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 MOTIONS TO DISMISS BY THE CITCO DEFENDANTS, PILGRIM AND FRANCOEUR

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Plaintiffs hereby file their consolidated response in opposition to the motions to dismiss filed by Defendants Citco Fund Services (Europe) B.V. and Citco (Canada) Inc. (Dkt. 329), Citco Bank Nederland N.V. Dublin Branch and Citco Global Custody N.V. (Dkt. 340), Citco Group Limited (Dkt. 344), Citco Fund Services (Bermuda) Limited and Ian Pilgrim (Dkt. 334), and Brian Francoeur (Dkt. 318).

PRELIMINARY STATEMENT

The Citco Defendants sued in Plaintiffs' Second Consolidated Amended Complaint (the "SCAC") were intimately involved in the operations of Fairfield Greenwich Group's four Madoff feeder Funds (the "Funds" or "FGG Funds"). They assumed responsibilities far greater than those of the typical fund administrator or custodian, served as directors of the Funds' investment manager/general partner, and were directly responsible for the losses suffered by Plaintiffs in the Madoff Ponzi scheme because of their total failure to fulfill their duties to Plaintiffs. Yet in their motions to dismiss they seek to avoid responsibility for investors' billions in losses.

The fund administrators, Citco Fund Services (Europe) B.V ("Citco Fund Services") and Citco (Canada) Inc. ("Citco Canada") (collectively, the "Citco Administrators"), and the fund custodian and depositary, Citco Bank Nederland N.V., Dublin Branch ("Citco Bank") and Citco Global Custody N.V. ("Citco Global") (collectively, the "Citco Custodians"), as supposedly independent fund service providers and fiduciaries to Plaintiffs, were uniquely situated to protect Plaintiffs from Madoff's theft, yet instead, they utterly failed to fulfill their duties to Plaintiffs. The Citco Administrators were responsible for *independently* calculating the Funds' net asset value, ("NAV"), and *independently* reconciling trading and portfolio information provided by the Funds' manager and broker, Madoff. Nevertheless, they communicated the NAV and other

information to Plaintiffs, in reckless disregard of whether the NAV calculation was supported by reliable information or indeed, any assets at all, and knowing that the information they were providing was contradicted by numerous red flags surrounding Madoff's operations and results. Each of the Plaintiffs invested on the basis of the false and misleading NAV. The Fund custodians and depositary, Citco Bank Nederland N.V., Dublin Branch ("Citco Bank") and Citco Global Custody N.V. ("Citco Global") (collectively, the "Citco Custodians") committed to safeguard Plaintiffs' assets – including through monitoring Madoff – yet they utterly failed to fulfill this duty, also ignoring obvious red flags while blindly entrusting Plaintiffs' assets to Madoff.

Another Citco entity, Citco Fund Services (Bermuda) Limited ("Citco Bermuda"), also became involved with the Funds and the FGG Defendants to solidify the lucrative position of the other Citco Defendants as service providers to the Funds.[1] Citco Bermuda was paid by the FGG Defendants to have two of its employees, Defendants Ian Pilgrim and Brian Francoeur (the "Citco Directors") serve as members of the Board of Directors of Fairfield Greenwich (Bermuda) Limited ("FGBL"), which acted as the investment manager/general partner of the FGG Funds. The Citco Directors were also fiduciaries to Plaintiffs, yet rather than alerting Plaintiffs to the misrepresentations of the FGG Defendants, including FGBL, and the extreme shortcomings in the monitoring of Madoff, they facilitated the misconduct. Under basic principles of agency law and *respondent superior*, Citco Bermuda is liable for the breaches of fiduciary duty and other torts committed by its employees in the course of their employment, which included their actions as FGBL directors.

[1] As used herein, "Citco Defendants" refers to Citco Group, the Citco Administrators, the Citco Custodians, Citco Bermuda, Pilgrim and Francoeur.

The Citco Defendants were not independent entities that all just happened to be engaged with the FGG Funds. Rather, the Citco Defendants operated in their extensive relations with the Funds as one corporate entity – Citco – led by parent company Citco Group Limited ("Citco Group"), which advertised and promoted its independence and fiduciary services to investors. Each Citco defendant was directly controlled by Citco Group, and served as the agent of Citco Group and of each other.

Accordingly, the Citco Defendants cannot avoid liability as a matter of law, and the motions to dismiss should be denied.

ARGUMENT

I. PLAINTIFFS' STATE LAW CLAIMS SHOULD NOT BE DISMISSED

A. Plaintiffs Have Stated Claims for Negligence, Gross Negligence, and Negligent Misrepresentation.

1. The Citco Administrators Owed Plaintiffs a Duty.

For purposes of the negligence, gross negligence and negligent misrepresentation claims, the Citco Administrators do not contest that Plaintiffs' allegations establish breach, but rather, contend that they owe no duty to Plaintiffs.[2]

[2] The negligence and gross negligence claims are governed by the Rule 8 pleading standard. *See, e.g., Rombach v. Chang*, 355 F.3d 164, 178 (2d Cir. 2004) (negligence claims); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*., 415 F. Supp. 2d 261, 278 (S.D.N.Y. 2005) (negligence claims); *Kinsey v. Cendant Corp*., 2005 WL 1907678, at *7 (S.D.N.Y. Aug. 10, 2005) (gross negligence claims). It is unclear in the Second Circuit whether the Rule 8(a) pleading standard also applies to plaintiffs' negligent misrepresentation claim. *See, e.g., Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 188 (2d Cir. 2004) ("Rule 9(b) may or may not apply to a state law claim for negligent misrepresentation."); *compare Liberty Media Corp. v. Vivendi Universal, S.A.*, 2004 WL 876050, at *2 (S.D.N.Y. Apr. 21, 2004) (applying Rule 8 to negligent misrepresentation claim), and *In re Parmalat Sec. Litig*., 479 F. Supp. 2d 332, 340 n.30 (S.D.N.Y. 2007) (applying Rule 9(b) to negligent misrepresentation claim because it incorporated the fraud claims and thus, alleged intentional, not negligent, misrepresentation). Plaintiffs contend that the Rule 8(a) standard should apply because its negligent misrepresentation claim is separate from its fraud claims, but Plaintiffs have, in any event, also satisfied the Rule 9 pleading standard, as set forth herein.

The Citco Administrators' basis for arguing that they owe no duty of care for purposes of the negligence claims is that Plaintiffs are not third party beneficiaries under the contracts. (Adm. Br. at 17-18.) This argument – which is devoid of any case support – proves too much. Under Defendants' view, a plaintiff could never bring a tort claim unless a contractual duty existed, but then the tort claim would be barred by the economic loss rule, so in fact, no tort claims at all could exist. This is not the law.

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 446 F. Supp. 2d 163 (S.D.N.Y. 2006), the court found that Citco Fund Services (Curacao) N.V. owed a duty of care to investors in funds for which it was administrator. *Id*. at 172-73, 199-200. The duty arose from Citco's having undertaken discretionary responsibilities, such as to "conduct a fair and independent valuation of the Funds." *Id.* at 173. *See also Harmelin v. Man Fin. Inc*., 2007 WL 2739579 (E.D. Pa. Sept. 20, 2007) (upholding negligence claim against fund administrator that had failed to properly calculate the NAV by failing to independently verify assets and to ensure that it had access to all of the fund's trading accounts).

The Citco Administrators here undertook similar discretionary responsibilities, including to independently calculate the Funds' NAV, to independently reconcile portfolio holdings, to reconcile balances at the Funds' broker (Madoff), to reconcile information provided by the Funds' prime broker (Madoff) with the information provided by the Investment Manager, to prepare accurate financial statements, and to relay accurate information to investors. (SCAC ¶¶ 157-58, 327-35.) These significant discretionary responsibilities establish a duty of care to Fund investors.[3]

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[3] *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 849 N.Y.S.2d 510, 512 (App. Div. 1st Dep't 2007) (cited in Adm. Br. at 17) is inapposite. There, the court found only that a law firm which had prepared the fund's offering memorandum and provided legal advice "solely related to the fund's formation and to

The Citco Administrators further contend (at 20-22) that they had no duty to provide correct information to Plaintiffs, for purposes of the negligent misrepresentation claim, because they were not in a relationship of privity or near-privity with Plaintiffs.[4] A duty to provide correct information arises where the parties' relationship approaches privity. *See VTech Holdings, Ltd. v. PricewaterhouseCoopers, LLP*, 348 F. Supp. 2d 255, 262-64 (S.D.N.Y. 2004). Such a relationship is established under the test formulated in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 493 N.Y.S.2d 435, 443 (N.Y. 1985), by allegations of: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Pension Comm.*, 446 F. Supp. 2d at 199 (*quoting Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 590 N.Y.S.2d 831, 834-35 (N.Y. 1992)). Plaintiffs satisfy each of these elements.

