original pleading. . . .") (quotation omitted).

It is of no import that the SCAC includes additional plaintiffs. Because they are other investors in the same funds Citco served, the Citco Defendants "could reasonably have expected them to be added." *Bombardier,* 2005 WL 2148919, at *49 (*quoting Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 297 (2d Cir. 1966)). Furthermore, it is irrelevant that some of the Citco Defendants were not named in the initial complaint, since the complaint put them on notice of the claims against them. *In re Complete Mgmt. Inc. Sec. Litig.*, 153 F. Supp. 2d 314, 336 (S.D.N.Y. 2001) ("[T]he touchstone for this inquiry is whether the original pleading placed the opposing party on notice of the claim in the amended pleading.") *See* Point IV, *supra.*

A. Plaintiffs' Federal Securities Claims Are Not Time Barred.

The Citco Defendants argue (Citco Group Br. at 22-23; Adm. Br. at 7 n.5) that Plaintiffs' federal securities claims are barred for investments made prior to April 24, 2004 under the five-year statute of repose applicable to claims brought under Sections 10(b) and 20(a), 28 U.S.C. § 1658(b) (2002).[44] Aside from using the wrong first complaint date, as set forth above, the Citco Defendants also start counting the statute of limitations on the wrong date. The correct start date for when the limitations period begins to run is 2008, the date of the Citco Administrators' last misrepresentations concerning NAV, due diligence and related matters. "In a case like this one, [for violations of section 10(b) and 20(a),] in which a series of fraudulent misrepresentations is alleged, this period of repose begins when the last alleged misrepresentation was made." *In re Dynex Capital, Inc. Sec. Litig.*, 2006 WL 314524, at *5 (S.D.N.Y. Feb. 10, 2006), *vacated in*

[44] Defendants do not argue that any of Plaintiffs' claims are barred by the two-year statute of limitations because they knew or should have known of the fraud earlier. 28 U.S.C. § 1658(b).

part on other grounds sub nom, Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190 (2d Cir. 2008), (statute of repose for Section 10(b) and 20(a) claims begins to run upon last material financial misstatement resulting from defendants' failure to adequately perform servicing duties); *see also Bombardier*, 2005 WL 2148919, at *5 (under previous statute of repose, plaintiff was required to initiate Section 10(b) and 20(a) claims within three years of most recent violation). "[T]he weight of authority, including in this Circuit, dictates that the five year statute of repose first runs from the date of the last alleged misrepresentation regarding related subject matter." *Plymouth County Ret. Ass'n v. Schroeder*, 576 F. Supp. 2d 360, 378 (E.D.N.Y. 2008).

In arguing that the statute of repose runs from the investors' initial investments, Defendants' reliance (Citco Group Br. at 22) on *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102-03 (2d Cir. 2004), is misplaced, because *P. Stolz* involved a claim brought pursuant to Section 12(a) of the Securities Act, which is subject to a repose period that begins when a security is "bona fide offered to the public," under an entirely different statute of limitations. 15 U.S.C. § 77m. Indeed, the court specifically states that it was not addressing "the situation of a defendant's being granted immunity to continue illicit offers without civil liability after . . . [the repose period has] passed." *P. Stolz*, 355 F.3d at 102. *Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290, 1294 (2d Cir.1992) (Citco Group Br. at 22), is also factually distinguishable because the plaintiff "failed to commence his action within any of the arguably applicable statute of limitations periods." The dispute was over the application of an asset valuation method that was disclosed in the buy-sell agreements first signed more than seven years prior to the commencement of the lawsuit, *id.*, which is materially different from a dispute such as this,

where Defendants' protracted fiduciary breaches caused Plaintiffs to invest and retain their investments right up until December 11, 2008 (SCAC ¶ 526).

