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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: FAIRFIELD SENTRY LIMITED, *et al*., Debtors in Foreign Proceedings.	Chapter 15 Case Case No. 10-13164 (SMB) Jointly Administered
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, as assignee of Fairfield Sentry Limited, Plaintiff, v. FAIRFIELD GREENWICH GROUP, FAIRFIELD GREENWICH (BERMUDA) LIMITED, FAIRFIELD GREENWICH ADVISORS, LLC, FAIRFIELD GREENWICH LIMITED, FAIRFIELD INTERNATIONAL MANAGERS, INC., WALTER M. NOEL, JR., JEFFREY TUCKER, ANDRÉS PIEDRAHITA, AMIT VIJAYVERGIYA, PHILIP TOUB, and CORINA NOEL PIEDRAHITA, Defendants.	Adv. Pro. No. 10-03800 (SMB) **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE TRUSTEE'S [PROPOSED] SECOND AMENDED COMPLAINT**
FAIRFIELD GREENWICH (BERMUDA) LIMITED, Third-Party Plaintiff, v. FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), Third-Party Defendant.	

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Plaintiff Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-*lll* ("SIPA"), and the substantively consolidated estate of Bernard L. Madoff ("Madoff"), and as assignee of claims from Fairfield Sentry Limited ("Fairfield Sentry," or the "Fund"), respectfully submits this memorandum of law in opposition to the motion filed by defendants Fairfield Greenwich Group ("FGG"), Fairfield Greenwich (Bermuda) Limited ("FG Bermuda"), Fairfield Greenwich Advisors, LLC, Fairfield Greenwich Limited ("FG Limited"), Fairfield International Managers, Inc., Walter M. Noel, Jr., Jeffrey Tucker, Andrés Piedrahita, Amit Vijayvergiya, Philip Toub, and Corina Noel Piedrahita (collectively, "Defendants") to dismiss the [Proposed] Second Amended Complaint ("PSAC").

PRELIMINARY STATEMENT

Through their motion to dismiss, Defendants seek to evade responsibility—and keep hundreds of millions of dollars in fees—taken on during their reckless mismanagement of Fairfield Sentry. Defendants FG Bermuda and FG Limited were contractually obligated to use their "best efforts" to monitor and manage the Fund. They flagrantly breached this duty by refusing to: report or follow-up on evidence of fraud at BLMIS (including trades that they knew were impossible); properly assess BLMIS's or the Fund's performance; ensure that BLMIS adhered to Fairfield Sentry's objectives and guidelines; monitor cash flow; limit risk to investors; or track Fund assets. Not only did all Defendants fail to ensure that these basic checks were conducted, they lied to the SEC about them and misled investors about what they knew. Despite this, each Defendant accepted funds that they received, directly or indirectly, out of the exorbitant "management" and "performance" fees paid by Fairfield Sentry.

The PSAC pleads causes of action in breach of contract, unjust enrichment, and constructive trust in order to recover these fees that Fairfield Sentry paid. Defendants do not—because they cannot—argue that the fees were rightfully earned and received in good faith. Rather, Defendants' arguments for dismissing these claims are largely technical, and seek to improperly hold the Trustee to an inappropriate pleading standard. FG Limited and FG Bermuda argue that their actions, however wrongful, are protected by a contractual exculpatory provision (notwithstanding that it carves out the very behavior the PSAC describes). They also argue that they should not be responsible for breaching some of their contractual duties, because not every duty was breached. As for the other causes of action, Defendants argue that the PSAC cannot plead a claim for unjust enrichment because it concurrently pleads a contract claim—notwithstanding that (a) Defendants had extra-contractual duties to Fairfield Sentry, (b) their retention of these fees is patently unfair, and (c) the bulk of these claims are brought against Defendants who were not signatories of any relevant agreement. Defendants also disregard New York state court decisions to argue that a cause of action for constructive trust does not exist, and that even if it did, pleading it would require identifying the exact amounts of money that passed through specific bank accounts until reaching the ultimate Defendant. However, a constructive trust cause of action is readily recognized by New York courts, and the pleading requirements for it are exceedingly flexible and, not surprisingly, do not require the level of specificity the Defendants call for.

These arguments, and the other minor ones Defendants raise, are specious and, for the most part, prematurely brought, as they directly involve issues of fact. Moreover, Defendants made nearly all of the same arguments before in a related class action, where the court roundly rejected

them. For the reasons set forth below, this Court should do the same, and deny Defendants' motion in its entirety.

BACKGROUND

I. THE PSAC

This action[1] seeks to recoup the fees Fairfield Sentry paid through breach of contract claims against FG Limited and FG Bermuda, and unjust enrichment and constructive trust claims against all Defendants. The PSAC alleges the following:

In 1983, Defendants Noel and Tucker founded FGG, which grew into a *de facto* partnership comprised of related and intertwined investment entities and their principals. PSAC ¶ 64. In essence, FGG operated so that Noel, Tucker, and the other Defendants could receive hundreds of millions of dollars for doing little more than feeding investor money into Madoff's fraud. *Id.* ¶¶ 3, 43, 44. In 1990, Noel and Tucker formed Fairfield Sentry, an investment fund organized under British Virgin Islands ("BVI") law. The Fund had none of its own employees, but rather functioned through FGG and its related entities, agents, and principals. *Id.* ¶ 40. Fairfield Sentry would ultimately become the largest BLMIS feeder fund. *Id.* ¶¶ 3, 4, 31.

FG Limited served as Fairfield Sentry's investment manager beginning around 1998. *Id.* ¶ 73. On December 31, 2001, Fairfield Sentry and FG Limited entered into an investment management agreement ("IMA"), which was amended and restated in 2002 (the "2002 IMA"). *Id.* ¶ 75. The 2002 IMA, which included a New York choice of law provision, required FG Limited to use "its best efforts to monitor the activities and performance of BLM[IS]." *Id.* ¶ 76. For its

[1] The action was commenced by the Fund's foreign liquidators. *See Fairfield Sentry Ltd. v. Fairfield Greenwich Grp.*, Index No. 601687/2009. The claims at issue here were later assigned to the Trustee as part of a settlement agreement, *id.*, ECF 87, So Ordered Stipulation Substituting Parties, Assigned Claims Docket (Jan. 24, 2019), and the Trustee moved for leave to file the PSAC. *Id.*, ECF 90. The parties agreed that Defendants could treat the PSAC as filed, and move to dismiss the PSAC rather than oppose a motion for leave to amend the complaint. *Id.*, ECF 87 ¶¶ 6, 7.

services, FG Limited received a 20% performance fee based on the appreciation of the purported net asset value of Fairfield Sentry's shares. *Id.*

On July 1, 2003, FG Bermuda replaced FG Limited as Fairfield Sentry's investment manager under a new agreement (the "2003 IMA"), which required FG Bermuda to use its best efforts to: (a) seek suitable investment opportunities and manage Fairfield Sentry's investment portfolio; (b) perform or oversee Fairfield Sentry's day-to-day investment operations; (c) act as Fairfield Sentry's investment adviser; (d) provide information in connection with the preparation of all reports to Fairfield Sentry's shareholders; and (e) arrange for and oversee the services provided by Fairfield Sentry's administrator, custodian, auditors, and counsel. *Id.* ¶ 78. FG Bermuda received a 20% performance fee and a 1% management fee based on the purported net asset value of certain Fairfield Sentry's shares. *Id.* ¶ 79. On October 1, 2004, FG Bermuda entered into a new agreement with Fairfield Sentry (the "2004 IMA"), which was largely similar to the 2003 IMA. *Id.* ¶¶ 80, 81. Both the 2003 IMA and 2004 IMA contained a Bermuda choice of law provision. *Id.* ¶¶ 79, 81.

Pursuant to the IMAs, Fairfield Sentry paid $919.5 million dollars in management and performance fees to FG Limited and FG Bermuda, all based on BLMIS's fraudulent returns. *Id.* ¶ 82. The fees were distributed to FGG partners, including the other Defendants. *Id.* ¶ 84. These funds were not received in good faith. FG Limited and FG Bermuda shirked their responsibilities under the IMAs and took exorbitant compensation while providing no discernible services. *Id.* ¶¶ 234-49. Defendants went out of their way to ignore patent signs of fraud at BLMIS, disregard industry-wide concerns about Madoff, and affirmatively mislead the SEC and Fairfield Sentry investors in order to keep their money flowing. When Madoff's fraud was finally exposed, Fairfield Sentry lost virtually everything. *Id.* ¶ 5.

II. THE RELATED *ANWAR* PROCEEDING

The PSAC raises many issues that have already been decided by the district court in *Anwar v. Fairfield Greenwich Ltd.*, 09-Civ.-0118 (S.D.N.Y.). In *Anwar*, investors of Fairfield Sentry and other FGG funds sued FGG principals and entities (the "FGG Defendants"),[2] asserting various claims, including securities fraud, breach of contract, gross negligence, and constructive trust. 728 F. Supp. 2d 372, 403 (S.D.N.Y. 2010). The crux of the *Anwar* complaint was that the FGG Defendants saw, but ignored, "red flags" about BLMIS, misled the SEC and investors about what they knew about BLMIS, and accepted millions of dollars in management and performance fees they did not earn. *Id.* at 408. The complaint also emphasized the FGG Defendants' failure to adequately monitor the FGG funds' investments, alleging, as the PSAC does here, that: "no one was meaningfully monitoring or independently verifying Madoff's trade activity; there was effectively no transparency to Madoff's operations; and no one had an independent, factual basis for stating that Madoff was executing a split-strike conversion strategy." *Id.* at 391 (internal citations omitted). The FGG Defendants moved to dismiss, making many of the same arguments made here.