On the first element, the Citco Administrators argue (at 21) that Citco "would not have expected prospective investors to receive, much less rely on, the funds' NAVs in making their investment decisions." To the contrary, Plaintiffs' allegations here establish Citco's knowledge that the information they provided would be used by Plaintiffs for the particular purpose of

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tax law" – the propriety of which was not challenged – owed no duty to fund investors. *Id.* In contrast, the SCAC establishes that Citco had significant discretionary responsibilities in the ongoing operation of the funds, that they were aware that their NAV calculations would be disseminated to investors for use in making their investment decisions, and that they communicated directly to investors. (SCAC ¶¶ 157-58, 327-35.) In addition, Plaintiffs are challenging the propriety of Citco's representations.

[4] Notably, the Citco Administrators' arguments on the negligent misrepresentation claim only address *prospective* fund investors. However, Plaintiffs' negligent misrepresentation claim encompasses misrepresentations to Plaintiffs who were already investors in the funds, and relied on Defendants' communications in retaining their investments and/or in making subsequent investments. (SCAC ¶ 534.) Accordingly, Citco rightly concedes that a sufficient near-privity relationship exists for such claims. *See, e.g., Pension Comm.*, 446 F. Supp. 2d 163, 199-200; *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 641 (S.D.N.Y. 2009).

making investment decisions. (SCAC ¶¶ 333, 502, 506, 535.) (*See also* discussion below at 6-8.) The Citco Administrators were retained for the specific purpose of independently calculating the Funds' NAVs and independently reconciling the balances and portfolio holdings with Madoff. (*Id*. ¶¶ 327, 334.) Plaintiffs, as prospective investors, sent their initial subscription documents and investment assets directly to the Citco Administrators, who sent back investment confirmations. (*Id*. ¶¶ 157, 328.) The number of shares that Plaintiffs received in exchange for their investment dollars depended directly on Citco's NAV calculations, as did the profits reported to Plaintiffs who retained their investments. (*Id*. ¶ 335.) Thus, the Citco Administrators "knew that Plaintiffs would rely upon the false NAV and account balance statement for the particular purpose of deciding whether to invest," and that the NAV "was fundamental to Plaintiffs' initial investment decisions." (*Id*. ¶¶ 335, 535.) Furthermore, Citco's marketing materials recognize the importance of the role played by the fund administrator to investors, and provided them with assurance about the quality of Citco's services. (*Id*. ¶¶ 324-26.) Indeed, Citco touted on its website that "[b]y providing fully independent services, we act as a reliable fiduciary to safeguard the interests of investors." (*Id*. ¶ 325.)

In *Pension Committee*, the court upheld the negligent misrepresentation claim because plaintiffs similarly alleged that "the NAV was the only measure by which they could evaluate shares in the Funds in order to make investment decisions," and because Citco's marketing materials said that Citco would "serve the interests of investors by providing them with the independent, accurate and timely information they need to make informed decisions about their investments." *Pension Comm*., 446 F. Supp. 2d at 199-200. In a later *Pension Committee* decision partially denying Citco's summary judgment motion, the court found that plaintiffs had presented evidence that Citco was aware its NAV calculations would be used for "a particular

purpose," and found that it would be "disingenuous" for Citco to argue that it was not aware that investors would rely on the NAV to evaluate investment performance. 592 F. Supp. 2d 608, 641 (S.D.N.Y. 2009). Given the allegations here, Citco's arguments are equally "disingenuous." (SCAC ¶¶ 333, 502, 506, 535.) Therefore, the first prong of the *Credit Alliance* test is satisfied.[5]

The Citco Administrators argue (at 21) that the second prong of *Credit Alliance*, the "known party" element, is not satisfied because "Plaintiffs, as prospective pre-investors, can only allege that they were part of a faceless or general class of persons." This argument is wrong legally, and is belied by the facts. Plaintiffs were specifically known to the Citco Administrators because, prior to investing, Plaintiffs sent their initial subscription documents and investment assets directly to the Citco Administrators, who thereby learned Plaintiffs' identity. (SCAC ¶ 328.) Prospective investors can be "known parties" under these circumstances. *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 411 (S.D.N.Y. 2005) ("first-time investors" justifiably relied on defendant fund managers and principals "to publish accurate information about the Funds they managed"); *AUSA Life Ins. Co. v. Ernst and Young*, 206 F.3d 202, 223 (2d Cir. 2000) (upholding negligent misrepresentation claim where auditors prepared no-default letters which they knew would be for the purpose of being forwarded to note holders, some of which subsequently used the letters to determine whether to make an additional loan).[6]

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[5] Defendants only cite on the "awareness" prong, *American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home, Inc*., 2007 WL 674691 (E.D.N.Y. Feb. 28, 2007) (Adm. Br. at 21), found an architect owed no duty to a surety to provide correct information because the purpose of the architect's involvement in the project was to design the site, not to document performance compliance with contractual requirements, such as preparing a log on which the surety sought to rely. *Id.* at **20-21. In contrast here, Citco's primary job was to calculate accurately the NAVs and reconcile the Funds' financial information.

[6] In the lone case cited by Defendants on the "known party" prong, *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co*., 586 N.Y.S.2d 87 (N.Y. 1992) (Adm. Br. at 21), the court did not focus on the "known party" prong; rather, it found that the plaintiff (who lent money to a company on the basis of an audit) and the defendant auditor lacked a relationship sufficiently approaching privity because the audit was only "incidentally or collaterally for the use of those to whom" the company might thereafter provide

Finally, the Citco Administrators argue (at 22) that the third prong of the near-privity test is not satisfied because Plaintiffs have not alleged the required "linking conduct," and that Plaintiffs "actually relied" on the NAV or account balance statements when making initial or subsequent investments. Direct dealings between the defendant and the third party are not required to show linking. *See Dorking Genetics v. United States*, 76 F.3d 1261, 1270-71 (2d Cir. 1996). Rather, the linking prong is satisfied where a service provider is aware of a "particular purpose" for its engagement – to be used by the third party – and acts to further that purpose. *Ossining Union Free Sch. Dist. v. Anderson*, 541 N.Y.S.2d 335, 339-40 (N.Y. 1989) ("linking conduct" is "some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance."); *Pension Comm.*, 592 F. Supp. 2d at 641 ("Citco NV's monthly mailing of NAV statements and other correspondence with plaintiffs is sufficient to establish a "linking" to plaintiffs such that it would have understood plaintiffs' reliance on these statements."); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 617 F. Supp. 2d 216, 221 (S.D.N.Y. 2009) (transmission of NAV statements to "interested parties" sufficient to satisfy linking requirement). Thus, where a service provider has reason to believe that information prepared by it would be disseminated by others to prospective investors, the linking requirement is satisfied. *See Gutman v. Equidyne Extractive Indus. 1980 Petro/Coal Program I*, 1990 WL 113193, at *5 (S.D.N.Y. July 25, 1990) (finding linking requirement satisfied because "it was foreseeable, and in fact intended, that [the plaintiff] . . ., and all prospective investors, would review the Offering Memorandum and tax opinion letter and, as intended third-party viewers of the documents, rely on them for investment purposes.")

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the audit. *Id*. at 94. In contrast, Citco's NAV calculations were fundamentally for the purpose of ascertaining how many shares Plaintiffs' investment would purchase, and subsequently, how much Plaintiffs' shares were worth. (SCAC ¶ 335.)

