UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: All Actions	MASTER FILE NO. 09-CV-0118 (VM)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED COMPLAINT ON BEHALF OF LOURDES BARRENECHE, ROBERT BLUM, CORNELIS BOELE, YANKO DELLA SCHIAVA, VIANNEY D'HENDECOURT, DAVID HORN, JACQUELINE HARARY, HAROLD GREISMAN, JULIA LUONGO, MARIA TERESA PULIDO MENDOZA, CORINA PIEDRAHITA, SANTIAGO REYES, AND PHILIP TOUB (THE "FEE DEFENDANTS")

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PRELIMINARY STATEMENT

Plaintiffs cannot cure the fundamental flaw in their case against the Fee Defendants – that the SCAC barely even mentions these thirteen individuals and alleges *no* misconduct by any of them. Strict liability is not alleged and Plaintiffs' failure to plead any theory of fault requires dismissal of all claims against these individuals.

For the reasons stated in the FG Defendants' reply memorandum of law ("FG Def. Reply Br."), which is incorporated herein by reference, and in this brief, the claims against the Fee Defendants for unjust enrichment, constructive trust, mutual mistake, and third-party beneficiary breach of contract fail as a matter of law.

First, Plaintiffs lack standing to bring their contract based claims. FG Def. Reply Br. at Point I.

Second, the claims are preempted by New York's Martin Act and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). FG Def. Reply Br. at Points II-III.

Third, the claims are barred by the exculpatory clauses in the investment management agreements ("IMAs") governing Sentry and Sigma (the "Offshore Funds") and the limited partnership agreements ("LPAs") governing Greenwich Sentry and Greenwich Sentry Partners (the "Onshore Funds") (collectively, the "Agreements"). Point I, below.

Fourth, Plaintiffs fail to plead facts from which the existence of a partnership could be proven. FG Def. Reply Br. at Point V.

Fifth, Plaintiffs unjust enrichment claim is precluded by the Agreements which cover the same subject matter. Point II, below.

Sixth, Plaintiffs have abandoned their attempt to seek a constructive trust.

Seventh, Plaintiffs concede that putative class members who invested in the Offshore Funds have no claim for mutual mistake and recent Madoff-related authority confirms that a

mutual mistake claim also fails with respect to investments in the Onshore Funds. Point III, below.

Eighth, Plaintiffs concede that putative class members who invested in the Onshore Funds have no claim for third-party beneficiary breach of contract and this claim also fails with respect to the Offshore Funds because third-party beneficiary breach of contract is not recognized under controlling Bermuda law. Point IV, below.

ARGUMENT

I. THE CONTRACT BASED CLAIMS ARE BARRED BY THE EXCULPATORY CLAUSES IN THE AGREEMENTS GOVERNING THE FUNDS

The Agreements governing the Funds contain exculpatory clauses shielding the Fee Defendants and other Fairfield-related Defendants from liability.[1] Courts routinely give effect to exculpatory provisions that bar contract based claims. *See, e.g.*, *Maric Mech., Inc. v. Dormitory Auth.*, 879 N.Y.S.2d 583, 583 (N.Y. App. Div. 2009); *Midtown Distrib. Corp. v. Mut. Ctr. Alarm Servs., Inc.*, 852 N.Y.S.2d 768, 768 (N.Y. App. Div. 2008); *Middlesex Mut. Assurance Co. v. Del. Elec. Signal Co.*, C.A. No. 076-12-005(THG), 2008 WL 4216145, at *3-4 (Del. Super. Ct. Sept. 11, 2008). Plaintiffs' attempts to avoid the consequences of the exculpatory clauses are unavailing for the reasons set forth in the FG Defendants' memoranda of law (*see* FG Def. Br. at 24-26, 61-63; FG Def. Reply Br. at Point IV) and for the additional reasons set forth below.

First, Plaintiffs concede that their unjust enrichment, constructive trust, and mutual mistake claims are within the scope of the exculpatory clause (*see* Pl. Br. at 82), but Plaintiffs contend that their third-party beneficiary breach of contract claim survives because it is purportedly based on allegations of willful misconduct and reckless disregard. However, no

[1] *See* Sentry IMA (Ex. 9) at ¶¶ 9(a) and (b); Sentry IMA (Ex. 5) at ¶¶ 10(a) and (b); Sigma IMA (Ex. 6) at ¶ 10(a) and (b); GS LPA (Ex. 7) at Sec. 2.05; GSP LPA (Ex. 8) at Sec. 2.05. Unless otherwise noted, "Ex. __" refers to exhibits attached to the December 22, 2009 Declaration of Michael Thorne.