The court first rejected the defense that FGG was not a formal entity that could be sued. The court found that FGG had all of the qualities of a *de facto* partnership, including that the entities and individuals within FGG shared a common aim: managing and profiting from feeder funds invested almost exclusively with Madoff. *Id.* at 404. The court also rejected the argument that the complaint was not particularized enough to sufficiently allege which actions could be

[2] All Defendants here, except for Fairfield International Managers, Inc., were named in *Anwar*, and were represented by the same counsel as in this matter. As used herein, "FGG Defendants" are the Defendants, except for Fairfield International Managers, Inc., and Piedrahita, against whom the *Anwar* court found scienter insufficiently pleaded because, unlike here, plaintiffs' allegations were interpreted by the court as describing him as having a passive role at FGG. *Compare Anwar*, 728 F. Supp. 2d 372, 409 (S.D.N.Y. 2010), *with* PSAC ¶¶ 105-11.

attributed to which defendant. Given the "tight weave of connections" between the defendants, a more generalized pleading was allowed. *Id.* at 406.

The court denied the motion to dismiss the securities law claims. The court found that the plaintiffs sufficiently pleaded scienter through allegations that the FGG Defendants failed to check information they had a duty to monitor. *Id.* at 408 (commenting that "[t]hese allegations largely take the form of 'red flags' that were either within the [defendants'] knowledge or that they seemingly failed to learn"). The court noted that, as pleaded, the FGG Defendants ignored numerous indicia of fraud, including BLMIS's conflicted role as both broker and custodian, its use of Friehling & Horowitz as its auditor, its practice of sending paper-only statements on a two- to three-day delay, and the presence of inexplicable anomalies on trade confirmations. *Id.* The court also credited allegations that the FGG Defendants stymied the SEC's investigation into BLMIS and misled investors about material facts about Fairfield Sentry, including the extent to which defendants conducted diligence on Madoff. *Id*.

The same factual allegations provided a basis for the court's denial of the motion to dismiss common law claims. The allegations supported a claim for gross negligence because they described how the FGG Defendants "acted in reckless disregard of their duties by investing substantially all of the Funds' money with Madoff, on whom these defendants conducted no due diligence and who they failed to monitor." *Id.* at 415 (internal marks omitted). The same allegations likewise supported plaintiffs' breach of contract claim against FG Limited and FG Bermuda, and plaintiffs' unjust enrichment claims (which the court found could co-exist with the breach of contract claims). *Id.* at 414, 421.

In their motion to dismiss the PSAC, Defendants make the same arguments that the district court in *Anwar* rejected. For the reasons set forth below, they are no more persuasive now, and the Court should deny Defendants' motion.

ARGUMENT

In order to survive a motion to dismiss the common law causes of action alleged here, a plaintiff need only submit a complaint that contains a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The factual allegations in the complaint must suffice to give the defendant notice of what the claim is and the grounds upon which it rests, and the claim itself must be one that, in light of the factual allegations, is at least "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 560 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. THE PSAC ADEQUATELY PLEADS BREACH OF CONTRACT

The allegations in the PSAC state a claim for breach of contract against FG Limited and FG Bermuda. The elements of this cause of action are: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendant's breach of his or her contractual obligation; and (4) damages resulting from the breach. *See Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 142 (2d Cir. 2011); *Nevco Contracting Inc. v. RP Brennan Gen. Contractors and Builders Inc.*, 139 A.D.3d 515, 515 (1st Dep't 2016). *Accord Chitty on Contracts*, Ch. 24 (31st ed. 2012) (interpreting English law). The PSAC pleads that Fairfield Sentry entered into IMAs with FG Limited and FG Bermuda, that Fairfield Sentry performed all of its obligations under the IMAs, that FG Limited and FG Bermuda breached their obligation to, *inter alia*, monitor BLMIS

and manage Fairfield Sentry's investments, and that Fairfield Sentry was damaged from that breach. PSAC ¶¶ 75-83, 255, *et seq*.

A. FG Limited Breached the 2002 IMA.

The 2002 IMA required FG Limited to "use its best efforts to monitor the activities and performance of BLM[IS]." *Id.* ¶ 76. The PSAC alleges that FG Limited breached this obligation by failing to implement its standard supervisory procedures, by accommodating Madoff's demands for opacity, and by deliberately preventing any meaningful effort to monitor BLMIS. *Id.* ¶¶ 225-233. As just one example, in December 2002, an FGG partner joined auditors for a site visit at BLMIS's offices, but their agreed-upon procedures were not performed, and they were not allowed to conduct meaningful diligence on BLMIS, such as the "review [of] the back office procedures of Madoff" or "interview[s of] other personnel." *Id.* ¶ 93. Nor were they provided "evidence about the existence of the US T bills (*e.g.*, stock record reconciliation / clearing confirmation)," which they had requested. *Id.* Without these, FG Limited was unable to monitor the activities and performance of BLMIS or even confirm that it had the investments with which FG Limited entrusted Madoff.

The PSAC alleges that FG Limited and the other Defendants knew that BLMIS functioned as Fairfield Sentry's custodian, investment adviser, and prime broker—an atypical structure in the investment industry because it did it not allow for independent oversight, thereby giving rise to a high risk of fraud and other malfeasance. *Id.* ¶¶ 150-161. When confronted with direct questions from investors about the absence of a third-party broker, FG Limited, through its partners, simply refused to address the lack of independence. *Id.* ¶ 151. Instead, FG Limited purposefully ignored this evidence that continued BLMIS investment created a grave risk to Fairfield Sentry and its investors. *Id.* ¶¶ 85-224.

FG Limited, through the individual partners, also knew that: (1) BLMIS's purported returns, which were consistently positive despite market conditions, were impossible, *id.* ¶¶ 185-92; (2) BLMIS could not have been trading equities in the volumes it claimed to be, *id.* ¶¶ 193-95; (3) BLMIS was reporting trades that were inconsistent with the split strike conversion strategy ("SSC Strategy") that Madoff purported to employ, *id.* ¶¶ 196-202; (4) the sheer number of options trades that would have been needed to conduct the SSC Strategy, given the volume of assets under management, was too large for BLMIS to be trading as it claimed, *id.* ¶¶ 203-09; and (5) other structural issues and inconsistencies in Madoff's purported options trading existed, such as the absence of proof of collateral for the options trading.[3] *Id.* ¶¶ 210-18. FG Limited and the other Defendants knew about these impossibilities, but they ignored their contractual and legal duties to take steps to safeguard the Fund. *Id.* ¶¶ 229-30.

These allegations describe FG Limited's failure to use its "best efforts" to monitor BLMIS's activities—in fact, it barely used any effort at all.

B. FG Bermuda Breached the 2003 and 2004 IMAs.

Likewise, the PSAC adequately pleads a breach of contract claim against FG Bermuda by alleging it failed to use best efforts to: (a) seek suitable investment opportunities and manage Fairfield Sentry's investment portfolio; (b) perform or oversee Fairfield Sentry's day-to-day investment operations; (c) act as Fairfield Sentry's investment adviser; (d) provide information in connection with the preparation of all reports to Fairfield Sentry's shareholders described in Fairfield Sentry's Confidential Private Placement Memorandum dated July 1, 2003; and

[3] In other words, Defendants knew that Madoff was lying about how he was trading, and that, therefore, he was conducting a fraud. What's more, had Defendants fulfilled their duties and conducted an analysis to properly determine how Madoff was trading, that analysis would have confirmed that no securities were being traded at all.

(e) arrange for and oversee Fairfield Sentry's administrator, custodian, auditors, and counsel. *Id.* ¶¶ 78, 80, 81, Ex. B ¶ 2, Ex. C ¶¶ 2, 8.

FG Bermuda breached the 2003 and 2004 IMAs by failing to manage Fairfield Sentry's investment portfolio and failing to oversee BLMIS's operations. For example, the PSAC alleges that FG Bermuda, and the individual FGG partners whose knowledge is imputed to FG Bermuda,[4] learned that BLMIS's representations to FGG about Friehling & Horowitz's qualifications and reputability were false. Nevertheless, FG Bermuda and the individual partners continued to lead investors to believe that those representations were true. *Id.* ¶¶ 128-144. After massive fraud was uncovered at the Bayou Hedge Fund Group, FGG investors noticed BLMIS's similarities to Bayou—including each of their use of obscure, non-independent auditors. *Id.* ¶¶ 135-49. As questions from investors persisted, FGG employees obtained a Dun & Bradstreet report showing that Friehling & Horowitz had far fewer employees and smaller annual receipts than an auditor that supposedly had hundreds of clients would have. *Id.* ¶¶ 140-41. An FGG employee forwarded this information to Tucker and suggested that he contact Madoff to clarify. Tucker responded "thank you," but never followed up. *Id.* FG Bermuda, through its partners, also admitted that it did not hold BLMIS to the same standards or tests to which it held its other alternative investment managers. *Id.* ¶ 101. The PSAC also alleges that FG Bermuda delegated its duties to Madoff and then attempted to conceal Madoff's role in managing Fairfield Sentry's investments. *Id.* ¶¶ 162-78. Indeed, FGG employees conspired with Madoff to mislead the SEC by concealing the fact that BLMIS held decision-making authority on every material aspect of the SSC Strategy. *Id.*

Like FG Limited, FG Bermuda was also aware of a host of signs that BLMIS was a fraud, *id.* ¶¶ 185-218, but did nothing about them, failed to disclose them to investors, and helped hide

[4] *See, e.g.*, *Picard v. Avellino (In re Bernard L. Madoff Inv. Sec. LLC)*, 557 B.R. 89, 118 (Bankr. S.D.N.Y. 2016).

them from the SEC. *Id.* ¶¶ 237-38, 245-46. FG Bermuda's failure to oversee Fairfield Sentry's day-to-day investment operations, manage Fairfield Sentry, or act as its investment manager constituted blatant disregard for its responsibilities and a breach of its obligations under the 2003 and 2004 IMAs. *Id.* ¶¶ 150, 162.

C. Assessing the Contract Claims Is Premature.

Defendants' arguments that the PSAC fails to establish a breach of contract claim is premature. New York law provides that a determination of "best efforts" will almost invariably involve a question of fact. *E.g.*, *Kroboth v. Brent*, 215 A.D.2d 813, 814 (3d Dep't 1995). Accordingly, whether that duty was breached should not be resolved on the face of the complaint. *US Airways Grp., Inc. v. British Airways PLC*, 989 F. Supp. 482, 491 (S.D.N.Y. 1997). This is true irrespective of whether the contract at issue contains an exculpatory clause that limits liability to losses resulting from bad faith or gross negligence. *Robin Bay Assocs. LLC v. Merrill Lynch & Co.*, No. 07 Civ. 376(JMB), 2008 WL 2275902, at *7 (S.D.N.Y. June 3, 2008).