Plaintiffs' allegations establish the requisite "linking conduct" under the above standards. As shown above, Citco knew of Plaintiffs' reliance because it received Plaintiffs' initial subscription documents and investment assets, sent directly to Citco, which sent back investment confirmations. (SCAC ¶¶ 157, 328.) Plaintiffs relied on the Citco Administrators' NAV calculations, and reasonably and foreseeably reposed trust and confidence in them. (*Id*. ¶ 335.) The Citco Administrators knew how important the NAVs were to Plaintiffs, and knew that potential and current investors were relying on them to make investment decisions. (*Id*. ¶ 333.) In addition, the Citco Administrators allowed their names, and the services they were ostensibly providing, to be included in the Funds' placement memoranda for prospective investors, and knew that their involvement provided potential investors with assurance about the quality of financial services provided to the Funds and the accuracy of reports and investment values. (*Id*. ¶¶ 333, 342.)

2. <u>The Citco Custodians Owed Plaintiffs a Duty.</u>

As to the negligence and gross negligence claims, the Citco Custodians (citing no authority) contend that they owed no duty of care to Plaintiffs. (Cust. Br. at 18.) To the contrary, such a duty of care exists because the Citco Custodians also undertook significant discretionary responsibilities. *See Pension Comm.*, 446 F. Supp. 2d at 172-73; *Fraternity Fund*, 376 F. Supp. 2d at 415. The Citco Custodians were obligated to ensure that securities purchased for the Funds were in the custody of sub-custodians, supervise Madoff as sub-custodian, maintain Fund records, engage with and transfer assets to sub-custodians, and regularly communicate with the Funds' managers. (SCAC ¶¶ 159-60.) Critically, they were responsible for taking due care in the ongoing monitoring of Madoff as sub-custodian, and they agreed to employ experts in the execution of their duties. (*Id*. ¶ 330.) Furthermore, the Citco Custodians

had the authority to "act without first obtaining instructions from the Fund[s]" if such action was necessary "to preserve or safeguard the Securities or other assets of the Fund[s]," and had absolute discretion to refuse to execute instructions by the Funds. (*Id*.) As custodians, Citco Global and Citco Bank agreed to use their best efforts and due care in the execution of their duties. (*Id*. ¶ 331.) These duties went beyond those of a typical fund custodian in that they imposed significant discretionary responsibilities. (*Id*.) Under the standards set forth above (at 4-5), these significant discretionary duties give rise to a duty of care to the Plaintiffs for purposes of the negligence and gross negligence claims.

3. Plaintiffs' Allegations of Recklessness Are Sufficient to State a Gross Negligence Claim.

The Citco Administrators argue (at 17-18) that Plaintiffs' gross negligence claim does not adequately allege the requisite culpability.[7] Gross negligence is an "extreme departure from the standards of ordinary care." *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 454 (2d Cir. 2009); *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd*., 595 N.Y.S.2d 381, 383 (N.Y. 1993) (gross negligence evinces "a reckless disregard for the rights of others"); *AT&T v. City of New York*, 83 F.3d 549, 556 (2d Cir. 1996) (a "gross failure to exercise due care").

Plaintiffs' allegations are sufficient to establish gross negligence. Plaintiffs allege that the Citco Administrators "grossly failed to exercise due care" (SCAC ¶ 503); that they were "grossly deficient in the fulfillment of . . . duties to Plaintiffs" (*id.* ¶ 336); that they acted in reckless disregard of their duties, failing to exercise prudence "that would be expected of any reasonable investment professional" (*id*. ¶ 503); and that they "utterly failed to make reasonable, industry-standard steps to fulfill its duties as administrator . . . ." (*Id.* ¶ 336.) The Citco

[7] Only the Citco Administrators have moved to dismiss the gross negligence claim on this ground although the gross negligence claim is against all Citco Defendants. Accordingly, the other defendants have conceded the adequacy of the claim.

Administrators "failed to take reasonable steps, industry-standard to calculate the Funds' NAV; to reconcile balances at the Funds' broker, Madoff; to independently reconcile the Funds' portfolio holdings with Madoff; to reconcile information provided by Madoff . . . with information provided by the Investment Manager; to prepare the monthly financial statements in accordance with International Accounting Standards; or to relay accurate information to investors." (*Id*. ¶ 337.) The Citco Administrators committed all of these errors recklessly, despite claiming that they had superior expertise in the financial services field. (*Id*. ¶¶ 324-25, 338.)

In particular, the Citco Administrators "blindly and recklessly relied on information provided by Madoff and the Funds to calculate and disseminate the Funds' NAV, and to perform its other duties, even though that information was manifestly erroneous" given the numerous red flags. (SCAC ¶ 338.) "Citco could not have reasonably relied on this information because the roles of investment manager, sub-custodian and trade execution agent were consolidated in Madoff, thus hugely increasing the risk of fraud, and the need for independent verification and scrutiny, as Citco was well aware." (*Id*.) Moreover, the trade and profit information from Madoff "was, on its face, virtually impossible to achieve," which should have caused Citco to inquire, scrutinize, and independently verify the information provided. (*Id*.)

The Citco Administrators also were aware of or willfully blind to the other Defendants' violations. Due to its "long-standing involvement in the Funds, and its experience in fund management," the Citco entities "knew or [were] . . . willfully blind" to the gross deficiencies in the Fairfield Defendants' due diligence and risk controls. (SCAC ¶ 341.) Citco entities thus knew that the Fairfield Defendants' representations that they were monitoring and performing

due diligence on the Fund managers were false, or at least were "willfully blind to the evident falsity." (*Id.*)

These allegations are clearly sufficient to establish recklessness. *See, e.g., Court Appointed Receiver of Lancer Offshore, Inc. v. The Citco Group Ltd.*, 2008 WL 926509, at **4, 7 (S.D. Fla. Mar. 31, 2008) (upholding gross negligence claim where defendants had willfully and recklessly "fail[ed] to use reasonable skill and care to value the Net Asset Values . . . and independently price the Offshore Funds," and had "willingly, knowingly, consciously, and recklessly failed to use reasonable skill and care to be aware of, discover, investigate and report numerous glaring red flags"); *Cromer Fin. Ltd. v. Berger*, 2001 WL 1112548, at **2-3 (S.D.N.Y. Sept. 19, 2001) (upholding gross negligence claim where defendant "issued materially false and misleading audit reports" and "knew or recklessly disregarded" that the reports were "the principal means by which investors were induced to purchase shares…, to increase their shares . . . and/or to retain their existing shares" and "there was no other purportedly independently-verified information available to investors on which they could rely"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 464 (S.D.N.Y. 2001) (allegations of negligence and gross negligence against offshore fund administrator sustained where "[p]laintiffs allege[d] that they and other Class members relied on the fictitious reports [prepared by the administrator] and 'would not have purchased or maintained their shares in the Fund' if they had known that the monthly NAV statements were materially false and misleading'").[8]

[8] The case law cited by Defendants on the recklessness issue is inapposite. In *AT&T v. City of New York*, 83 F.3d 549, 556 (2d Cir. 1996) (Adm. Br. at 17-18), the Second Circuit found that the district court misapplied the gross negligence standard at summary judgment (*i.e.*, after discovery), because, rather than considering the nature of the carrier's errors, and whether they constituted a gross failure to exercise due care, the plaintiff had focused on the magnitude of harm to the plaintiff. *Id.* at 551. Likewise, in *In re Enron Corp.*, 292 B.R. 752, 755 (Bankr. S.D.N.Y. 2003) (Adm. Br. at 18), also decided on summary judgment, the court held that there was no allegation that the conduct in question was "(i) reckless, (ii)

The Citco Administrators (at 18) attempt to equate the standard for gross negligence with the requirement of scienter in a securities fraud case. This is incorrect. *See, e.g., Di Maio v. State*, 517 N.Y.S.2d 675, 679 (N.Y. Ct. Cl. 1987) (*citing Marine Midland Bank v. Russo Produce Co.*, 427 N.Y.S.2d 961 (N.Y. 1980) ("Negligence, whatever its grade, does not include a wrongful purpose . . . .")); *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707, 710 (S.D.N.Y. 1984) (gross negligence is "not equivalent to fraud"); *Equitable Life Assurance Soc. v. Alexander Grant & Co.*, 627 F. Supp. 1023, 1033 (S.D.N.Y. 1985) ("grossly negligent misrepresentation is clearly distinguished from fraudulent misrepresentation"). In any event, Plaintiffs have also established, *see* pp 41-43 below, that the SCAC establishes scienter for the fraud claims.

