UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE REFCO SECURITIES LITIGATION	07 MDL 1902 (JSR)
	Applies To: 08 Civ. 3065 08 Civ. 3086
KENNETH M. KRYS, et al., Plaintiffs, -v- CHRISTOPHER SUGRUE, et al., Defendants.	MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On November 20, 2009, Special Master Ronald J. Hedges issued a Report and Recommendation in the above-captioned two cases recommending that the motion of defendant PricewaterhouseCoopers (Cayman Islands) ("PwC Cayman") to enforce a forum selection clause be granted and that, as a consequence, the amended complaint be dismissed as to this defendant. After plaintiff timely submitted objections to the Special Master's recommendations, and defendants responded thereto, the Court heard oral argument on January 13, 2010. Having now reviewed the matter de novo (see Case Management Order #3), the Court finds itself fully persuaded by the Special Master's Report and Recommendation and adopts it here by reference.

In particular, the Court agrees with Special Master Hedges's reliance on "the strong federal policy in favor of the enforcement of forum selection clauses," R&R ¶ 24 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972); Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993)), and further agrees with the Special Master's application of the four-step test laid out by the Second Court in Phillips v. Audio Active Ltd., 494 F.3d 378, 383-84 (2d Cir. 2007), to find that a presumption of enforceability exists and has not been overcome.

The Court finds unavailing plaintiffs' arguments that PlusFunds, and thus its successor, plaintiff Sinclair, is not bound by the forum selection clause at issue. Plaintiffs' own allegations in the amended complaint belie their argument that they are not bound by the engagement letters -- one of which was signed by the PlusFunds Chief Financial Officer -- which, according to the complaint, "memorializ[ed] [PwC Cayman's] agreements with SPhinX and PlusFunds." Am. Compl. ¶¶ 611, 612. Independently, moreover, the two entities are bound by the forum selection clause under the so-called "closely related" test that is the law of a number of other circuits, has been frequently applied by the district courts in this circuit, see R&R ¶ 50-51 (citing cases), and was recently cited with approval by the Second Circuit in Aquas Lenders Recovery Group LLC v. Suez S.A., 585 F.3d 696, 701 (2d Cir. 2009). As the Report and Recommendation

recounts, the allegations of the complaint themselves establish the close relationship that existed between SPhinX and PlusFunds. See R&R ¶ 55.

Therefore, the Court adopts the recommendation of the Special Master and orders that the amended Krys complaint be dismissed in its entirety as against defendant PwC Cayman.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
January 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO INC., SECURITIES LITIGATION	07-MDL 1902 (JSR)

This Document Relates to:

KENNETH M. KRYS, et al., Plaintiffs, v. CHRISTOPHER SUGRUE, et al., Defendants.	08 Civ. 3086 (JSR) 08 Civ. 3065 (JSR) REPORT AND RECOMMENDATION OF PRICEWATERHOUSE COOPERS (CAYMAN ISLANDS) TO ENFORCE FORUM SELECTION CLAUSE

HEDGES, SPECIAL MASTER

I have considered the papers submitted in support of and in opposition to this motion. I heard oral argument on November 4, 2008. I have also considered the post-argument submissions of the parties.

Attached hereto are the moving party's Proposed Findings of Fact and Conclusions of Law, which I adopt. For the reasons set forth therein, I recommend that the motion be GRANTED, the Amended Complaint be dismissed, and the plaintiffs be left to their remedies in the Cayman Islands.*

I appreciate plaintiffs' concerns that judicial action taken in the Cayman Islands may affect the pending litigation in the Southern District of New York. I recommend that, should an

* The moving party is directed to file the Second Declaration of Savvas A. Foukas with the Clerk of the Court.

action be filed in the Cayman Islands, the parties there respectfully ask the presiding judge to confer with Judge Rakoff and/or the undersigned to determine if any coordination might be helpful and appropriate.