Defendants' motion to dismiss the contract claims should therefore be denied as premature.

D. Defendants' Arguments for Dismissing the Breach of Contract Claims Are Without Merit.

Even if the Court were to assess the breach of contract claims now, it could easily find that, as pleaded, the PSAC sufficiently alleges how FG Limited and FG Bermuda breached their duties under the IMAs. Tellingly, these Defendants do not even attempt to argue that they used their best efforts to monitor BLMIS and manage Fairfield Sentry's investments. Instead, they argue that the PSAC merely pleads "red flags" that cannot provide a basis for liability, and that the IMA exculpatory clauses bar the contract claims. However, the PSAC pleads much more than objective red flags (which, in any case, can provide a basis for common law liability). And the IMA exculpatory clauses explicitly carve out an exception for the very type of "willful misfeasance, bad

faith or gross negligence" pleaded in the PSAC.[5] Moreover, the exculpatory clauses in the 2003 and 2004 IMAs are unenforceable under Bermuda law.[6]

1. The PSAC Alleges More than a Failure to Notice Red Flags.

Defendants attempt to portray the PSAC as an amalgam of "red flag" allegations that are per se insufficient to state a claim. Def. Br. at 17-18. In support, they rely on SIPA cases assessing claims brought under 11 U.S.C. § 550 and an unreported Westchester County court case, *Baker v. Andover Assocs. Mgmt. Corp*., No. 6179/09, 2009 WL 7400085 (N.Y. Sup. Ct. Nov. 30, 2009). These decisions are inapplicable here. This Court applied a pleading standard to BLMIS-related SIPA cases that is higher than the pleading standard applicable to this proceeding. *Compare Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 594 B.R. 167, 198 (Bankr. S.D.N.Y. 2018) (Bernstein, J.) (determining whether the plaintiff adequately pleaded defendants' awareness of the high probability that BLMIS was not actually trading securities), *with, e.g.*, *Sapirstein-Stone-Weiss Found. v. Merkin*, 950 F. Supp. 2d 621, 628 (S.D.N.Y. 2013) (denying motion to dismiss breach of contract claim where complaint pleaded that defendants were aware of numerous "red flags" and may have had access to information suggesting that their public statements were inaccurate). And *Baker* simply stands for the unexceptional point that conclusory allegations that defendants missed red flags that they should have found, does not, without more, constitute gross negligence. *Baker*, 2009 WL 7300085, at *20.

[5] Such behavior would be outside the clause's protection even without the carve-out because New York courts do not permit exculpatory clauses to excuse grossly negligent or reckless behavior. *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309 (N.Y. 1986). *See also* Supply of Services (Implied Terms) Act, 2003:9, §§ 3, 6 (Berm. 2003) (same under Bermuda law).

[6] The 2003 and 2004 IMAs contained a Bermuda choice of law provision that applies to contract claims. PSAC, Ex. B § 15 & Ex. C § 15; *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd*., 230 F.3d 549, 556 (2d Cir. 2000) (absent fraud or violation of public policy, New York courts apply the law selected in a choice of law provision contract to breach of contract claim, as long as the state selected has sufficient contacts with the transaction).

Moreover, the Second Circuit has held that red flag allegations can suffice to plead a common law cause of action against a sophisticated investment manager. *See Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 64-65 (2d Cir. 2012). In *Bayerische*, investors sued their investment manager for breach of contract and gross negligence, alleging that the manager disregarded risks inherent in its investment choices. *Id.* at 45. The defendant investment manager relied on *Baker* and cases arising from the BLMIS litigation to argue that the gross negligence claim should be dismissed because plaintiffs merely alleged that the manager should have been aware of "red flags." *Id.* at 64. The court disagreed, and found that, unlike the other cases, the applicable pleading standard was subject "only of Fed. R. Civ. P. 8, not Rule 9 or the Private Securities Litigation Reform Act." *Id*. The court then focused on allegations that the defendant abandoned its role to safely manage the plaintiff's investment, and found gross negligence was sufficiently pleaded. *Id.* at 65.

Here, the PSAC alleges Defendants were aware, in real time, of red flags that they purposefully ignored, including that the reported trades on Fairfield Sentry's BLMIS accounts were impossible, and that BLMIS's auditor lied to them. PSAC ¶¶ 128-144, 185-95. The PSAC also alleges that Defendants went out of their way to affirmatively disregard the evidence they uncovered and failed to report it to the Fund. *Id.* ¶¶ 84-127, 179-84. They also purposefully gave false answers when approached with questions and concerns regarding Madoff and thwarted an SEC investigation of him. *Id.* ¶¶ 162-78. Accordingly, the PSAC alleges more than that Defendants failed to detect red flags they "should have" known (which, in any case, could suffice to establish the liability sought here).

2. The Exculpatory Clauses Do Not Bar the Breach of Contract Claims.

For these same reasons, the misconduct described in the PSAC falls outside the IMAs' exculpatory provision, which explicitly carves out losses resulting from "willful misfeasance, bad faith or gross negligence . . . [or] by reason of the Investment Manager's reckless disregard of their obligations and duties," PSAC Exs. A ¶ 9(a), B ¶ 10(a), C ¶ 10(a). *See, e.g.*, *Merkin*, 950 F. Supp. 2d at 629 (denying motion to dismiss breach of contract claim, notwithstanding exculpatory clauses excepting "gross negligence and bad faith," where complaint pleaded that defendants failed to conduct meaningful due diligence on the fund's investments with BLMIS despite their awareness of numerous "red flags").[7]

a. The PSAC Alleges Behavior Excluded by the IMA Exculpatory Clauses.

In New York, gross negligence is "conduct that is so careless as to show complete disregard for the rights and safety of others." *Gentile v. Garden City Alarm*, 147 A.D.2d 124, 131 (2d Dep't 1989) (citing N.Y. Pattern Jury Instr., Civil 2:10A). The bar for gross negligence by a fiduciary is even lower. *See Hazard v. Chase Nat'l Bank of City of New York*, 159 Misc. 57, 70 (Sup. Ct. N.Y. Cnty. 1936) (by a fiduciary, gross negligence "is not necessarily an active participation in the default in duty . . . It is rather a reckless and intentional passivity, when in fact affirmative preventative action should have been taken . . ."), *aff'd*, 257 A.D. 950 (1st Dep't 1939), *aff'd*, 282 N.Y. 652 (1940), *cert. den.*, 311 U.S. 708 (N.Y. 1940); *see also Aris Multi-Strategy Offshore Fund, Ltd. v. Devaney*, No. 602231/08, 2009 WL 5851192, at *8 (N.Y. Sup. Ct. Dec. 14, 2009) (investment manager is a fiduciary). In the context of BLMIS-related litigation, gross negligence

[7] Defendants argue that they are also shielded by the IMAs' indemnity clauses, but these too provide that there is no indemnification for any acts or omissions that constitute the same misconduct and recklessness that is carved out of the exculpatory clauses. *Compare* PSAC Exs. A ¶ 9(a), B ¶ 10(a), and C ¶ 10(a), *with* PSAC Exs. A ¶ 9(b), B ¶ 10(b), and C ¶ 10(b).

has been found to be sufficiently alleged through a management company's "fail[ure] to exercise even slight care in failing to detect [Madoff's fraud]" or by "show[ing] complete disregard for [the relevant fund's] rights and the safety of its investment[s]." *Sacher v. Beacon Assocs. Mgmt. Corp.*, No. 005424/09, 2010 WL 1881951, at *12 (N.Y. Sup. Ct. Apr. 26, 2010). For example, in *Anwar*, the court found that gross negligence was adequately pleaded against defendants that "grossly failed to exercise due care, and acted in reckless disregard of their duties by investing substantially all of the Funds' money with Madoff, on whom these defendants conducted no due diligence and who they failed to monitor." *Anwar*, 728 F. Supp. 2d at 415 (internal marks omitted).

Similarly, failure to adhere to standard good-faith investment protocol has been held to constitute "gross negligence, misfeasance, or bad faith" carved out by an exculpatory clause. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 892 F. Supp. 2d 596, 607 (S.D.N.Y. 2012) (denying defendants' summary judgment motion, and finding that "the trier of fact could conclude that these widespread failures to follow customary servicing practices constituted 'gross negligence, misfeasance, or bad faith'" and therefore fall outside the applicable exculpatory provision). An investment manager's knowledge of undue risk of an investment, without disclosing the risk to the investor, has been held as willful misconduct that is also outside the scope of an exculpatory clause. *See Ambac Assur. UK Ltd. v. J.P. Morgan Inv. Mgmt., Inc.*, 88 A.D.3d 1, 3-10 (1st Dep't 2011) (reversing dismissal of breach of contract claim based on an investment management agreement with an exculpatory provision for gross negligence or willful misconduct where plaintiff alleged defendant made investments despite his knowledge the investments could "go up in smoke"). And actions that contravene the purpose of an agreement are per se outside of that agreement's exculpatory clause. *Healthextras, Inc. v. SG Cowen Sec. Corp.*, No. 02 Civ. 9613(RO), 2004 WL 97699, at *2 (S.D.N.Y. Jan. 20, 2004) (basing gross negligence liability

against adviser on proposed private offering notwithstanding exculpatory provision because provision could only apply to services aimed towards completing the offering, not harming it).