B. Plaintiffs Have Stated Claims for Breach of Fiduciary Duty.

1. <u>The Citco Administrators Owed a Fiduciary Duty to Plaintiffs.</u>

The elements of a claim for breach of fiduciary duty are "breach by a fiduciary of a duty owed to plaintiff; defendant's knowing participation in the breach; and damages." *Pension Comm.*, 446 F. Supp. 2d at 196-98. The Citco Administrators only challenge part of the first element – whether as administrators they owed Plaintiffs any fiduciary duty. (Adm. Br. at 18-20.)[9]

A fiduciary relationship arises where "one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party," and the defendant was "under a duty to act for or to give advice for

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with knowledge that . . . [its] actions or omissions probably would result in damage or injury, or (iii) in a manner that implied a reckless disregard of the probable consequences." *Id.* at 781-82. Furthermore, the conduct was consistent with the party's obligations under an agreement. *Id.* at 782. In contrast, here the allegations are that Citco's conduct constituted a gross failure to exercise due care and comply with its obligations.

[9] Plaintiffs' fiduciary duty claims are governed by the Rule 8 pleading standard. *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, 2009 WL 321222, at *12 (S.D.N.Y. Feb. 9, 2009) (breach of fiduciary duty claims).

the benefit of another upon matters within the scope of the relation." *Pension Comm.*, 446 F. Supp. 2d at 195-96; *Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 552 N.Y.S.2d 935, 937 (App. Div. 1st Dep't 1990). Whether a fiduciary duty exists between two parties is a "fact-specific inquiry." *Pension Comm.*, 446 F. Supp. 2d at 196; *Litton Indus., Inc. v. Lehman Bros, Kuhn Loeb, Inc.*, 767 F. Supp. 1220, 1231 (S.D.N.Y. 1991); *Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank*, 261 F.R.D. 13, 26 (S.D.N.Y. 2009) ("New York courts generally avoid dismissing a claim of breach of fiduciary duty . . . because it usually involves a question of fact: whether someone reposed trust and confidence in another who thereby gains a resulting superiority or influence."); *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 274 (S.D.N.Y. 2006) (whether a fiduciary duty exists "normally depends on the facts of a particular relationship, [and] therefore a claim alleging the existence of a fiduciary duty is not subject to dismissal"). The existence of a fiduciary relationship cannot be determined "by recourse to rigid formulas." *Litton*, 767 F. Supp. at 1231.

In this case, the Citco Administrators had such superior access to confidential information that Plaintiffs were compelled to repose their trust and confidence in Citco when investing in the Funds. Indeed, Citco acknowledged on its website that "[b]y providing fully independent services, we act as a reliable fiduciary to safeguard the interests of investors." (SCAC ¶ 325.) Before investing, Plaintiffs were provided with private placement memoranda, at least some of which contained historical values of the Funds that had been calculated by Citco. (*Id*. ¶ 335; GS COM-94/98 at 15-17 (Dkt. 363-7); F. Sentry PPM 07/03 at 23-27 (Dkt. 116-6); F. Sentry PPM 10/04 at 21-25 (Dkt. 363-9).) Plaintiffs had to rely on this information; Plaintiffs had no access to information through which they could independently calculate or test these reported values. Similarly, when Plaintiffs decided to invest or re-invest they had no access to

information through which they could verify the investment confirmations they received (SCAC ¶ 328); they had to accept that their investment assets purchased the number of shares reported by the Citco Administrators at the stated NAV. Moreover, in deciding whether to retain their investments, Plaintiffs had to repose their trust in the Citco Administrators' statements of their account values on an ongoing basis, which were based on the Citco Administrators' NAV calculations, as well as the other communications received from Citco about the Funds' performance. (*Id.* ¶¶ 327-28.) Because Plaintiffs had no access to information through which they could independently calculate or test the values reported on their account statements, they were forced to rely on the Citco Administrators in deciding to retain their investments. (*Id.* ¶ 335.) These allegations establish that the Citco Administrators owed Plaintiffs a fiduciary duty. *See Pension Comm.*, 446 F. Supp. 2d at 196-97 (denying motion to dismiss fiduciary duty claim against Citco administrator because Citco "had superior access to confidential information regarding the Funds' NAV by virtue of its role as the Funds' administrator," Citco "held itself out to investors as having policies and procedures to ensure that the Funds' valuations would be accurate and fair," Plaintiffs relied on these representations, and Citco had failed to show that it was relegated solely to ministerial functions).

Citing *Jordan (Berm.) Investment Co. v. Hunter Green Investments LLC*, 2007 WL 2948115, at **22-23 (S.D.N.Y. Oct. 3, 2007), Defendants claim (Adm. Br. at 19-20) that any relationship was far "too attenuated" to give rise to a fiduciary duty. In *Jordan*, however, which was decided on summary judgment, the evidence established that the administrator had no contact with the plaintiff; that the plaintiff did *not* rely on the administrator's account statements; and that the administrator had not undertaken to calculate the NAV independently. *Id.* at **60-66. *Pension Committee*, 592 F. Supp. 2d at 640, recognized the same distinction in the *Jordan*

case. Furthermore, on an earlier motion to dismiss and motion for reconsideration, the *Jordan* court held that the allegations had established a fiduciary duty between the administrator and investors. *Jordan (Berm.) Investment Co. v. Hunter Green Investments Ltd.*, 2003 WL 1751780, at *13 (S.D.N.Y. Apr. 1, 2003) ("It is presumed that . . . the Fund administrator[ ] had a fiduciary duty . . . to implement all trades on behalf of those shareholders and to report the status of each shareholder's account accurately."); *Jordan (Berm.) Investment Co. v. Hunter Green Investments Ltd.*, 2003 WL 21263544, at *4 (S.D.N.Y. June 2, 2003) (emphasizing that the administrator's duties, as alleged, "went beyond ministerial functions."). Plaintiffs here have similarly alleged that the Citco Administrators' duties went beyond ministerial functions. *See supra* at 4-5.

Moreover, as noted *supra* at 8-9, Plaintiffs allege that they necessarily communicated with the Citco Administrators prior to investing, contrary to Defendants' denials. (Adm. Br. at 20.) Plaintiffs were not merely a "client of a client," but instead had a direct relationship wherein the Citco Defendants' superior position and purported expertise and skill necessitated that Plaintiffs reasonably and foreseeably repose their trust and confidence in Citco, which Plaintiffs did by investing and retaining investments in the Funds. (SCAC ¶ 493.)

The Citco Administrators contend (at 18-19) that Plaintiffs' trust in them was "unilateral" and that they never accepted it. But Defendants' after-the-fact disclaimer cannot undo the fiduciary nature of the relationship, as exemplified by Citco's assurance that it would "act as a reliable fiduciary to safeguard the interests of investors." (SCAC ¶ 325.) As discussed above (at 9-10), the Citco Administrators allowed their names, duties and past NAV calculations to be set forth in the private placement memoranda for prospective investors; knowingly accepted investment monies directly from Plaintiffs; sent investment confirmations directly to Plaintiffs; continued to calculate the NAV on which they knew Plaintiffs relied to ascertain account values;

and communicated regularly with Plaintiffs as investors – all without ever disclaiming the fiduciary nature of the relationship. (SCAC ¶¶ 327, 328, 333, 342, 488-491.)

Citco now claims that describing itself "as a reliable fiduciary" in marketing materials is not sufficient to establish a fiduciary duty. The reality, however, is that the entirety of Citco's relationship with Plaintiffs, including the marketing statements, establishes that Citco is a fiduciary. The cases cited in support of Citco's marketing argument (Adm. Br. at 19) arose in starkly different circumstances. *See World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 504-5 (S.D.N.Y. 2007) (the relationship between two commercial entities was governed by a contract that did not mention a fiduciary relationship), *DeBlasio v. Merrill Lynch & Co., Inc*., 2009 WL 2242605, at *28 (S.D.N.Y. July 27, 2009) (plaintiffs offered only the "conclusory assertion" that the defendants held themselves out as financial advisors who would be fiduciaries, and alleged no "interactions-indirect or otherwise" between plaintiffs and defendants); *Barron Partners, LP v. Lab123, Inc*., 593 F. Supp. 2d 667, 671 (S.D.N.Y. 2009) (applying general rule that there is no fiduciary relationship between sellers and buyers of corporate stock); *Musalli*, 261 F.R.D. at 26 (applying general rule that banks do not owe fiduciary duties in a deposit or lending relationship).