allegations of *any* misconduct have been pled against the Fee Defendants, and the theory that the FG Defendants and the Other Fairfield Defendants were reckless fail for the reasons discussed in those Defendants' respective briefs. *See* FG Def. Br. at 32-34; FG Def. Reply Br. at VI(A)(2); Other Fairfield Def. Br. at 8-10; Other Fairfield Def. Reply Br. at I(B); Attride-Stirling Aff. ¶ 61; *cf. SNS Bank, N.V. v. Citibank, N.A.*, 777 N.Y.S.2d 62, 65 (N.Y. App. Div. 2004) ("[P]laintiff's claim that Citibank breached the financial management agreement by making improper, imprudent, and unsuitable investments would be barred by that contract's exculpatory clause. Even on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully, in bad faith or with reckless disregard of its duties.") (internal citation omitted).

Second, the argument that the exculpation clauses do not apply because Plaintiffs are not parties to the Agreements is wrong. Plaintiffs who invested in the Onshore Funds were parties to the LPAs governing those Funds. And with respect to the IMAs governing the Offshore Funds, Plaintiffs contend that they are third-party beneficiaries under those agreements. Plaintiffs cannot take the contradictory position that they have a right to sue under the IMAs but that the Fairfield Defendants are prohibited from invoking provisions in those agreements that protect them from liability. Moreover, similar exculpatory language is contained in the PPMs pursuant to which Plaintiffs invested in the Offshore Funds. *See* FG Def. Br. at 25. Plaintiffs' contention that this exculpatory language has no effect because "PPMs are merely disclosure documents" (Pl. Br. at 81) cannot be reconciled with the argument made later in their Opposition that "[t]he IMAs and the PPM dated October 1, 2004 must be read together…" (Pl. Br. at 70).

Third, Plaintiffs' suggestion that the exculpatory provisions do not extend to the Fee Defendants is inconsistent with their (erroneous) partnership theory and their lumping of all

Fairfield Defendants together throughout the SCAC. Plaintiffs cannot rely on "group pleading" while simultaneously arguing that only certain Fairfield Defendants have defenses.

II. PLAINTIFFS' UNJUST ENRICHMENT CLAIM IS PRECLUDED BY THE AGREEMENTS GOVERNING THE FUNDS

Plaintiffs' unjust enrichment claim is precluded by the Agreements, which are valid and enforceable contracts covering the same subject matter as the unjust enrichment claim. *See* FG Def. Br. at 67-68; Fee Def. Br. at 16-17. According to Plaintiffs, the Fairfield Defendants were unjustly enriched because they were paid for work they did not perform. *See* Pl. Br. at 72. Even if Plaintiffs' allegation was true (which it is not), it is legally irrelevant because the Fairfield Defendants' performance under the Agreements plainly is covered by the terms of the Agreements themselves thereby precluding an unjust enrichment claim. *See Baker v. Andover Assocs. Mgmt. Corp.*, Index No. 6179/09, slip op. at 28 (N.Y. Sup. Ct. Nov. 30, 2009).

Plaintiffs' argument that the Agreements may be invalidated based on "substantive unconscionability" also is without merit. Plaintiffs have not alleged substantive unconscionability in the SCAC and therefore the Agreements cannot be rescinded on that basis. Moreover, under New York law, a contract can only be voided for unconscionability when there is *both* procedural and substantive unconscionability. *See Ragone v. Atl. Video at the Manhattan Ctr.*, 595 F.3d 115, 121-22 (2d Cir. 2010); *Laugh Factory, Inc. v. Basciano*, 608 F. Supp. 2d 549, 562 (S.D.N.Y. 2009). Plaintiffs do not even argue procedural unconscionability in their Opposition, much less plead facts to support this theory in the SCAC.[2] Substantive

[2] In testing for procedural unconscionability courts consider, "whether there is a lack of meaningful choice' for a party, looking at factors such as 'size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." *U.S. Underwriters Ins. Co. v. Landau*, 679 F. Supp. 2d 330, 340 (E.D.N.Y. 2010) (internal quotation marks and citation omitted); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10-11 (1998). None of these factors weigh in favor of the Court finding procedural unconscionability here. To the contrary, Plaintiffs are, by definition, sophisticated investors, who invested pursuant to detailed disclosures that alerted them to the risks of investing

unconscionability also was not alleged in the SCAC.[3]