B. Plaintiffs' State Law Claims Are Not Time Barred.

The Citco Defendants also argue that Plaintiffs' negligence-based claims are barred for investments made prior to April 24, 2006. (Citco Group Br. at 22-23; Adm. Br. at 7 n.5; Citco Ber. Br. at 9; Cust. Br. at 1 n.1; Francoeur Br. at 5). As set forth above (at 56), they use the wrong first complaint date in arriving at this bar date.[45] In any event, the statute of limitations for Plaintiffs' state law claims was equitably tolled until the Madoff fraud was disclosed on December 11, 2008, because the Citco Defendants were obligated to disclose material facts to Plaintiffs and failed to do so. (*See* Points I.A and B, *supra.*) Non-disclosures are sufficient to establish equitable tolling where "the defendant is under a fiduciary duty to disclose material facts." *In re Stanwich Fin. Servs. Corp.*, 317 B.R. 224, 231 (Bankr. D. Conn. 2004).

As shown above (*see* Point I.B), Plaintiffs' allegations establish that the Citco Defendants were fiduciaries, yet they failed to disclose their multiple and continuous transgressions. These allegations are sufficient to establish, for purposes of a motion to dismiss, that the statute of limitations was tolled at least until Madoff's fraud was revealed – on December 11, 2008. (SCAC ¶ 348.) *See In re Everfresh Beverages, Inc.*, 238 B.R. 558, 577 (Bankr. S.D.N.Y. 1999) ("The question of whether a statute of limitations should be equitably tolled is necessarily a

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[45] Just as with the securities claims, Plaintiffs' state-law claims relate back to the first filing of a complaint against Citco, meaning that any claim subject to a three-year statute of limitations would have to accrue after January 12, 2006, and any claim subject to a six-year statute of limitations would have to accrue after January 12, 2003. (*See* Point VII.A, *supra.*), subject to tolling for concealment. The Citco Defendants also contend (Citco Group Br. at 22-23; Adm. Br. at 7, n.5; Citco Ber. Br. at 9; Cust. Br. at 1 n.1; Francoeur Br. at 5) that any negligence-based claims "may be subject to shorter limitations periods depending on the law of Plaintiff's individual domicile." (citing CPLR § 202). As set forth in Points I.B.3.a, I.D, and VIII, *supra* , under the applicable choice of law rules, New York law governs these claims.

factual one and is often not ripe for consideration on a motion to dismiss."); *In re Stanwich Fin. Servs.*, 317 B.R. at 231 (whether fraudulent concealment tolled the statute of limitations is a question of fact to be determined at trial).

Even if the statute of limitations were not tolled, the statute started running on Plaintiffs' tort claims upon each instance of the Citco Defendants' wrongful conduct, not when Plaintiffs initially committed to invest, as the Citco Defendants suggest. *See, e.g., Bona v. Barasch*, 2003 WL 1395932, at **2-5 (S.D.N.Y. March 20, 2003) (defendants violated continuing duty to review investments each time they renewed imprudent contracts with fund administrators). Because all Citco Defendants continued to be engaged with the Funds within the last three years (the shortest possible limitations period), and continued to commit the transgressions set out in the SCAC throughout this period – such as relaying inaccurate NAVs to Plaintiffs and failing to monitor Madoff – all of Plaintiffs' claims are timely.

Finally, because any "uncertainty regarding the applicability of a statute of limitation should be settled in favor of the longer limitations period," Plaintiffs' claims should be afforded an opportunity for judgment on their merits. *See, e.g., In re Argo Commc'ns Corp.*, 134 B.R. 776, 788 (Bankr. S.D.N.Y. 1991).[46]