Finally, a fiduciary relationship may be found in any case "in which influence has been acquired and abused, in which confidence has been reposed and betrayed." *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc*., 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002) (*quoting Penato v. George*, 383 N.Y.S.2d 900, 904 (App. Div. 2d Dep't 1997)). That is precisely what occurred here. The Citco Administrators, by virtue of their superior position, access to confidential information, and undertaking of discretionary responsibilities, compelled Plaintiffs to repose confidence in their fiduciary relationship. (SCAC ¶¶ 492-94.) The Citco

Administrators then abused their position by failing to discharge their obligations by inaccurately calculating the Funds' NAV and communicating fictitious Fund valuations to Plaintiffs, (*id.* ¶ 495), which were central to Plaintiffs' investment decisions.[10] In addition, the Citco Administrators' superior position was augmented by the numerous responsibilities and relationships of the other Citco entities, layered on top of their role as administrators. (SCAC ¶¶ 159-61, 326, 330-35.)

2. The Citco Custodians Owed a Fiduciary Duty to Plaintiffs.

Like the Citco Administrators, the Citco Custodians only challenge part of the first element of the fiduciary duty claims – whether as custodians they owed Plaintiffs any fiduciary duty – and only do so in passing, with no citation to authority. (Cust. Br. at 18.) The Citco Custodians also owed Plaintiffs a fiduciary duty under the same legal standards discussed above (at 14-18).[11]

The Citco Custodians undertook the key responsibilities of ensuring that the securities were in the custody of Madoff as sub-custodians and of monitoring Madoff. (SCAC ¶¶ 159-60, 330.) In this capacity, they had access to confidential information, and were in a superior position to Plaintiffs, who had no ability whatsoever to obtain such information on their own or

[10] Other cases cited by the Citco Administrators (Adm. Br. at 18-19) are inapposite. *See Thermal Imaging v. Sandgrain Sec. Inc.*, 158 F. Supp. 2d. 335, 343-44 (S.D.N.Y. 2001) (dismissing a claim based on an alleged fiduciary relationship stemming from a loan agreement or a broker/customer relationship where the alleged fiduciary had non-discretionary duties only); *Musalli*, 2009 WL 860635, at *40 (dismissing a claim based on alleged fiduciary duties by banks to non-customers, depositors, or customers in lending relationships).

[11] Courts impose fiduciary duties on custodians of assets in various other contexts. *See, e.g., In re U. S. Oil & Gas Litig.*, 1988 WL 28544, at *25 (S.D. Fla. Feb. 8, 1988) ("As these defendants were designated custodians of investor funds, they owed fiduciary duties to the investors.); *Schoenholtz v. Doniger*, 628 F. Supp. 1420, 1430 (S.D.N.Y. 1986) (custodian of a retirement plan); *Cash v. Titan Fin. Servs., Inc.*, 873 N.Y.S.2d 642, 646 (App. Div. 2d Dep't 2009) (a custodian and escrow agent responsible for the distribution of proceeds held for the benefit of others); *Grosso v. Radice*, 2009 WL 749906 (E.D.N.Y. Mar. 16, 2009) (custodian of minors' accounts); *Underwood v. Bank of Huntsville*, 494 So. 2d 619, 620 (Ala. 1986); *Lake Worth v. First Nat'l Bank*, 93 So. 2d 49 (Fla. Sup. Ct. 1957); *In re Marriage of Petrie*, 19 P.3d 443 (Wash. App. Ct. 2001).

verify the assets. In addition, the Citco Custodians inspired trust and confidence in the Plaintiffs because they had the authority to "act without first obtaining instructions from the Fund[s]" if such action was necessary "to preserve or safeguard the Securities or other assets of the Fund[s]," and had absolute discretion to refuse to execute instructions by the Funds. (*Id*. ¶¶ 160, 330.) The Citco Custodians agreed to use their best efforts and due care in the execution of these duties. (*Id*. ¶ 331.)

The Citco Custodians accepted Plaintiffs' trust by being listed in the various Fund offering documents disseminated to the investors. They were aware that existing and potential investors knew that they were providing significant services to the Funds and were relying on their reputation and expertise (*id*. ¶¶ 333-34). The Citco Custodians then abused their position of trust and confidence by, among other omissions, failing to discharge their custodial obligations, sub-delegating responsibility to BMIS as sub-custodian without supervision, and blindly and recklessly handing over Plaintiffs' assets to BMIS (*id*. ¶ 496), all despite their knowledge of the numerous red flags (*id*. ¶ 339). Therefore, Plaintiffs' allegations establish that the Citco Custodians owed Plaintiffs a fiduciary duty.

3. Plaintiffs Have Stated a Claim for Breach of Fiduciary Duty Against Citco Bermuda, Pilgrim, and Francoeur.

Citco Bermuda and the Citco Directors argue that Plaintiffs' allegations do not establish that the Citco Directors, who served as directors to the Funds' investment manager/general partner, FGBL, owed a fiduciary duty to Plaintiffs, or breached that duty. Citco Bermuda also claims that it is not liable for the conduct of its employees, the Citco Directors.

a. New York Law Governs the Claims for Breach of Fiduciary Duty Against Citco Bermuda, Pilgrim, and Francoeur.

As an initial matter, Citco Bermuda and the Citco Directors contend that Bermuda law

governs the breach of fiduciary duty claim, because the claim implicates the internal affairs of FGBL, which is incorporated in Bermuda.[12] (Citco Ber. Br. at 6; Francoeur Br. at 5.) Defendants' reliance on the internal affairs doctrine is misplaced, because Plaintiffs are shareholders in the FGG Funds, not FGBL; thus, the internal affairs of FGBL are not implicated. *See, e.g., Roselink Investors, L.L.C. v. Shenkman,* 386 F. Supp. 2d 209, 225 (S.D.N.Y. 2004) (citing *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba,* 462 U.S. 611, 621 (1983).[13] In contrast, the cases cited by Defendants (Citco Ber. Br. at 6; Francoeur Br. at 5) all fundamentally relate to shareholders suing a corporation or its own officers.[14]

Accordingly, traditional New York conflict of laws analysis for torts, which considers which jurisdiction has the "greatest interest" in the litigation, applies. *See, e.g., PPI Enters. (U.S.), Inc.*, 2003 WL 22118977, at *19; *Roselink*, 386 F. Supp.2d at 225.[15] New York has the

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[12] Francoeur also argues that Delaware law is potentially dispositive of the claim for breach of fiduciary duty, by reference to the FGG Defendants' Brief. (Francoeur Br. at 6; FG Defs. Br. at 59). Plaintiffs hereby incorporate their responses to the referenced FGG Defendants' arguments. *See* FGG Opp. Br. at Point IIC. In addition, New York law applies to the claims against Francoeur for all the same reasons it applies to the claims against Pilgrim, set forth herein (at 20-21).

[13] *See also PPI Enters. (U.S.), Inc. v. Del Monte Foods Co.*, 2003 WL 22118977, at *19 (S.D.N.Y. Sept. 11, 2003) (rejecting the application of internal affairs doctrine to investor claims against corporation's financial advisor because "no corporate, contractual, or statutory relationship" existed between the two parties and plaintiff's claims were "separate and distinct" from its relationship with the corporation); *In re Adelphia Commc'ns. Corp.*, 365 B.R. 24, 39-41 (Bankr. S.D.N.Y. 2007) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)) (internal affairs doctrine inapplicable where "claims do not involve 'matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders'").