Contrary to Plaintiffs' assertions, the Agreements are not invalid merely because there is a "dispute" as to whether Plaintiffs can recover under them. Nor does it matter for purposes of an unjust enrichment claim whether all plaintiffs and defendants are parties to the Agreements. *See, e.g.*, *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009) (Marrero, J.) ("[C]laims for unjust enrichment may be precluded by the existence of a contract governing the subject matter of the dispute even if one of the parties to the lawsuit is not a party to the contract.") (internal quotation and citation omitted); *see also Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537(MBM), 2003 WL 23018888, at *17-18 (S.D.N.Y. Dec. 22, 2003), *aff'd*, 110 F. App'x 191 (2d Cir. 2004). The validity of the Agreements cannot be challenged.[4]

The unjust enrichment claim must also be dismissed because Plaintiffs who invested in the Offshore Funds were not in privity with any of the Fairfield Defendants. *See* FG Def. Br. at 68-69. The product liability cases Plaintiffs rely on to counter this argument, *In re Canon Cameras Litig.*, No. 05 Civ. 7233(JSR), 2006 WL 1751245, at *2 (S.D.N.Y. June 23, 2006) and *Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147, 148-49 (N.Y. App. Div. 2004), are inapposite.

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in the Funds. Moreover, Plaintiffs were not forced to invest in the Funds – they were free to invest with other hedge fund managers or to not invest at all.

[3] Plaintiffs' new allegations of fact (*see, e.g.*, Pl. Br. at 71 n.65) must be disregarded because they are not alleged in the SCAC. *See Civic Ctr. Motors Ltd. v. Mason St. Imp. Cars, Ltd.*, 387 F. Supp. 2d 378, 382 (S.D.N.Y. 2005).

[4] The cases cited by Plaintiffs are distinguishable because they involved situations where, unlike here, there was either no contract or a question as to the *existence* of an applicable contract. *See, e.g.*, *Intellectual Capital Partner v. Institutional Credit Partners LLC*, No. 08 Civ. 10580(DC), 2009 WL1974392, at *8-9 (S.D.N.Y. July 8, 2009) ("bona fide dispute" as to whether contract had been repudiated) (internal quotation and citation omitted); *Cruz v. McAneney*, 816 N.Y.S.2d 486, 490-91 (N.Y. App. Div. 2006) (no contract existed).

Similarly, Plaintiffs have not even attempted to allege that the Fee Defendants breached any alleged fiduciary duty, despite the fact that their unjust enrichment claim is premised on such an alleged breach. *See* SCAC ¶ 568; *cf. Simkin v. Blank*, Index No. 101501/2009, slip op. at 5 (N.Y. Sup. Ct. Dec. 22, 2009) ("It is clear that as one of Madoff's many victims, plaintiff has been unjustly harmed. There is no evidence, however, that defendant was unjustly enriched.").

Finally, recent case law confirms that Plaintiffs' unjust enrichment claim is ripe for dismissal at this phase of the litigation. *See Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.,* 355 F. App'x 516, 517 (2d Cir. 2009) (affirming dismissal of unjust enrichment claim on motion to dismiss); *see also Baker v. Andover Assocs. Mgmt. Corp.*, Index No. 6179/09, slip op. at 27-28 (N.Y. Sup. Ct. Nov. 30, 2009) (dismissing unjust enrichment claim on motion to dismiss).[5]

III. RECENT CASE LAW CONFIRMS THAT THE CLAIMS FOR MUTUAL MISTAKE FAIL

Plaintiffs concede that putative class members who invested in the Offshore Funds are not entitled to bring a claim for mutual mistake. Pl. Br. at 74. And recent Madoff-related authority confirms that a mutual mistake claim by Plaintiffs who invested in the Onshore Funds also must fail. *See Simkin v. Blank*, Index No. 101501/2009 (N.Y. Sup. Ct. Dec. 22, 2009). In *Simkin*, the court refused to reform a divorce agreement entered into under the mistaken belief that a Madoff account was worth $5.4 million. Slip op. at 4. There, the plaintiff asserted mutual mistake based on the same theory that Plaintiffs' set forth in the SCAC – that Madoff's account was a "fiction" which had no assets. The court dismissed the claim, holding:

[5] The cases cited by Plaintiffs are inapposite. *See Ambac Assurance Corp. v. EMC Mortgage Corp.*, No. 08 Civ. 9464(RMB)(MHD), 2009 WL 734073 (S.D.N.Y. Mar. 16, 2009) (involving request for rescissory damages rather than unjust enrichment); *Russo v. Mass. Mut. Life Ins. Co.*, 1997 N.Y. Misc. LEXIS 170, at *2, *7 (Sup. Ct. Tompkins County Mar. 25, 1998) (refusing to dismiss unjust enrichment claim because plaintiff's fraud-related claims on which it was based survived motion to dismiss); *Owens v. Hous. Auth. of the City of Stamford*, 394 F. Supp. 1267 (D. Conn. 1975) (no unjust enrichment claim).