Notably, in cases involving alleged securities law violations, which require that the plaintiff plead to the higher standard of scienter, courts have routinely found that complaints with allegations similar to those in the PSAC survive a motion to dismiss. In *In re Jeanneret Assocs.*, for example, investors brought a securities fraud action against investment advisers, an asset management consultant, and other associated defendants for damages sustained as result of Madoff's Ponzi scheme. 769 F. Supp. 2d 340 (S.D.N.Y. 2011). Upon deciding the defendants' motion to dismiss, the court recognized that scienter could be pleaded by alleging a conscious recklessness, *i.e*., a "state of mind approximating actual intent, and not merely a heightened form of negligence," or "an extreme departure from the standards of ordinary care." *Id.* at 365 (internal marks omitted). The court found that plaintiffs met this burden by alleging that defendants "failed to check information that they had a duty to monitor . . . ." *Id*. (internal marks omitted). The court focused on allegations that defendants admitted that they could never "close the loop" on Madoff, refused to perform standard due diligence on BLMIS, and never understood how BLMIS was able to achieve its purported returns. These allegations, together with the fact that defendants continued to place the client's money with Madoff, gave rise to an inference of conscious misbehavior or recklessness sufficient to plead scienter. *Id.* at 365-66. *See also Dymm v. Cahill*, 730 F. Supp. 1245, 1254 (S.D.N.Y. 1990) (declining to dismiss securities fraud claim where defendant accountant allegedly failed to review offering materials).

The allegations in the PSAC are analogous to those establishing scienter in *Jeanneret* and other securities cases, and easily suffice to withstand a motion to dismiss the common law claims made here. *See Anwar*, 728 F. Supp. 2d at 414 (finding scienter properly pleaded with allegations

of defendants' failure to monitor the FGG funds, and then holding, upon addressing plaintiffs' common law claims: "As the pleading burden for a § 10(b) claim is much higher than it is for these common law claims . . . once Plaintiffs have cleared the federal hurdle, many of their common law claims are adequately alleged."). The PSAC alleges that neither FG Limited nor FG Bermuda showed any concern about Fairfield Sentry's rights, its investors, or the safety of its investments. *E.g.*, PSAC ¶¶ 130-41; 150-61 (after significant concerns were raised, Tucker never followed up on information about the size and capabilities of BLMIS's auditor). They also acted willfully and in bad faith. *E.g.*, *id.* ¶¶ 162-78 (at Madoff's instruction, Defendants lied to the SEC about their relationship with BLMIS). Rather than monitor BLMIS, they refused to conduct their customary diligence protocol on it, took affirmative steps to hide signs of Madoff's fraud, lied to the SEC, and misled investors about the steps they were taking to protect them. *Id.* ¶¶ 185-224. Accordingly, the PSAC alleges acts that sufficiently support an action for breach of contract, notwithstanding the IMA exculpatory clauses.

b. The Exculpatory Clauses in the 2003 and 2004 IMAs Are Unenforceable.

The exculpatory clauses in the 2003 and 2004 IMAs in particular provide no relief for FG Bermuda because they are unenforceable under Bermuda law. In Bermuda, an exculpatory clause cannot apply if a fundamental breach—*i.e.*, a breach that undermines the entire purpose of that party's contractual obligation—occurs. *See, e.g.*, *Yeoman Credit Ltd. v. Apps*, [1962] 2 Q.B.D. 508 (holding that where there is a fundamental breach of contract, a party cannot rely on an exemption clause); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (exculpatory clauses "only avail the party when he is carrying out his contract in its essential respects"); *Re Springboard Relief*, [2012] Bda LR 15 (recognizing that where a fundamental breach of contract has occurred, restrictive covenants are discharged). Because the entire purpose of the 2003 and 2004 IMAs was

for FG Bermuda to manage Fairfield Sentry through the very obligations the PSAC alleges were breached, the exculpatory clauses are unenforceable here.

In addition, the exculpatory clause in the 2004 IMA is unenforceable under the Supply of Services Act (the "Act"), under which every contract for the supply of services, including services such as the investment adviser services under the 2004 IMA, contains an implied term that the services will be performed with reasonable care and skill. Supply of Services (Implied Terms) Act, 2003:9, § 3 (Berm. 2003). The Act forbids the supplier from avoiding the reasonable care and skill standard by including other terms in the contract, such as the 2004 IMA exculpatory clause, which overrides the implied term of reasonable care and skill. *Id.* § 6 ("The terms implied by this Act in a contract for the supply of service shall have effect notwithstanding any agreement, course of dealing between the parties or usage.").[8]

c. What Constitutes Gross Negligence is a Question of Fact that Cannot Be Determined on a Motion to Dismiss.

Even if the Court were to find that the PSAC does not clearly plead the behavior excluded in the exculpatory clauses, the case should nevertheless be permitted to proceed, and the issue should be reexamined after discovery is conducted. *Robin Bay*, 2008 WL 2275902, at *6 ("[B]ecause of the subtle distinctions that differentiate gross negligence from negligence" courts are loath to assess claims of the former without first permitting the parties to conduct formal discovery); *Clark St. Wine & Spirits v. Emporos Sys. Corp.*, 754 F. Supp. 2d 474, 481-82 (E.D.N.Y. 2010) (whether a breach constitutes gross negligence is an issue of fact that generally should not be addressed on a motion to dismiss).

[8] Defendants cite *Patton and Cook v. Bank of Berm.*, [2011] Bda. L. R. 34 to argue that the Act does not apply here. But there, the trial court noted that the Act was inapplicable to the case at bar, and any commentary on it was dicta that should not override the Act's plain language.

3. Fairfield Sentry's Maintenance of a BLMIS Account Does Not Excuse Defendants' Breach.

Defendants' last-ditch effort to argue the futility of the breach of contract claims is that because the IMAs stated that Fairfield Sentry would have a BLMIS account, the only contractual duty FG Limited and FG Bermuda had was to funnel money to BLMIS—and that if they did this, they would be immune to any breach of contract claim. Def. Br. at 11-13. This argument makes no sense. First, even if there was an obligation to invest certain funds with BLMIS,[9] there were separate and distinct obligations to use best efforts to monitor, oversee, and cull information about that investment. PSAC ¶¶ 73–84. These obligations are the ones the PSAC pleads were breached. *Id.* ¶¶ 73–84, 225–264. *Cf. Dowle v. MasterCard Int'l Inc.*, No. 15 CV 9360-LTS, 2016 WL 9649874, at *2 (S.D.N.Y. Dec. 15, 2016), *aff'd*, 700 App'x 22 (2d Cir. 2017) (dismissing claim for breach of contract where allegations "d[id] not identify any breach of the alleged contract"). To argue that fulfilling one contractual obligation precludes a breach claim as to other contractual obligations is absurd.

Second, Fairfield Sentry could not assess how well its investment strategy was working, or how risky it was, except through its agents, such as FG Limited and FG Bermuda. So even if Defendants were correct in stating that Fairfield Sentry (which had none of its own employees) ultimately "controlled its own investment decisions," Def. Br. at 12, the only means it had for assessing the wisdom of those decisions, and whether new ones should be made, was through the information it received from its managers. PSAC ¶¶ 73–84. This, of course, was the primary purpose of the IMAs. Defendants' argument—that because Fairfield Sentry was investing with

[9] Defendants mischaracterize the IMAs as requiring FG Limited and FG Bermuda to blindly invest all of the Fund's capital with BLMIS, when in fact the 2002 IMA provided only that FG Limited and FG Bermuda "maintain an account with BLMIS" and that non-SSC Investments could not exceed 5% of the Fund's net asset value. 2002 IMA ¶ 1. Nothing precluded the Fund from taking out its investments and holding cash.

BLMIS, there was no obligation to assess Fairfield Sentry's investment with BLMIS—is circular, sophist, and at odds with why the IMAs existed in the first place. There is no point in having an investment manager to monitor a fund if the fund cannot redeem its investment when the manager detects fraud risk.[10]

For the reasons set forth above, Defendants' motion to dismiss the breach of contract claims should be denied.

II. THE PSAC ADEQUATELY PLEADS UNJUST ENRICHMENT

The allegations in the PSAC state a claim for unjust enrichment against all Defendants. The elements of this cause of action are: (1) the defendant was enriched (2) at the plaintiff's expense, and (3) in equity and good conscience, the defendant ought not be allowed to retain what the plaintiff seeks to recover. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 174, 182 (N.Y. 2011); Goff & Jones, The Law of Unjust Enrichment (8th ed., Sweet & Maxwell 2011), at 1-09 (assessing English law). A claim for unjust enrichment does not require a showing that the enriched party took an active role in obtaining the cash or property plaintiff seeks to recover, nor does the plaintiff need to show any wrongful act by the defendant. *Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC*, 114 A.D.3d 888, 889 (2d Dep't 2014).

A. Defendants Were Unjustly Enriched by Fairfield Sentry.

The PSAC pleads that Fairfield Sentry paid FG Limited and FG Bermuda hundreds of millions of dollars in fees, and that these fees flowed to the other Defendants (the "Non-Contract

[10] Defendants' assertion that Fairfield Sentry appreciated the risks it was taking because of two boilerplate sentences in the PPMs regarding fraud risks is also unsound. Def. Br. at 12 n.12. First, every investment has risks—the point of having a manager is knowing how great and extensive that risk is. Second, it was Defendants' duty to protect against such risks, and the fact that they did nothing in light of this disclosure underscores their breaches here. Finally, as the court held in *Anwar*, where Defendants made the same argument, "two anodyne sentences, innocuously embedded within a single-spaced document exceeding fifty pages in length" did not adequately reflect a warning that Defendants should have made "from the rooftops." *Anwar*, 728 F. Supp. 2d at 412.

Defendants"), based on their ownership interests as partners. PSAC ¶¶ 82-84. The PSAC also explains why, in good conscience and equity, these fees should be disgorged—they were based on assets that never existed and investments that were never made, and were grossly disproportionate to any "work" performed, or care used, by Defendants. *See Anwar*, 728 F. Supp. 2d at 421 (denying motion to dismiss unjust enrichment claim where "[t]he circumstances in which these defendants collected the management fees—in the course of steering Plaintiffs' investments to a Ponzi scheme of which the complaint adequately alleges they should have been on notice—would, if adequately proven, in equity and good conscience require disgorgement of the fees").

Rather than explain why Defendants deserved the hundreds of millions of dollars in fees they received, Defendants argue that: (1) the unjust enrichment claims are precluded as to all Defendants because of the breach of contract claim against FG Limited and FG Bermuda; and (2) the PSAC does not plead a "direct benefit" to the Non-Contract Defendants.