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[46] The cases upon which Defendants rely in arguing for application of a three-year statute of limitations to claims for breach of fiduciary duty are inapposite because they are either suits for legal relief based in negligence or allege that the injury to Plaintiff was a discrete occurrence. *See Ciccone v. Hersh*, 530 F. Supp. 2d 574, 579 (S.D.N.Y. 2008), *aff'd, Ciccone v. Hersh*, 320 Fed. App'x 48, 50 (2d Cir. 2009) (negligence-based breach of fiduciary duty claim for monetary damages); *Savino v. Lloyds TSB Bank, PLC*, 499 F. Supp. 2d 306, 312 (W.D.N.Y. 2007) (seeking legal, not equitable relief); *Weiss v. TD Waterhouse*, 847 N.Y.S.2d 94, 95 (App. Div. 2d Dep't 2007) (negligence-based claim seeking money damages); *Ackerman v. Nat'l Prop. Analysts, Inc.*, 887 F. Supp. 494, 508 (S.D.N.Y. 1992) (investors failed to allege any injuries beyond initial investments). *See also Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 486 (E.D.N.Y. 1998) (stating the rule for determining applicable statute of limitations but not discussing the analysis) (citing *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 120 (2d Cir. 1984) (dismissing claims because plaintiff failed to establish existence of fiduciary duty)).

VIII. PLAINTIFFS' CLAIMS AGAINST THE CITCO CUSTODIANS ARE PROPERLY BROUGHT IN THIS JURISDICTION.

The Citco Custodians' assertion (at 5-11) that the claims against them and the other Citco entities must be litigated in the Netherlands is without merit. A party may enforce a forum selection clause only if the forum choice was communicated to the resisting party, is mandatory, and applies to the claims and parties involved. *See Altvater Gessler-J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia S.A.*, 572 F.3d 86, 89 (2d Cir. 2009). "Plaintiff's choice of forum in bringing his suit in federal court in New York will not be disregarded unless the contract evinces agreement by the parties that his claims *cannot* be heard here." *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 387 (2d Cir. 2007) (emphasis added).

Contrary to Citco's assertion, the Sigma 2003 Brokerage and Custody Agreement and the Sentry 2006 Custodian Agreement (collectively, the "Custodian Agreements") do ***not*** state "that *any* claims against CBN and CGC" must be brought in the courts of Amsterdam. (Cust. Br. at 6 (emphasis added)). Rather, the Custodian Agreements each contain two forum clauses, neither of which compels litigation in the Netherlands.

The first clause in each Agreement states that "any disputes which may arise out of or in connection with" the Custodian Agreements "may be brought" in The Netherlands.[47] This, of course, is not the language of exclusive jurisdiction. "[A]n agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion." *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Dists. Inc.*, 22 F.3d 51, 52 (2d Cir. 1994) (emphasis in original; citation omitted); *see Salis v. Am.*

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[47] This clause provides in full: "All parties agree that the courts of The Netherlands are to have jurisdiction to settle disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding arising out of or in connection with this Agreement may be brought in such courts." F. Sigma 2003 Cust. Agr. § 22.2 (Dkt. 342-3); F. Sentry 2006 Cust. Agr. § 22.2 (Dkt. 116-26).

Export Lines, 331 Fed. App'x 811, 813 (2d Cir. 2009) ("[C]ourts will not enforce a clause that specifies only jurisdiction in a designated court without any language indicating that the specified jurisdiction is exclusive.") (citation omitted). A forum clause that provides where certain disputes "may be brought" is "permissive in its language" and leaves open "the possibility that an action could be brought in any forum where jurisdiction can be obtained." *Foothill Capital Corp. v. Kidan*, 2004 WL 434412, at *2 (S.D.N.Y. Mar. 8, 2004) (quoting *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 979 (2d Cir. 1993)).

The second clause specifies that when such proceedings or claims are "brought by the Fund" (*i.e.*, Sentry) or "by the Customer" (*i.e.*, Sigma), those claims "shall be brought exclusively in Amsterdam, The Netherlands."[48] Because Plaintiffs' claims are not "brought by the Fund" or "by the Customer," the second clause has no application and cannot preclude litigation in this Court. "[W]hether or not a forum selection clause applies depends on what the *specific clause at issue* says." *Phillips,* 494 F.3d at 389 (quoting *John Wyett & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997) (Alito, J.)) (emphasis in original).