[14] *See Winn ex rel. Scottish RE Group Ltd. v. Schafer*, 449 F. Supp. 2d 390 (S.D.N.Y. 2007) (shareholder derivative action); *Galef v. Alexander*, 615 F.2d 51 (2d Cir. 1980) (corporation suing its own officer); *Seybold v. Groenink*, 2007 WL 737502 (S.D.N.Y. Mar. 12, 2007) (same, and specifically distinguishing direct shareholder actions, where the internal affairs doctrine would not apply). *See also BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999) (corporation suing third parties for aiding and abetting its own director's breaches of fiduciary duty) (*compare In re Adelphia Commc'ns. Corp.*, 365 B.R. 24, 39-40 (reconciling seeming split of authority on choice of law for aiding and abetting claims and holding that normal "interest analysis" principles apply to claims for aiding and abetting breaches of fiduciary duty, warranting application of the law of the jurisdiction with the greatest interest in a particular case); *LaSala v. UBS, AG*, 510 F. Supp.2d 213, 231 n.9 (S.D.N.Y. 2007) (same)).

[15] Indeed, even if the internal affairs of FGBL were implicated, a New York court would still apply New York law as the state with the "overriding interest" in the claims, as compared to Bermuda. Federal

greatest interest in this action, and therefore, the law of New York applies. Much of the tortious activity surrounding the management of the Funds occurred in New York. *See* FGG Opp. Br. at Point IIA.[16] Likewise, the information which the Citco Defendants failed to verify, in breach of their fiduciary and other duties, issued from Madoff in New York. (SCAC ¶¶ 157-60.) *See, e.g.*, *Pension Comm.*, 446 F. Supp. 2d at 194 (applying New York law to breach of fiduciary duty claims against the Citco defendants and fund directors, instead of internal affairs doctrine, because "New York has a strong interest in applying its law with respect to defendants who aid and abet torts masterminded and executed by hedge fund managers from within the state, and who breach their fiduciary duties, to serve as a check against such misconduct," and because "the breach of fiduciary duty relates to the Citco Defendants' failure to independently verify false information issued to them from Lauer and Lancer Management in New York.").[17] Furthermore, Pilgrim is no longer a director of FGBL (SCAC ¶ 164), so is not at risk of being faced with inconsistent obligations in Bermuda.

Citco Bermuda and the Citco Directors also contend that the law of Bermuda should be applied under the investment management agreements between FGBL and the funds, which contain a Bermuda choice of law provision. (Citco Ber. Br. at 6; Francoeur Br. at 5.) To the contrary, the contractual choice of law provisions in the FGBL-Fund contract are not applicable to tort claims between Plaintiffs and the Citco Directors, where neither were parties to the

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courts in this district have rejected "any automatic application" of the internal affairs doctrine, instead applying the law of the state with the "overriding interest" in the issue to be decided. *Pension Comm.*, 446 F. Supp. 2d at 192; *Stephens v. Nat'l Distillers and Chem. Corp.*, 1996 WL 271789, **4-5 (S.D.N.Y. 1996).

[16] Plaintiffs incorporate herein by reference all applicable arguments in the FGG Opposition Brief and the PwC Opposition Brief.

[17] Notably, in *Pension Committee*, the directors being sued had been directors of the *fund*, and the plaintiffs were shareholders in *that fund*, so there was a stronger argument there for application of the internal affairs doctrine than here.

contract. *See, e.g., Hong Kong and Shanghai Banking Corp. Ltd. v. HFH USA Corp.*, 805 F. Supp. 133, 139-49 (W.D.N.Y. 1992) (choice of law provision that "operated to the detriment" of non-parties not applied). In addition, contractual choice of law provisions generally do not govern non-contractual causes of action. *See Rosenberg v. Pillsbury Co*., 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989); *Fin. One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 335 (2d Cir. 2005) ("Under New York law . . . tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract . . . ."). *See also infra* at 62.

Accordingly, New York law applies to the breach of fiduciary duty claims against Citco Bermuda and the Citco Directors.

b. The Citco Directors Owed Fiduciary Duties To Plaintiffs.

Defendants further contend that, even if New York law applies, the Citco Directors owed no fiduciary duty to Plaintiffs. (Citco Ber. Br. at 7; Francoeur Br. at 5.) Under the applicable legal standard, *supra*, at 14-15, Plaintiffs have established that the Citco Directors owed fiduciary duties to Plaintiffs. Plaintiffs allege that Francoeur and Pilgrim served as members of FGBL's Board of Directors. (SCAC ¶¶ 163-64, 559-60.) Plaintiffs also allege that FGBL's Board of Directors had responsibility for FGBL, which in turn had day-to-day management responsibility for the Funds, including selecting and monitoring the Fund's investments and investment advisors and maintaining relationships between the Funds and their advisors, custodians, administrators, and transfer agents. (*Id.* ¶¶ 559-61.) These allegations are sufficient to establish a fiduciary duty. Furthermore, the Citco Directors owed Plaintiffs a fiduciary duty for the same reasons that FGBL and FGG's principals owed Plaintiffs a fiduciary duty. *See* FGG Opp. Br. at Point IIC. Contrary to Francoeur's argument (Francoeur Br. at 6), it is clear that as

director of the general partner (FGBL) of a limited partnership (Greenwich Sentry and Greenwich Sentry Partners).

Moreover, it is clear that Francoeur owed fiduciary duties to Plaintiffs, as limited partners in the partnership. *See In re Kingston Square Assocs.*, 214 B.R. 713, 735-36 (Bankr. S.D.N.Y. 1997) (finding it "inconceivable" that defendant director of general partner would not understand fiduciary obligations to limited partners); *Tobias v. First City Nat'l Bank and Trust Co.*, 709 F. Supp. 1266, 1277 (S.D.N.Y. 1989) (limited partner stated claim for breach of fiduciary duty against director of general partner); *Crossen v. Bernstein*, 1994 WL 281881, at *4 (S.D.N.Y. June 23, 1994) (allegations that defendants were directors of general partner of limited partnership in which plaintiff invested established fiduciary relationship). The result should be no different in terms of Pilgrim and Francoeur's obligations to shareholders in Fairfield Sigma and Fairfield Sentry. *Cf. Tucker Anthony Realty Corp. v. Schlesinger*, 888 F. 2d 969, 973 (2d Cir. 1989) ("New York makes no distinction between the fiduciary duty owed by a general partner and that owed by a corporate director . . . . Both are bound by the same rule of fair-dealing with limited partners or shareholders who rely on the integrity of the general partner and corporate directors who are empowered . . . to manage the business into which those passive investors have placed their funds.").[18]

Cases cited by Defendants regarding the existence of a fiduciary duty are inapposite. (Citco Ber. Br. at 7-8, Francoeur Br. at 5.) *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc.*, 1999 WL 47223 (S.D.N.Y. Feb. 3, 1999), was decided in the context of fraud perpetrated by a broker and an investment advisor. *Renner v. Chase Manhattan Bank*, 2000 WL 781081 (S.D.N.Y. June

[18] The Citco Directors' fiduciary duties flow from public policy, not the parties' contract. *See Bullmore v. Banc of Am. Sec. LLC.*, 485 F. Supp. 2d 464, 470 (S.D.N.Y. 2007). Therefore, Francoeur's defense (at 6) that the Limited Partnership Agreements protect directors from a breach of fiduciary duty claim is also misplaced.

16, 2000), similarly involved a fiduciary duty claim against a securities broker. Any duties of brokers and investment advisors, who are generally involved only at the point of the initial investment, are not germane to the fiduciary responsibilities of corporate directors, who have ongoing duties and obligations.

c. The Citco Directors Breached Their Fiduciary Duties To Plaintiffs.

Defendants also contend that Plaintiffs' allegations do not establish breaches of their fiduciary duties to Plaintiffs. (Citco Ber. Br. at 8; Francoeur Br. at 5.) To the contrary, Plaintiffs allege that the Citco Directors breached their fiduciary duties by failing to supervise the Funds' advisor (*i.e.*, Madoff) or the investments that were entrusted to Madoff, and in failing to pursue red flags that should have alerted them to the presence of unlawful activity. (SCAC ¶ 562.) These allegations are sufficient to establish breach. *See, e.g., Automatic Catering, Inc. v. First Multifund for Daily Income Inc.*, 1981 WL 1664 (S.D.N.Y. Aug. 3, 1981) (denying summary judgment motion based on allegations that an investment manager and its directors breached fiduciary duty of managing, selecting, and supervising the assets of a fund, instead making omissions or misrepresentations concerning the fund's investment strategy).[19]

d. Citco Bermuda Is Liable Under the Respondeat Superior Doctrine.