B. Defendants' Arguments for Dismissing the Unjust Enrichment Claims Are Without Merit.

1. The Unjust Enrichments Claims Are Not Precluded.

a. The Unjust Enrichment Claims Against FG Limited and FG Bermuda Should Not Be Dismissed.

The unjust enrichment claims against FG Limited and FG Bermuda should survive notwithstanding the concurrent breach of contract claims against them. A signatory of a contract may be liable in tort if the plaintiff violated an independent duty. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co*., 70 N.Y.2d 382, 389 (1987) (finding further that such independent duty may be "connected with and dependent upon the contract"). Even when a contract delineates a defendant's duties, an unjust enrichment claim is appropriate if a jury could find that allegations of improper conduct dictate the return of the funds received pursuant to that contract. *Healthextras*, 2004 WL

97699, at *2 (finding further that an unjust enrichment claim is appropriate where "the circumstances were such that in equity and good conscience the defendant should return the money or property to plaintiff") (quoting *Steinmetz v. Toyota Motor Credit Corp.*, 963 F. Supp. 1294, 1307 (E.D.N.Y. 1997)). Moreover, a motion to dismiss an unjust enrichment claim because of a related contract should be denied where the scope of the contractual obligations is disputed and "the possibility remains that 'the defendant has not breached a contract nor committed a recognized tort,' but that 'circumstances create an equitable obligation running from the defendant[s] to the plaintiff[s].'" *U.S. Bank Nat'l Ass'n v. BFPRU I, LLC*, 230 F. Supp. 3d 253, 266 (S.D.N.Y. 2017) (quoting *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012)). *See also Anwar*, 728 F. Supp. 2d at 421-22 (allowing plaintiff to plead breach of contract and unjust enrichment claims in the alternative and denying motion to dismiss as premature where discovery had not commenced). *Cf. ESI, Inc. v. Coastal Power Prod. Co.*, 995 F. Supp. 419, 436 (S.D.N.Y. 1998) (finding that the federal rules permit alternative pleading of claims for a constructive trust and for contract damages). Also, a breach of contract claim should be assessed first to see whether it survives to impact a concurrent unjust enrichment claim. *See Chefs Diet Acquisition Corp. v. Lean Chefs, LLC*, 14-CV-8467 (JMF), 2016 WL 5416498, at *9 n.5 (S.D.N.Y. Sept. 28, 2016) (denying motion to dismiss unjust enrichment claim between parties to a contract because "recovery for unjust enrichment is not duplicative given the Court's dismissal of [plaintiff's] breach-of-contract claim").

For these reasons, the Trustee should be permitted to further litigate the unjust enrichment claims against FG Limited and FG Bermuda.

b. The Unjust Enrichment Claims Cannot Be Precluded Against Non-Signatories of the IMAs.

Under proper New York precedent, a breach of contract claim against a signatory of that contract poses no bar to unjust enrichment claims brought against non-signatories. *See, e.g.*, *Taylor Precision Prods., Inc. v. Larimer Grp., Inc*., No. 1:15-CV-4428 (ALC), 2018 WL 4278286, at *30-31 (S.D.N.Y. Mar. 26, 2018) (citing cases). *See also Slocum Realty Corp. v. Schlesinger*, 162 A.D.3d 939, 945 (2d Dep't 2018) ("[U]njust enrichment is not duplicative of the breach of contract cause of action insofar as asserted against the defendants *who were not parties to the [a]greement.*") (emphasis added); *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 448 (1st Dep't 2010) (whether an unjust enrichment claim is duplicative depends on "the existence of valid and enforceable written contracts *between the parties*") (emphasis added); *Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc*., 723 F. Supp. 976, 994 (S.D.N.Y. 1989) ("Unjust enrichment is designed to prevent one person who has obtained a benefit from another *without ever entering into a contract with that person* from unjustly enriching himself at the other person's expense.") (emphasis added; internal marks omitted).[11]

This issue was recently, and thoroughly, addressed in *Lee v. Kylin Management LLC*, No. 17-CV-7249 (JMF), 2019 WL 917097, at *1 (S.D.N.Y. Feb. 25, 2019). There, the plaintiff ("Lee") sued his employer ("Kylin") for unpaid compensation, asserting a breach of contract claim and other causes of action, including unjust enrichment. *Id.* The plaintiff subsequently sought leave

[11] In addition to arguing that the equitable claims in the PSAC are duplicative, Defendants also attempt to conflate these claims with a breach of contract claim, and argue that the PSAC attempts to hold the non-IMA Defendants liable for breach of contract through the equitable claims asserted. Def. Br. at 23 (citing *Capax Discovery, Inc. v. AEP RSD Inv'rs, LLC*, 285 F. Supp. 3d 579 (W.D.N.Y. 2018) and *MBIA Ins. Corp. v. Royal Bank of Can.*, 706 F. Supp. 2d 380, 397-99 (S.D.N.Y. 2009). However, those cases are unlike this one: the PSAC does not assert a breach of contract claim against the non-IMA Defendants, and the unjust enrichment and constructive trust claims are distinct causes of action, with different elements and pleading requirements. *Cf. Capax*, 285 F. Supp. 3d at 593 (dismissing breach of contract claim against defendants who were not parties to the relevant contract); *MBIA*, 706 F. Supp. 2d at 397-99 (describing scenarios in which a non-signatory can be liable for breach of contract and denying motion to dismiss breach of contract claim).

to amend to add an unjust enrichment claim against the employer's principal ("Kang"). Kylin opposed the motion, arguing its futility because of the connection to the relevant contracts between Kylin and Lee. *Id.* at *2. The argument failed.

The court focused on an earlier decision which held that "the mere existence of a written contract governing the same subject matter does not preclude recovery in quasi-contract from non parties so long as the other requirements for quasi contracts are met." *Id.* (quoting *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 754 F. Supp. 37, 40-41 (S.D.N.Y. 1991)) (internal marks omitted).[12] While the court in *Lee* acknowledged that some decisions diverged from this holding, it found that the courts issuing those decisions, rather than relying on New York Court of Appeals precedent, "generally relied on Appellate Division decisions of dubious lineage, which are not binding on federal courts in any event" or "primarily relied on a chain of decisions ultimately traceable to a pair of First Department cases whose own foundation in Court of Appeals precedent is suspect." *Lee*, 2019 WL 917097, at *2 & n.1 (listing cases). The court also noted that these other holdings contravene "the logic of the equitable doctrine of quantum meruit which is designed to prevent unjust enrichment where the absence of an enforceable contract otherwise prevents recovery from [noncontracting] parties." *Id.* at *3 (quoting *Seiden*, 754 F. Supp. at 41).

The court then explained why Lee's unjust enrichment claim should be allowed:

> Kang is neither a party to, nor bound by the terms of, any contract with Lee. Thus, the gravamen of Lee's proposed claim is not that Kang breached a contractual obligation to *pay* Lee; instead, it is that Kang unjustly *received* and retained Lee's money. As Lee points out, Kylin's position, if accepted, would produce the unfair result of immunizing Mr. Kang for his own conduct in receiving and retaining funds belonging to Mr. Lee, notwithstanding that there is no contract between Mr. Kang and Mr. Lee and therefore no claim in contract. ***It would also create a perverse incentive for closely held companies that are parties to a contract to transfer the***

[12] The *Lee* court recognized that one judge had later opined that *Seiden* was no longer considered good law, but the court found that judge was incorrect and that the underpinnings in the decision did not support that conclusion. *Lee*, 2019 WL 917097, at *2 (addressing *Mueller v. Michael Janssen Gallery Pte. Ltd*., 225 F. Supp. 3d 201, 207 (S.D.N.Y. 2016)).

> ***moneys owed on a contract to their principals*.** After all, if Lee were to prevail on his contract claim against Kylin, he would have no remedy against Kang—even if he could prove that Kang took money knowing it belong by right to Lee. And that would be true even if Kylin were insolvent at the time of judgment.

Id. (emphasis added; internal marks omitted). The court granted the motion to amend. *Id. See also Taylor*, 2018 WL 4278286, at *30-31 (permitting unjust enrichment claim despite related contract because defendant was a non-signatory who could not be liable for breach of contract); *Howe v. Bank of New York Mellon*, 783 F. Supp. 2d 466, 486 (S.D.N.Y. 2011) (permitting unjust enrichment claim against non-signatory to an indenture contract where non-signatory aided and abetted the indenture's breach); *Hughes v. BCI Int'l Holdings*, 452 F. Supp. 2d 290, 304 (S.D.N.Y. 2006) (permitting unjust enrichment claims against non-signatories because contract in question did not explicitly set forth plaintiff's rights and obligations to non-signatory defendants).

For the reasons set forth in *Lee*, Defendants' argument that the breach of contract claim against FG Limited and FG Bermuda precludes recovery for unjust enrichment from the other Defendants is based on a misapprehension of New York law and conflicts with the equitable underpinnings of the cause of action. Moreover, as in *Lee*, barring these claims would unreasonably foreclose a primary means of recovering funds that rightfully belongs to Fairfield Sentry.

2. If the Court Agrees that New York Law Precludes Unjust Enrichment Claims Here, BVI Law Should Apply, Which Has No Such Bar.

As described above, New York law does not preclude the unjust enrichment claims pleaded in the PSAC merely because Fairfield Sentry had a contract with FG Limited and FG Bermuda. Nevertheless, if the Court disagrees, and instead adopts Defendants' view that New York law precludes the unjust enrichment claims, this Court should apply BVI law to these causes of action.