Furthermore, Plaintiffs' tort claims fall outside the forum selection because they are not contractual. Citco's argument that they should nonetheless be treated as contractual because they "ultimately depend on the existence of a contractual relationship between the parties" (Cust. Br. at 9), necessarily fails because Plaintiffs are *not* parties to the various Administration and Custodian Agreements. It is clear that Plaintiffs never entered into any "freely negotiated private international agreement" to select the Amsterdam courts that Citco purports to give "full effect."

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[48] In the Sentry 2006 Custodian Agreement, this clause provides in full: "Any proceedings or claims brought by the Fund against the Custodian and/or Depositary and/or its affiliates, arising out of or related to this Agreement shall be brought exclusively in Amsterdam, The Netherlands." F. Sentry 2006 Cust. Agr § 22.2 (Dkt. 116-26). In the 2003 Sigma Brokerage & Custody Agreement the language is identical, except that it refers to Fairfield Sigma as "the Customer." F. Sigma 2003 Cust. Agr. § 22.2 (Dkt. 342-3).

(*Id.* at 5.) The fact that "resolution of the claims relates to interpretation of the contract[s]" from which the Citco entities' roles arose (*id.*) is insufficient to tie Plaintiffs' claims to the forum selections in those contracts. *See Phillips*, 494 F.3d at 389 (rejecting Seventh Circuit approach that disputes arise out of a contract just because they "arguably depend on the construction of an agreement"). Citco's citation to Seventh Circuit precedent and lower court decisions that predate *Phillips* (Cust. Br. at 8-9) cannot change that result.

Furthermore, in order to enforce a forum selection against non-signatories like Plaintiffs, the clause must have been "reasonably communicated" to them. *Shea Dev't Corp. v. Watson*, 2008 WL 762087, at *2 (S.D.N.Y. Mar. 24, 2008) (citation omitted). Such a close relationship is rare, and requires a near-complete unity of interests between a party and a non-signatory. *See Aguas Lenders Recovery Group v. Suez, S.A.*, 585 F.3d 696, 701-2 & n.4 (2d Cir. 2009) (non-signatory successor-in-interest bound by its predecessor's forum clause).[49] No such relationship exists here. Nor does Plaintiffs' status as third-party beneficiaries create "a merger of identity" with the FGG Defendants. *Sea Harmony*, 1998 WL 214777, at *2.[50] Here, there are minimal connections to the Netherlands. Even Citco Bank's custodial services were assigned to its branch in Dublin, Ireland. (*See* Dkt. 116-26 & 342-3.) The global patchwork of service providers here did not make it foreseeable to investors from around the world that they would be forced to litigate their disputes in the Netherlands.

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[49] *See also Direct Mail Prod. Servs. Ltd. v. MBNA Corp.*, 2000 WL 1277597, at **4-5 (S.D.N.Y. Sept. 7, 2000) (forum clause enforced where non-signatories were affiliates within *same group of companies*); *Constab Polymer-Chemie*, 2007 WL 2891981, at *8 (clause clearly foreseeable to insurer who as *subrogee* "stands in the shoes of its insured" under the contract).

[50] *Novak v. Tucows*, 2007 WL 922306 (E.D.N.Y. Mar. 26, 2007) is not to the contrary. The plaintiff in that case raised "nearly identical" claims against the actual buyer of a domain name and the middleman-reseller to which the plaintiff thought he was selling. *Id.* at *1. In a footnote, the court stated that if *the middleman* had sued *plaintiff* for a service fee as a third-party beneficiary (which it had not), the middleman would have been bound by the clause. *Id. at* *13 & n.11. This remark was purely hypothetical and dictum.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motions to dismiss filed by the Citco Defendants.[51]

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Respectfully submitted,

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

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