Citco Bermuda contends that even if its employees Pilgrim and Francoeur breached their fiduciary duties, Citco Bermuda is not liable for their conduct, because they were acting as directors of another company, FGBL. (Citco Ber. Br. at 12-13; *see also* Cust. Br. at 24-25; Citco

[19] *Moscato v. TIE Technologies, Inc*., 2005 WL 146806 (S.D.N.Y. Jan. 21, 2005) (Citco Berm. at 9) is inapposite to this element, because the court found that plaintiff had failed to allege the existence of a fiduciary duty by stock issuers, stock transfer company, and the issuers' common director, so the court did not proceed to the analysis of any alleged breach.

Group Br. at 21.) This argument ignores ancient principles of *respondeat superior*.[20] Citco Bermuda directed Pilgrim and Francoeur to "serve as directors of FGBL within the scope of their employment." (SCAC ¶ 161.) Each served as a director of FGBL "as part of his duties and responsibilities as an employee and officer of CFSB." (*Id*. ¶¶ 163-64, 559-60.) FGBL paid Citco Bermuda for their services. (*Id*.) Moreover, in providing the services of its employees to FGBL, Citco Bermuda was acting to solidify the relationship of the Citco companies with FGG, an important customer that paid substantial services fees to the Citco Administrators and Custodians. (*Id*. ¶¶ 343, 564.)[21] As investment manager of the funds, FGBL had the authority to select the Funds' administrator and custodian – and thus, to keep the Citco Administrators and Custodians installed in these lucrative positions. (*Id.* ¶ 119.) These allegations are sufficient to establish that the Citco Directors were acting as directors for FGBL within the scope of their employment for Citco Bermuda, and in furtherance of their duties of Citco Bermuda, and thus, that Citco Bermuda is liable under the doctrine of *respondeat superior*. *See Riviello v. Waldron*, 418 N.Y.S.2d 300, 302 (N.Y. 1979) ("[T]he test [for respondeat superior] has come to be 'whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions.'"); *Lundberg v. State*, 306 N.Y.S.2d 947, 950 (N.Y. 1969) ("An employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities.").

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[20] Citco Bermuda is also liable because of the agent-principal relationship of the Citco entities to each other (as discussed in Point IV, *infra*).

[21] It is irrelevant that Citco Bermuda did not contract with the Funds. The agreements that the Citco Administrators and Citco Custodians entered with the Funds provide that services may be provided by Citco Group and any of its companies – not just the company specifically engaged. (SCAC ¶ 323.) Citco's marketing materials also tout the interchangeability of its staff between its individual companies. (*Id*.) The service of Citco Bermuda employees as directors reflects this interchangeability of the Citco companies and staff.

Citco Bermuda suggests (at 12) that a company which directs its employees to serve as directors to another company can never be liable for the conduct of the director-employees under respondeat superior, because, as directors, they are serving the other company. Citco's argument makes no sense. The doctrine of *respondeat superior* makes a company liable for the torts of its employees, acting within the scope of their employment, whether they are driving a truck or managing someone else's business. This is particularly true where, as here, the company employing the directors was acting to solidify its already complex and lucrative relationship with the other company, and entrench itself within that company, and where Citco Bermuda was itself paid by FGG for providing the services of the employees.[22]

Citco Bermuda questions (at 13) whether Pilgrim or Francoeur were acting as its agents, but factual questions regarding whether employees were acting within the scope of their employment cannot be resolved on a motion to dismiss. *See, e.g., Armstrong v. McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983) (holding on motion to dismiss that determination of liability of two alleged employers "as principals under the common law of agency" must "await further factual development"); *Zaro v. Mason*, 658 F. Supp. 222, 228 (S.D.N.Y. 1987) (denying summary judgment because determination of respondeat superior liability "would require the resolution of factual questions concerning the scope of employment of the third-party defendants, and whether their acts were within the scope of their employment"); *Quadrozzi v. Norcem, Inc*., 509 N.Y.S.2d 835, 836 (App. Div. 2d Dep't 1986) ("Because the determination of whether a particular act was

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[22] *In re Global Crossing, Ltd. Securities Litigation*, 2005 WL 1881514 (S.D.N.Y. Aug. 5, 2005) and *In re Global Crossing, Ltd. Securities Litigation*, 2005 WL 2990646 (S.D.N.Y. Nov. 7, 2005) (Berm. Br. at 12), are not to the contrary. The defendants had appointed directors to another company under their right to do so as minority shareholders; they were not providing a service to a customer. Nor were the defendants otherwise providing services to the second company, which did not pay defendants for the services of their employees as directors, unlike the situation here. In addition, the court noted that the plaintiffs were trying to use respondeat superior to establish liability for direct federal securities fraud claims; in contrast, here Plaintiffs are seeking to establish liability for common law torts.

within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury.").

C. Plaintiffs Have Stated Claims for Aiding and Abetting Fraud and Aiding and Abetting Breach of Fiduciary Duty.

The Citco Administrators and the Citco Custodians contend that Plaintiffs' allegations fail to establish claims for aiding and abetting the Fairfield Defendants' fraud and breach of fiduciary duty. (Adm. Br. at 23-24; Cust. Br. at 19-21). To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must show: "(1) breach of fiduciary obligations to another of which the aider and abettor had actual knowledge; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered actual damages as a result of the breach." *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 466 (S.D.N.Y. 2009). Similarly, to state a claim for aiding and abetting fraud, a plaintiff must show: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Kottler*, 607 F. Supp. 2d at 464. The Citco Defendants dispute only the knowledge element – whether the allegations sufficiently establish knowledge of the breach of fiduciary duty or fraud by the Citco Defendants.[23]

The knowledge requirement can be satisfied by a "reasonable inference of actual knowledge," and is not identical to the scienter required for the underlying fraud. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495, 502-3 (S.D.N.Y. 2009). Willful blindness or conscious avoidance is sufficient. *See, e.g., Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007) ("[T]he Court sees no reason to spare a putative aider and abettor who consciously avoids confirming

[23] Plaintiffs' claim for aiding and abetting breach of fiduciary duty claim is governed by Rule 8 pleading standard, *Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A*, 261 F.R.D. 13, 23-24 (S.D.N.Y. 2009), while Plaintiffs' claim for aiding and abetting fraud is governed by Rule 9.

facts that, if known, would demonstrate the fraudulent nature of the endeavor he or she substantially furthers."). In any event, however, Plaintiffs demonstrated actual knowledge.[24]

Plaintiffs allege that the Citco Defendants had actual knowledge that the Fairfield Defendants' owed fiduciary duties to Plaintiffs, and that the Fairfield Defendants were breaching those duties by employing due diligence and risk controls on the Funds' investments that were grossly deficient. (SCAC ¶¶ 511-12.) Plaintiffs further allege that the Citco Defendants had actual knowledge that the Fairfield Defendants were making false representations to Plaintiffs that they had undertaken meaningful due diligence and implemented risk controls, and the Fairfield Defendants were failing to disclose the clear deficiencies in their internal controls and monitoring of Madoff. (*Id.* ¶¶ 517-18.) Plaintiffs allege that the Citco Defendants acquired such knowledge through Citco's position as a leading provider of services to the hedge fund industry, and the Citco Defendants' long-standing relationship with and knowledge of the Funds' operations, as administrator, custodian, bank and depositary. (*Id.* ¶¶ 512, 518.) In addition, Plaintiffs allege that the Citco Defendants were aware of the misconduct of the Fairfield Defendants because of the red flags surrounding Madoff, including the lack of any transparency into Madoff's operations (*id.* 218), his family members' involvement in key positions at his firm (*id.* ¶ 220), his lack of segregation of important functions (*id.* ¶ 221), his use of an unknown auditing firm (*id.* ¶ 222), his use of paper trading records (*id.* ¶ 223), and his implausibly consistent investment returns (*id.*), as well as the consolidation of the roles of investment manager, custodian and execution agent in Madoff. (*Id.* ¶ 524.) Moreover, Plaintiffs allege that

[24] Even where Rule 9(b) is applicable, a "more general standard of scienter is applicable" when pleading state of mind, because "a plaintiff realistically cannot be expected to plead a defendant's actual state of mind." *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 425 (S.D.N.Y. 2007) (*citing Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000)). In fact, "[a]ctual knowledge of the fraud may be averred generally." *In re Worldcom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 560 (S.D.N.Y. 2005) (internal quotation marks omitted).

the Citco Defendants were obligated, among other duties, to independently calculate the NAVs and to monitor Madoff as a sub-custodian. (*Id.* ¶ 335.)