> [T]he claim of mistake is opaque, stating simply that the account at issue did not exist. There is no assertion, however, that at the time of the agreement the account could not be redeemed for value . . . . An investor's ability to redeem an account for value, was the assumption on which the parties relied in dividing their property and in doing so they made no mistake. *Id.* at 5.

Simkin is directly on point. Here, as there, Plaintiffs invested in the Funds on the assumption that they could redeem their investments for value. And, as in *Simkin*, the parties were correct in that assumption. The SCAC itself alleges that Plaintiffs "could have redeemed their investments in the Funds and recovered their principal at any time during the many years in which redemption requests were being paid." SCAC ¶ 175. That they were unable to do so after Madoff's fraud was revealed does not create a mutual mistake where none existed previously. *Fantozzi v. Axsys Techs., Inc.*, No. 07 Civ. 02667(LMM), 2008 WL 4866054, at *11 (S.D.N.Y. Nov. 6, 2008) ("Under New York law…the mutual mistake of fact must exist at the time of contract formation . . . .") (internal quotation marks and citation omitted).[6]

IV. PLAINTIFFS CONCEDE THAT BERMUDA LAW BARS PLAINTIFFS' CLAIM FOR THIRD-PARTY BENEFICIARY BREACH OF CONTRACT

Plaintiffs concede that putative class members who invested in the Onshore Funds cannot assert a claim for third-party beneficiary breach of contract. Pl. Br. at 69 fn. 64. That claim also fails with respect to Plaintiffs who invested in the Offshore Funds.

As a preliminary matter, Plaintiffs ignore the argument that a breach of contract claim can only be brought against FGL and FGBL as Sentry and Sigma's investment managers. *See* Pl. Br. at 68-69; *see also Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir. 1993) (officers, directors, and employees of a corporation are not personally liable for corporate

[6] Plaintiffs' mutual mistake claim also fails for a number of independent reasons set forth in the FG Defendants and Fee Defendants' opening briefs, which have gone unchallenged by Plaintiffs. *See* FG Def. Br. at 70-72; Fee Def. Br. at 20-22.

contracts). Moreover, the IMAs contain a Bermuda choice of law clause and Bermuda law does not recognize third party contractual rights. *See* FG Def. Br. at 72; Fee Def. Br. at 22.

Plaintiffs do not dispute that their third-party beneficiary claim fails as a matter of Bermuda law. Instead, Plaintiffs contend that the Bermuda choice of law clauses in the IMAs should be disregarded. However, enforcing these choice of law clauses would not, as Plaintiffs assert, serve to "further" Defendants' alleged fraud in any way. Indeed, Plaintiffs do not allege that the choice of law clause was procured by fraud, and thus their reliance on *Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 643 N.Y.S.2d 528 (N.Y. App. Div. 1996) is misplaced. *Id.* at 531 ("[A] choice of law provision might be held invalid where it was procured by fraud."); *cf. Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 693 F. Supp. 1479, 1495 (S.D.N.Y. 1988) (upholding a choice of law provision where plaintiff "ha[d] not established that the choice of law clause itself was consented to as a result of fraud or misrepresentation").

Plaintiffs also have not met their "heavy burden" of showing an overriding public policy concern requiring the Court to disregard the choice of law clause.[7] Indeed, in *Haywin Textile Prods., Inc. v. Int'l Fin. Inv. and Commerce Bank Ltd.*, 152 F. Supp. 2d 409 (S.D.N.Y. 2001), the court enforced a choice of law provision – even though the foreign law did not recognize third party beneficiary rights to a contract – on the grounds that the "law regarding third party beneficiaries does not represent such a fundamental public policy that it would justify disregarding the normal choice of law analysis." *Id.* at 411-412. Finally, even under New York

[7] *See Finucane v. Interior Constr. Corp.*, 695 N.Y.S.2d 322, 325 (N.Y. App. Div. 1999) ("[T]he party opposing enforcement of a contractual choice of law on this ground bears a heavy burden of demonstrating that the foreign law is offensive to our public policy. This burden is not met by a mere showing that our law is different from that of a sister State. Rather, it must be demonstrated that the applicable foreign law would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.") (internal quotation marks and citations omitted); *see also Hageman v. Home Depot U.S.A., Inc.*, 846 N.Y.2d 305, 307 (N.Y. App. Div. 2007).

law, Plaintiffs would be unable to state a claim for third-party beneficiary breach of contract. *See* FG Def. Br. at 72 n. 58; Fee Def. Br. at 22 n. 24.

CONCLUSION

For all the foregoing reasons, the Fee Defendants' motion to dismiss should be granted in all respects.

Dated: New York, New York
May 21, 2010

Respectfully submitted,

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