New York courts conduct a choice of law analysis when there is an "actual conflict" between the relevant substantive laws of the implicated jurisdictions. *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 736 F.3d 213, 219 (2d Cir. 2013). An actual conflict exists where using one law versus the other would have a "significant *possible* effect on the outcome of the trial." *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005) (emphasis in the original, quoting *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46, 71 (E.D.N.Y. 2000)). If no actual conflict exists, a New York court may simply apply New York law. *See Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co*., 363 F.3d 137, 143 (2d Cir. 2004). When an actual conflict does exist, New York courts generally apply an "interest analysis" to tort claims.[13] *See, e.g.*, *In re Hydrogen, L.L.C.*, 431 B.R. 337, 359 (Bankr. S.D.N.Y. 2010) (applying interest analysis to unjust enrichment claims); *Gimbel v. Feldman*, No. CV-93-4761, 1996 WL 342006, at *4 (E.D.N.Y. June 17, 1996) (applying interest analysis to constructive trust claim). The outcome of this analysis is usually the application of the law of the jurisdiction where the injury took place or where the injured party is domiciled. *Innovative BioDefense, Inc. v. VSP Techs., Inc.*, No. 12 Civ. 3710(ER), 2013 WL 3389008, at *6 & n.8 (S.D.N.Y. July 3, 2013); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 195-96 (N.Y. 1985).

Under Defendants' interpretation of New York law, the Trustee has no right to recovery for unjust enrichment because a related contract exists. This interpretation would create an actual

[13] This analysis applies regardless of whether there is a related contract involved because New York courts are reluctant to construe a contract's choice-of-law provisions broadly to encompass tort or other contractual claims, *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.,* 414 F.3d 325, 334–35 (2d Cir. 2005), especially when one or more of the parties is a non-signatory of that contract. *See, e.g.*, *U.S. Metalsource Corp. v. W & B Assocs., Inc.*, No. 90 Civ. 5983 (SWK), 1997 WL 159595, at *22 (S.D.N.Y. Apr. 3, 1997) (declining to apply contract's choice of law to a non-signatory, noting that it was unlikely that the provision was intended to apply to that defendant); *Anglo Am. Ins. Grp., P.L.C. v. CalFed Inc*., 940 F. Supp. 554, 558 (S.D.N.Y. 1996) (finding no legal basis for binding a non-signatory to a choice of law clause). Choice of law provisions with language nearly identical to that in the IMAs have been consistently held to be too narrow to apply to tort claims. *See, e.g.*, *Lehman Bros.*, 414 F.3d at 335.

conflict with the law of BVI (Fairfield Sentry's domicile), under which there is no such bar.[14] *See Fraunteld Mgmt. Ltd. v. Featherwood Trading Ltd.*, 2012/0103 BVIHC (COM) (recognizing a claim of unjust enrichment under BVI law). Because Fairfield Sentry is a BVI entity, under the interests analysis, BVI law should then apply to the unjust enrichment claims, and the concurrent breach of contract claims, and the agreements upon which they are based, would be irrelevant to the Court's analysis of whether the PSAC states a claim for unjust enrichment.

C. The PSAC Pleads that All Defendants Benefited from Their Receipt of Funds from Fairfield Sentry.

Save for their preclusion argument, Defendants offer no reason for why the unjust enrichment claims against FG Limited and FG Bermuda should be dismissed. As for the Non-Contract Defendants, their only substantive argument for dismissal is that the PSAC fails to adequately plead that they were "enriched" because their receipt of their portion of fees paid by Fairfield Sentry—*i.e*., millions of dollars for over a decade—did not constitute a "specific and direct benefit" to them. Def. Br. at 28. But while some courts have commented that in order to establish unjust enrichment, a plaintiff must describe a "specific and direct benefit" to the defendants, this means only that "the defendant must either be put in possession of the benefit, or otherwise obtain financial relief because of the benefit." *Buchwald v. Renco Grp.*, 539 B.R. 31, 49 (Bankr. S.D.N.Y. 2015). *See also id*. at 49-50 ("[A] benefit is direct when it or its functional equivalent is in the defendant's possession to return."). For example, in *M+J Savitt, Inc. v. Savitt*, No. 08 Civ. 8535 (DLC), 2009 WL 691278, at *10 (S.D.N.Y. Mar. 17, 2009), the one case Defendants cite to support this argument, the plaintiff made a loan to a family business, and then sought recovery of the loan from her sibling under an unjust enrichment theory. The court

[14] This conflict would exist irrespective of whether the elements of an unjust enrichment cause of action are substantively the same under both New York and BVI law.

dismissed the unjust enrichment claim, finding that the defendant received no "specific and direct" benefit from the plaintiff's payment of the loan because none of the loan proceeds were transferred to the sibling, and the sibling had no obligation to make the same, or any, loan to the business. *Id.*

In contrast, here, the PSAC alleges that fees paid by Fairfield Sentry were received by FG Limited and FG Bermuda and were then directly transferred to the Non-Contract Defendants, who then had the funds in their possession, received the specific financial benefit of that money, and can pay that money back. PSAC ¶¶ 3, 42-43, 84. The PSAC therefore pleads a "direct and specific benefit."

III. THE PSAC SUFFICIENTLY PLEADS A CLAIM FOR CONSTRUCTIVE TRUST

For the same reasons the PSAC adequately pleads unjust enrichment, the PSAC sufficiently pleads a claim for constructive trust: it would be inequitable to allow Defendants, who flagrantly disregarded signs of Madoff's fraud, and who acted in bad faith, to keep the money they took from Fairfield Sentry. Still, Defendants argue that the constructive claims should be dismissed because: (1) a constructive trust is a remedy, not a cause of action; and (2) the Trustee has not traced the funds over which to place the constructive trust. Both arguments fail.

A. New York Recognizes an Action for Constructive Trust.

"New York courts recognize a cause of action for constructive trust." *Schron v. Grunstein*, No. 650702/2010, 2013 WL 1688929, at *8 (Sup. Ct. N.Y. Cnty. Apr. 9, 2013) (rejecting defendants' "flawed" argument that a constructive trust is a remedy only). *See also Siegel v. Siegel*, 98 A.D.3d 426, 427 (1st Dep't 2012) (finding that "the complaint states a cause of action for constructive trust"); *CF 135 Flat LLC v. Triadou SPY S.A.*, No. 15-CV-5345 (AJN), 2016 WL 5945933, at *13 (S.D.N.Y. June 21, 2016) ("Numerous New York Appellate Division decisions

have repeatedly referred to constructive trust as a claim *or* cause of action under New York law.") (citing cases; emphasis added).

For example, in *Superintendent of Insurance for the State of New York v. Ochs (In re First Central Financial Corp.)*, the primary case Defendants rely upon, the liquidator of an insolvent insurance company sought a constructive trust over a tax rebate the government issued to the parent company, which was also in bankruptcy. 377 F.3d 209 (2d Cir. 2004). After discovery, on a motion for summary judgment, the bankruptcy court found in favor of the parent company's Chapter 7 trustee and rejected the constructive trust claim. *Id.* at 211-12. On appeal, the Second Circuit found that the first element of the constructive trust claim, a fiduciary or confidential relationship, was absent. *Id.* at 215. Moreover, the rights regarding the tax rebate were already laid out in a tax allocation agreement between the parent and subsidiary. *Id.* at 213-14. While the parent's retention of the rebate may have breached the agreement, that breach could not provide grounds for a constructive trust because there was "no suggestion" of the parent's " bad faith or malfeasance of any kind." *Id.* at 215. Rather, the parent's retention of the rebate "essentially resulted from its insolvency" and the parent's trustee's obligations under the Bankruptcy Code. *Id*. The tension between constructive trust law and the Bankruptcy Code was a further reason for the court's ruling. *Id.* at 217 ("[B]y creating a separate allocation mechanism outside the scope of the bankruptcy system, 'the constructive doctrine can wreak . . . havoc with the priority system ordained by the Bankruptcy Code.'") (quoting *Haber Oil Co., Inc. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 436 (5th Cir. 1994)). Accordingly, the court affirmed the district court's decision to deny the issuance of a constructive trust. *Id.* at 219.

These reasons for not establishing a constructive trust are absent here. First, Defendants do not contest that a confidential relationship existed between Fairfield Sentry and Defendants.

Second, while the PSAC alleges that two of the Defendants breached the IMAs, it also alleges their bad faith. Third, whether the breach of contract claim would provide an adequate remedy cannot be determined prior to discovery, and, in any case, such argument is unavailable to the Non-Contract Defendants. And unlike all of the constructive trust cases Defendants cite,[15] there is no tension with any other recovery system that should weigh against finding a constructive trust.

Notwithstanding the above, if the Court agrees that New York law does not recognize the constructive trust claims brought here, the law of BVI, which does recognize a constructive trust action, should be applied. *See generally Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam (In re Fairfield Sentry Ltd.)*, 596 B.R. 275, 287-303 (Bankr. S.D.N.Y. 2018) (Bernstein, J.) (recognizing constructive trust claim under BVI law). *See also supra* § II.B.1.b.2.

B. The Constructive Trust Claim Cannot Be Dismissed for Tracing Reasons.

Defendants also argue that the constructive trust claim must be dismissed because the Trustee has not traced the funds at issue through specific bank accounts, in specific amounts, into the Defendants' possession. Def. Br. at 21-22. This argument fails for three reasons. First, it presumes a failure of proof and not that the PSAC failed to spell out a claim for relief, and is therefore irrelevant on a motion to dismiss. Second, the degree of specificity in the PSAC meets any relevant pleading requirement and is more than sufficient to defeat a motion to dismiss. Third, courts may relax any tracing requirement in circumstances like those present in this case.

[15] All of the cases the Defendants cite on this point are based in bankruptcy or forfeiture. *See In re First Cent. Fin. Corp.*, 377 F.3d at 209; *Aldrich v. Redington (In re Weis Sec., Inc.)*, 605 F.2d 590 (2d Cir. 1978); *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411 (2d Cir. 2001); *Majutama v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 142 B.R. 633 (S.D.N.Y. 1992); *Salisbury Inv. Co. v. Irving Trust Co. (In re United Cigar Stores Co. of America)*, 70 F.2d 313 (2d Cir. 1934).