These allegations are sufficient to establish knowledge for purposes of the aiding and abetting claim. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2007 WL 528703, at *7 (S.D.N.Y. Feb. 20, 2007) (denying motion to dismiss the aiding and abetting breach of fiduciary duty and fraud claims against Citco administrator, and holding "actual knowledge" requirement satisfied where there was "circumstantial evidence" giving rise to an "inference of knowledge," such as the series of "red flags" that the Citco Defendants allegedly ignored); *Pension Comm.*, 652 F. Supp. 2d at 504 (denying motion for summary judgment by fund's prime-broker/custodian on aiding and abetting claim, because a reasonable jury could infer that the custodian had actual knowledge from circumstantial evidence, such as evidence that the custodian was instructed to include in its position reports certain transactions that were "too good to be true" and other inconsistencies in the trades and values it reported). As in the *Pension Committee* decisions, Plaintiffs here have alleged both actual knowledge and circumstances from which such knowledge can be inferred – including the numerous red flags, the long-standing involvement of the Citco Defendants in the Funds, and the service of Citco employees Pilgrim and Francoeur as directors of FGBL, as well as the Citco Defendants' duties to verify the information they received and reported, and to monitor Madoff. (SCAC ¶¶ 157-60, 163-64, 217-23, 332-35.)

Musalli, 261 F.R.D. 13 (Cust. Br. at 21), is distinguishable because there it was alleged only that the defendants "knew, or should have known" of the improper conduct, and plaintiff failed to explain *how* the defendants would have known that the conduct (certain bank transfers)

was improper. *Id*. at 24.[25] In contrast, Plaintiffs allege that the Citco Defendants *knew* of the Fairfield Defendants' wrongful conduct, and explain how the Citco Defendants came to know of the improper conduct by the Fairfield Defendants. (SCAC ¶¶ 341, 511-12, 517-18.)

The Citco Defendants contend that *Musalli* stands for the proposition that allegations of "collective knowledge" are insufficient. However, Plaintiffs are not relying on "collective knowledge" and the complaint alleges knowledge by each Citco entity. The term "Citco" is defined as each of the Citco Defendants; thus, when making allegations against Citco, Plaintiffs allege that *each* of the Citco Defendants individually had the requisite knowledge. The complaint goes on to explain that such knowledge was gained by virtue of the specific services provided by the administrator, custodian, bank, and depositary entities (*i.e.*, Citco Fund Services, Citco Canada, Citco Bank, and Citco Global), and also alleges that two of Citco Bermuda's employees served as directors for one of the Fairfield Defendants that engaged in the primary misconduct. (SCAC ¶¶ 163-64.) Furthermore, just as a corporation may be charged with the knowledge of its employees, *Musalli*, 261 F.R.D. at 23-25, Citco Group and the unified "Citco Fund Services" division may be charged with the knowledge of its subparts.

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[25] Far weaker allegations explain and distinguish other cases cited by the Citco Defendants as well. In *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 426 (S.D.N.Y. 2007) (Cust.Br. at 20), the court found allegations insufficient where plaintiff merely alleged that a defendant's employee "would have" or "must have" had knowledge of the misconduct. In *Abu Dhabi Commercial Bank v. Morgan Stanley & Co*., 651 F. Supp. 2d 155, 187 (S.D.N.Y. 2009) (Citco Bank & Cust. Br. at 20), the only facts alleged were that a bank was compensated for ascertaining the value of a fund's assets, the compensation was based on the market value of those assets, the bank was responsible for marking to market all of the fund's assets on a daily basis, and the bank had participated and approved the selling documents that had been distributed for the fund. Even weaker allegations were dismissed in *Filler v. Hanvit Bank*, 156 Fed. App'x 413, 417 (2d Cir. 2005), involving allegations that a defendant had helped a company falsify its revenues and transmitted it to an accountant, without alleging any connection to the allegedly false financial statements made by an affiliated company that was accused of perpetrating fraud. Similarly, in *Rand Int'l Leisure Products, Inc. v. Bruno*, 875 N.Y.S.2d 823, 2009 N.Y. Slip Op. 50085U, at *4 (N.Y. Sup. Ct. 2009), plaintiffs had made only "nebulous and unelaborated claims" that a defendant had "supported" another's tortious conduct by providing financial support, without indicating that defendant knew or had reasons to suspect the underlying conduct.

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 Europe B.V. v. PontMeyer B.V.*, NJ 2007, 575 (Neth. Sup. Ct. Jan. 19, 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, at *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.

[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. (*Id.* ¶ 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, *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005) (Adm. Br. at

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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13), the 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…." (*Id.* ¶ 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

[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.*, 583 N.Y.S.2d 957, 962 (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.*, 639 N.Y.S.2d 283, 287 (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 v. Devon Stores*, 521 N.Y.S. 2d 672, 676 (App. Div. 1st Dep't 1987) (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 (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. *Id.* at *1. 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]

[36] The other cases cited by Defendants are similarly inapposite. In *Long Island Lighting Co. v. Stone & Webster Engineering Corporation*, 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 (*id.* ¶¶ 172-73). 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 Comm.*, 592 F. Supp. 2d at 639-40; *Fraternity Fund*, 376 F. Supp. 2d at 410.

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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 Investors., 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*, 519 N.Y.S.2d 804 (N.Y. 1987), following the line of interpretation of *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Associates.*, 595 N.Y.S.2d 492, 494 (App. Div. 2d Dept. 1993), *Horn v. 440 East 57th Company*, 547 N.Y.S.2d 1, 5 (App. Div. 1st Dep't 1989), and *Eagle Tenants Corp. v. Fishbein*, 582 N.Y.S.2d 218, 219 (App. Div. 2d Dep't 1992), 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 v. Kasaks*, 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]

[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

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

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not alleged any red flags or any other facts that should have put the defendants on alert that fraud was being committed.

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 Administrators 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 In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 487 (S.D.N.Y. 2005) (Marrero, J.), (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 Sec. Litig.*, 241 F. Supp. 2d 281, 393 (S.D.N.Y. 2003); *Alstom,* 406 F. Supp. 2d at 486. *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. v. Shane*, 453 F. Supp. 2d 807, 825 & 829 (S.D.N.Y. 2006) (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. Mar. 20, 2006). *See also Bruhl v. PricewaterhouseCoopers*, 2008 WL 899253, at *3 (S.D. Fla. Mar. 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 (S.D.N.Y. Aug. 5, 2005) (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*, 2009 WL 4668579, at *12 (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 Corp. v. Shane*, 453 F. Supp. 2d at 829 (*citing Suez Equity Invest., LP v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001)) ("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. *Cromer*, 245 F. Supp. 2d 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) (*quoting Riverside Research Inst. v. KMGA, Inc.*, 489 N.Y.S.2d 220, 223 (App. Div. 1st Dep't 1985)).

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 at 825. 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 Enter*s., 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

[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).

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 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. Mar. 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

[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. Bear 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.

of what the plaintiff's claim is and the ground upon which it rests." *Atuahene v. City of 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]

[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).

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 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]

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.*

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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 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).

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 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

[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).

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 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

[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.

limitations was tolled at least until Madoff's fraud was revealed – on December 11, 2008. (SCAC ¶ 348.) *See Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 518-19 (2d Cir. 2001) ("[T]he limitations period for claims arising out of a fiduciary relationship does not commence 'until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.'"); *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 factual one and is often not ripe for consideration on a motion to dismiss.").

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. Mar. 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]

[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,*

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

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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)).

[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).

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. 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 Indus. 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

[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).

"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." (*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. *Maritime Ins. Co. Ltd. v. M/V "Sea Harmony"*, 1998 WL 214777, at *2 (S.D.N.Y. May 1. 1998).[50] Here, there are minimal connections to the Netherlands. Even

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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*); *Great Northern Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, 2007 WL 2891981, at *8 (N.D.N.Y. Sept. 28, 2007) (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-

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.

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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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.

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

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