1. Sufficiency of Tracing Cannot Be Decided on a Motion to Dismiss.

Defendants maintain that "there is no way to determine (much less prove by a preponderance of the evidence)" that the Non-Contract Defendants received fees from Fairfield Sentry. Def. Br. at 29. This is clearly not the correct standard on any motion to dismiss. *See Iqbal*, 556 U.S. at 678. And for constructive trust cases specifically, sufficiency of tracing can be considered only at later stages of litigation because of its fact-intensive nature, and the need for discovery to establish it. *See State Farm Mut. Auto. Ins. Co. v. Cohan*, No. 12–CV–1956, 2013 WL 4500730(JS)(GRB), at *5 (E.D.N.Y. Aug. 20, 2013) (citing *In re First Cent. Fin. Corp.*, 377 F.3d at 212) (denying motion to dismiss constructive trust claim on grounds that the plaintiff failed to sufficiently set forth facts that trace the monies it has lost).[16] *See also SEC v. Credit Bancorp, Ltd.*, 138 F. Supp. 2d 512, 533 (S.D.N.Y. 2001), *rev'd in part on other grounds*, 297 F.3d 127 (2d Cir. 2002) (noting that "[i]n cases involving Ponzi schemes, courts have taken a broad view of the constructive trust remedy, and the tracing requirement, in order to effectuate the goal of returning to the victims of the fraud their stolen property or proceeds of that property"). Notably, none of the cases Defendants rely upon for their tracing argument are decisions on a motion to dismiss.

Here, the parties have not engaged in discovery and it is therefore premature to address tracing arguments or dismiss on those grounds.

[16] *Accord IM Partners v. Debit Direct Ltd.*, 394 F. Supp. 2d 503, 520-21 (D. Conn. 2005) (at pleading stage, "the ability to trace the plaintiff's investment is not a bar to the plaintiff's claims"); *FTC v. Capital City Mortg. Corp.*, 321 F. Supp. 2d 16, 20 (D.D.C. 2004) (denying defendant's motion to dismiss construct trust claims for insufficient tracing because those were "issues of proof and fact that do not weigh in a court's decision regarding a motion to dismiss"); *Scholastic Corp. v. Najah Kassem & Casper & De Toledo LLC*, 389 F. Supp. 2d 402, 414 (D. Conn. 2005) (defendants' argument that the funds at issue in constructive claim are not strictly "identifiable" "may eventually be a formidable issue for [plaintiff] to overcome, . . . [h]owever, such a fact-dependent argument is not a proper basis for dismissing Scholastic's complaint before the facts are developed).

2. Tracing Was Sufficiently Pleaded in the PSAC.

Even when courts do look at tracing allegations on a motion to dismiss, the level of detail called for by Defendants is not one deemed necessary by any New York court. For example, in *Klein v. Gutman*, 12 A.D.3d 348, 351 (2d Dep't 2004), the plaintiff pleaded that his business partner and the partner's relative "allegedly transferred the plaintiff's interest in [a piece of real] property (or the proceeds derived from its sale) through various business entities that they controlled." *Id.* The court denied the defendant's motion to dismiss the constructive trust claim, finding, "[a]t this stage of the action, we find that the plaintiff adequately stated all of his causes of action." *Id.* What was important was merely that the court could discern a trail of the property going from the plaintiff to the ultimate defendant from the face of the complaint. *See also Speedfit LLC v. Woodway USA, Inc*., 53 F. Supp. 3d 561, 580-81 (E.D.N.Y. 2014) (constructive trust claim sufficiently pleaded despite the fact that "plaintiffs have not traced a specific transfer of funds to [defendant]"); *Fairfield Fin. Mortg. Grp., Inc. v. Luca*, 584 F. Supp. 2d 479, 486 (E.D.N.Y. 2008) (denying motion to dismiss constructive trust claim under *Twombly* standard upon, finding that allegations were plausible on their face: "[p]laintiff need not prove its claims" at the pre-answer stage). Likewise, that the *res* at issue here—fees paid by Fairfield Sentry—may have been commingled with other funds is not, contrary to Defendants' contention, a reason to dismiss a constructive trust claim. *In re Drexel Burnham Lambert Grp., Inc.*, 142 B.R. at 637 (assessing constructive trust claim and holding that "[t]he fact that the alleged *res* has been mingled with other funds in an account does not prevent tracing").

3. Tracing May Be Excused at Any Stage of the Litigation.

If this Court were to assess the allegations made in the PSAC and find they insufficiently alleged tracing, the constructive trust claim should still survive. New York courts have recognized

and endorsed exceptions to any need that a plaintiff prove tracing for a constructive trust cases—even after discovery has taken place. *Wilde v. Wilde*, 576 F. Supp. 2d 595, 605 (S.D.N.Y. 2008) ("[I]n view of equity's goal of softening where appropriate the harsh consequences of legal formalisms, in limited situations the tracing requirement may be relaxed.") (quoting *Rogers v. Rogers*, 63 N.Y.2d 582, 586 (N.Y. 1984)). As this Court has acknowledged, the requirements for determining whether a constructive trust can be established are "flexible" and "the facts need not satisfy every element in all cases." *Tekinsight.Com, Inc. v. Stylesite Mktg., Inc. (In re Stylesite Mktg., Inc.*), 253 B.R. 503, 508 (S.D.N.Y. Bankr. 2000) (Bernstein, J.). *See also Koreag, Controle et Revision S.A. v. Refco F.X Assocs., Inc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341, 353 (2d Cir. 1992) ("New York courts have consistently stressed the need to apply the [constructive trust] doctrine with sufficient flexibility to prevent unjust enrichment in a wide range of circumstances."); *Ning Xiang Liu v. Al Ming Chen*, 133 A.D.3d 644, 645 (2d Dep't 2015) (holding that while identifying the elements of a constructive trust claim may be "useful in many cases, the constructive trust doctrine is not rigidly limited . . . [and] is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity") (internal marks and citations omitted).

For these reasons, Defendants' assertions that the PSAC does not "trace" the fees paid to them by Fairfield Sentry provide no reason to dismiss the constructive trust claims.

IV. FGG IS A LEGAL ENTITY THAT CAN BE SUED

Defendants also contend that FGG is not a legal entity and therefore any claims against it must be dismissed. The same unavailing argument was made—and rejected—in *Anwar*. 728 F. Supp. 2d at 403-04. As the court noted there, alleging a partnership requires showing four elements: "(1) the parties' sharing of profits and losses; (2) the parties' joint control and

management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties' intention to be partners." *Id.* (quoting *Kidz Cloz, Inc. v. Officially For Kids. Inc*., 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004)). *See also Anwar*, 728 F. Supp. 2d. at 406 (finding further that "[t]hough it may be overly cynical to assume that such a business labyrinth was erected defensively just to avoid liability in legal proceedings, whatever the motives, the [defendants'] force field has failed them here"). The court found that plaintiffs easily carried their burden because they alleged, as the PSAC does here, that: the FGG partners shared profits and losses related to all the Fairfield Greenwich entities, made contributions to FGG's capital, and intended to operate the Fairfield Greenwich entities to realize a profit; FGG exercised control over the entire Fairfield Greenwich business; the FGG partners also prepared and disseminated materials given to investors; and FGG held itself out as a partnership that was operated by its partners.[17] *Compare Anwar*, 728 F. Supp. 2d at 404, *with* PSAC ¶¶ 63-72. Notwithstanding their current arguments, Defendants in fact represented to the SEC that FGG was comprised of "partners," including the Defendants here. Decl. of J. Forman, Sept. 23, 2019 ("Forman Decl."), Ex. 6.[18]

The cases Defendants cite on this point are inapposite. *See* Def. Br. at 30 (citing *Ellul v. Congregation of Christian Bros.*, No. 09 Civ. 10590(PAC), 2011 WL 1085325, at *3 (S.D.N.Y. Mar.

[17] Further, because FGG existed as a partnership, and because of the other Defendants' relationship to it and each other, referring to the Defendants collectively is warranted. *See Anwar*, 728 F. Supp. 2d at 406 (due to the "tight weave of connections" between defendants, statements or omissions could be attributed to individual defendants even when the exact source of those statements is unknown); *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Secs., LLC*, 797 F.3d 160, 173 (2d Cir. 2015) (permitting group pleading when defendants were subsidiaries of bank that operated together and represented themselves under shared name in offering materials containing alleged misrepresentations).

[18] Partners are jointly and severally liable for their partnership's liabilities, *e.g., In re Cross Media Marketing Corp*, 367 B.R. 435, 455-56 (Bankr. S.D.N.Y. 2007), and partners are agents of their partnership, *e.g.*, *In re 650 Fifth Ave. and Related Props.*, No. 08 Civ. 10934 (KBF), 2017 WL 636413, at *2 (S.D.N.Y. Feb. 16, 2017). *See also Medcalf v. Thompson Hine LLP*, 84 F. Supp. 3d 313, 322 (S.D.N.Y. 2015) ("Indeed, a general principle of partnership liability is that a partner is an agent for the partnership, and a partnership is liable for the wrongful acts of its partners committed in the ordinary course of the business of the partnership.")

23, 2011) (finding that a group of nuns identifying as the "Order of the Sisters of Mercy" could not be sued because it lacked structure and a purpose to act as a formal entity) and *Vello v. Liga Chilean de Futbol*, 148 A.D.3d 593, 593-94 (1st Dep't 2017) (finding that plaintiff could not maintain an action against an entity that was not a corporation, but merely a business name)). Defendants' ancillary argument, that they cannot be liable as partners because they are "separate entities," is even more unsound. Def. Br. at 25-26. Separate individuals and entities form partnerships all the time.

None of the PSAC claims should be dismissed upon a finding that FGG cannot be sued.

V. THIS COURT HAS PERSONAL JURISDICTION OVER BOTH PIEDRAHITA AND VIJAYVERGIYA

The PSAC alleges facts that amply support this Court's exercise of personal jurisdiction over Piedrahita and Vijayvergiya. To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff "must make a prima facie showing that jurisdiction exists." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018). A plaintiff sufficiently pleads a basis for specific personal jurisdiction by alleging that (1) the defendant purposefully directed its activities into the forum, and (2) the underlying cause of action arises out of or relates to those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). An adversary proceeding "arises out of" a defendant's contacts with the United States if, but for those contacts, the plaintiff's claim would not have arisen. *See, e.g.*, *Picard v. Cohmad Sec. Corp. (In re BLMIS)*, 418 B.R. 75, 80 (Bankr. S.D.N.Y. 2009). In addition, due process requires that the exercise of jurisdiction is reasonable. *SPV Osus*, 882 F.3d at 343.

A. Piedrahita Purposefully Directed Activities into New York.

The PSAC alleges how Piedrahita purposefully engaged in significant conduct underlying the unjust enrichment and constructive trust claims in New York. He was a founding partner of

FGG, oversaw FGG's New York operations, and he received significant income (including the fees sought here) from FGG's New York-centered activities, namely, investing with BLMIS in New York. PSAC at ¶¶ 52, 62-67. Piedrahita met with Madoff at BLMIS's New York headquarters, used the phone number and address of FGG's New York headquarters as his contact information for FGG clients, hosted FGG business dinners and client events in New York, and attended FGG meetings in New York. PSAC at ¶ 54; Forman Decl., Exs. 3, 5. He also owned a condominium in New York and maintained an office in FGG's New York headquarters, from where he participated in the mismanagement of FGG that gave rise to the claims made here. PSAC at ¶¶ 4, 54, 58, 64-67, 70, 72; Forman Decl., Exs. 1-2.[19]

Piedrahita's activities clearly support this Court's jurisdiction. *See, e.g.*, *U.S. Bank Nat'l Assoc. v. Bank of Am. N.A.*, 916 F.3d 143, 151-52 (2d Cir. 2019) ("We have found that a claim arises out of forum contacts when defendant's allegedly culpable conduct involves at least in part financial transactions that touch the forum."); *Roe v. Arnold*, 502 F. Supp. 2d 346, 348, 350-51 (E.D.N.Y. 2007) (finding personal jurisdiction over a foreign defendant whose "essential operations" were supported by New York office and who earned approximately one-third of his income from national accounts having their origin in New York). Courts have found that the exercise of jurisdiction over defendants with far fewer New York contacts comports with due process. *See, e.g.*, *Foundry, A Print Commc'ns Co. LLC v. Trade Secret Web Printing, Inc*., No. 11 Civ. 9553 (ALC)(KNF), 2012 WL 3031149, at *5 (S.D.N.Y. July 25, 2012) (finding personal jurisdiction over Canadian corporation whose principal solicited transactions by telephone with New York entity that "had its center of gravity inside New York") (internal marks omitted).

[19] Piedrahita also owned a condominium in Miami, Florida and a house in Greenwich, Connecticut—both of which he used to help him with his work for FGG. PSAC ¶ 58.

B. Vijayvergiya Purposefully Directed Activities into New York.

Vijayvergiya was an FGG partner and its Chief Risk Officer, charged with monitoring BLMIS. PSAC ¶ 108. Defendants' statement that Vijayvergiya's business was unmoored from these claims is absurd—all of the claims arise out of the failure to monitor the Fund and BLMIS. Vijayvergiya's willful malfeasance, which was conducted in and directed into New York, is emblematic of the bad faith underlying the claims brought against him and the other Defendants, a prime example being Vijayvergiya's coordination of FGG's scheme with Madoff in New York to lie to the SEC about FG Bermuda's role in overseeing its investments with BLMIS. PSAC at ¶¶ 168-78.

Defendants' attempt to frame Vijayvergiya's New York contacts as "transitory," Def. Br. at 32, is unfounded. The PSAC details how Vijayvergiya purposefully directed his actions into New York for over five years, with his multiple visits to meet with FGG partners, and countless, near daily, business communications with his FGG partners and clients in New York concerning the facts underlying the claims here. *See, e.g.*, PSAC at ¶¶ 4, 13. The PSAC also describes how Vijayvergiya "spoke to BLMIS over 500 times" and lied to the SEC in New York regarding Defendants' due diligence and risk management efforts for Fairfield Sentry. PSAC at ¶¶ 57, 162-78. Even in cases where the defendant was in New York less than Vijayvergiya was, courts have found personal jurisdiction proper when the actions were directed into the forum. *See*, *e.g.*, *Agency Rent A Car Sys. v. Grand Rent A Car Corp.*, 98 F.3d 25, 30-31 (2d Cir. 1996) (reversing a dismissal for lack of personal jurisdiction where defendants allegedly contacted plaintiffs in New York frequently for business purposes and questioning "whether, in an age of e-mail and teleconferencing, the absence of actual personal visits to the forum is any longer of critical consequence"); *Foundry*, 2012 WL 3031149, at *5 (finding that one business call made into the jurisdiction supported specific jurisdiction).

Defendants' cases support jurisdiction over Vijayvergiya. The Second Circuit's decision in *U.S. Bank*, 916 F.3d 143, in which the court emphasized the importance of a nexus between the claims sought and the actions taken in the forum, supports jurisdiction, given how the PSAC alleges Vijayvergiya's coordinated response with Madoff in lying to the SEC about FG Bermuda's role in overseeing its investments with BLMIS. PSAC at ¶¶ 168-78. To take fees in light of this type of conduct is directly tied to the unjust enrichment and constructive trust claims. And unlike the defendant in *Siegel v. Holson Co.*, 768 F. Supp. 444, 446 (S.D.N.Y. 1991) (also cited by Defendants), whose "trips into New York were few and unrelated to the cause of action," Vijayvergiya's numerous meetings in New York with his FGG partners, investors, and Madoff all relate to the causes of action herein. Defendants' reliance on *Picot v. Weston* is similarly inapposite because the defendant's contacts with that forum "were merely 'random, fortuitous, or attenuated.'" 780 F.3d 1206, 1213 (9th Cir. 2015) (quoting *Burger King*, 471 U.S. at 475). The allegations in the PSAC are more akin to those in another case cited by Defendants, *Absolute Activist Master Value Fund, Ltd. v. Ficeto*, where the court found specific jurisdiction over a defendant who "collaborated" with another defendant to "cover-up" their misconduct through telephone calls and other actions directed at the United States. There, the court found jurisdiction over another defendant based on the "activities of [his] co-venturer and agent." No. 09 Civ. 8862(GBD), 2013 WL 1286170, at *12-16 (S.D.N.Y. Mar. 28, 2013), at *14 (citing *Stone v. Patchett*, No. 08 Civ. 5171(RPP), 2009 WL 1108596 (S.D.N.Y. Apr. 23, 2009) for its collection of cases "that recognize that actions of one co-venturer are attributable to the other co-venturers in a personal jurisdiction analysis"). Vijayvergiya's New York-related actions constitute sufficient minimum contacts to support this Court's exercise of personal jurisdiction over him.

C. FGG's New York Actions Are Attributable to Piedrahita and Vijayvergiya.

Personal jurisdiction is also warranted over Piedrahita and Vijayvergiya by virtue of the New York-based actions of the other FGG partners because, "[u]nder New York law, partners act as agents for all of the general partners in the partnership," including for purposes of determining personal jurisdiction. *Afloat in France, Inc. v. Bancroft Cruises Ltd.*, No. 03 Civ. 917(SAS), 2003 WL 22400213, at *8 (S.D.N.Y. Oct. 21, 2003) (denying motion to dismiss for lack of personal jurisdiction as to partner defendants); *see also CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 366 (2d Cir. 1986) (finding personal jurisdiction and holding that "joint participation in a partnership or joint venture establishes 'control' sufficient to make each partner or joint venture an agent of the others"). The PSAC alleges numerous New York-based actions conducted on behalf of and for the *de facto* partnership, including partners Piedrahita and Vijayvergiya, that were conducted at their direction or with their knowledge or consent. PSAC ¶¶ 4, 62-67, 72. Courts in the Second Circuit routinely find personal jurisdiction where agents act on behalf of their principal. *See, e.g.*, *Picard v. Chais (In re BLMIS)*, 440 B.R. 274, 279-80 (Bankr. S.D.N.Y. 2010) (determining that foreign defendant's appointment of New York agent for BLMIS account a factor in finding basis for personal jurisdiction); *Ross v. UKI Ltd.*, No. 02 Civ. 9297(WHP), 2004 WL 384885, at *7-8 (S.D.N.Y. Mar. 1, 2004) (finding personal jurisdiction over a foreign defendant who was an officer and shareholder of a foreign adviser where defendant consented to its adviser's and officer's actions in New York, was involved in negotiation of relevant agreements, and benefitted from them). Consequently, the actions of the other FGG partners in New York provide an additional basis for exercising jurisdiction over Piedrahita and Vijayvergiya.

D. Jurisdiction Over Piedrahita and Vijayvergiya Is Reasonable.

Cases in which jurisdiction is so unreasonable as to defeat a showing of minimum contacts are rare, occurring only where the defendant presents a "compelling case" that the burden of

litigating in the forum is so serious it clearly outweighs the interests of the plaintiff and forum. *See Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. 86, 100 (Bankr. S.D.N.Y. 2010). The FGG partnership was based in New York and it operated the Fund out of New York. BLMIS was a New York corporation with its files here, the bulk of key information pertinent to this case is here, and the BLMIS liquidation proceeding is before this Court. PSAC ¶¶ 4, 7, 20; Forman Decl., Ex. 8. This forum, and the Trustee, have a strong interest in litigating here. *See Cohmad*, 418 B.R. at 82. Any burden Piedrahita and Vijayvergiya would have litigating in New York is minimal, given that each is represented by New York counsel and has actively litigated in New York for more than ten years in multiple proceedings. *See Picard v. Maxam Absolute Return Fund, L.P. (Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec.)*, 460 B.R. 106, 119-120 (Bankr. S.D.N.Y. 2011) (finding the exercise of personal jurisdiction reasonable because defendant's counsel was in New York, there was a U.S. nexus to defendant's economic activities, and modern communication and transportation mitigate potential hardship due to geographic distance). Jurisdiction here is reasonable.

E. Jurisdictional Discovery Should Be Permitted if Necessary.

If the Court finds that the Trustee has not made a prima facie showing of jurisdiction over these Defendants, the Court should permit jurisdictional discovery. *See McKinnon v. Gonzales (In re S. African Apartheid Litig.)*, 643 F. Supp. 2d 423, 431 (S.D.N.Y. 2009).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that this Court deny Defendants' motion.

Dated: September 23, 2019
New York, New York

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