RONALD J. HEDGES
SPECIAL MASTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION	:	07 MDL No. 1902 (JSR)

This Document Relates To:

KENNETH M. KRYS and CHRISTOPHER STRIDE, as JOINT OFFICIAL LIQUIDATORS of SPHINX LTD., *et al.*,	:	08 Civ. 3086 (JSR)
Plaintiffs,	:	
-against-	:	
CHRISTOPHER SUGRUE, *et al.*,	:	
Defendants.	:	

DEFENDANT PRICEWATERHOUSECOOPERS (CAYMAN ISLANDS)' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO ENFORCE FORUM SELECTION CLAUSES

William R. Maguire
David W. Wiltenburg
Savvas A. Foukas
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Attorneys for Defendant
PricewaterhouseCoopers (Cayman Islands)

Pursuant to the request of Special Master Ronald J. Hedges at the November 4, 2009 hearing on the motion to enforce forum selection clauses filed by Defendant PricewaterhouseCoopers (Cayman Islands) ("PwC-Cayman"), PwC-Cayman submits the following proposed findings of fact and conclusions of law. The facts as proposed herein are based upon the allegations of the Complaint, Amended Complaint and proposed Second Amended Complaint (the "Complaints")[1], which are taken as true for purposes of the present motion only, documents referred to and incorporated by reference in the Complaints, and declarations and supporting documents submitted by the parties.

FINDINGS OF FACT

I. The SPhinX Funds And PlusFunds

1. In or around 1998, PlusFunds Ltd. was founded in the Cayman Islands. (Am. Compl. ¶ 95.) By December 20, 2001, PlusFunds Ltd. entered into an exclusive license agreement with Standard & Poor's to develop and market hedge fund investment products designed to track the S&P Hedge Fund Index and related indices. (*Id.* ¶ 98.) In March 2002, PlusFunds Group, Inc. ("PlusFunds") was organized under Delaware law and the S&P license was transferred to it. (*Id.* ¶ 99.)

2. Beginning in the spring of 2002, PlusFunds created the SPhinX Funds as investment products designed to achieve returns consistent with S&P's Hedge Fund Index. (Am. Compl. ¶¶ 2, 100.) The SPhinX Funds were organized and incorporated under the laws of the Cayman Islands. (*Id.* ¶¶ 32-33.)

---

1. All three Complaints are identical with respect to the allegations that are of significance for the present motion. Accordingly, citations herein are to the Amended Complaint, which is the controlling version until leave is granted to file the Second Amended Complaint. For convenience, a cross-reference table is included as Appendix A hereto, showing the corresponding paragraph numbers in all three Complaints.

3. The SPhinX Funds had no employees or physical facilities of their own but delegated the day-to-day management of their operations to PlusFunds. (Am. Compl. ¶¶ 133, 137-38.)

4. Plaintiffs describe the role of PlusFunds as follows:

> Under the [Investment Management Agreements], PlusFunds was the exclusive investment manager for SPhinX. *PlusFunds was given broad authority and discretion to run SPhinX's daily operations*, as well as the responsibility to allocate assets, transfer and hold cash balances, open and maintain bank accounts, make distributions, borrow and pledge funds, *hire service providers and professionals and execute documents for and on behalf of SPhinX.*

(*Id.* ¶ 133; emphasis added.)

5. Plaintiffs further allege that "the business operations of SPhinX and PlusFunds were intertwined," and that "[s]ervice providers, contract parties and investors dealing with SPhinX generally communicated with PlusFunds agents and understood that PlusFunds acted as the investment manager for SPhinX." (*Id.* ¶ 138.)

6. Plaintiffs further allege that 97% of PlusFunds' 2005 revenues were derived from SPhinX management fees. (Am. Compl. ¶ 136.)

II. PwC-Cayman And The Engagement Letters

7. PwC-Cayman is a Cayman Islands accounting firm. (*See* Am. Compl. ¶ 43.) PwC-Cayman was engaged to issue reports on the financial statements of three of the SPhinX Funds for the years ended December 31, 2003, 2004, and 2005. (*See id.* ¶¶ 43, 611-12; Declaration of Savvas A. Foukas, executed Sept. 8, 2008 ("First Foukas Decl.") Exs. B-E.) PwC-Cayman issued reports on the financial statements of the three SPhinX Funds for the 2003 and 2004 fiscal years. (Am. Compl. ¶¶ 614, 617.) The audit of the 2005 financial statements was never completed.

8. Plaintiffs allege that PwC-Cayman was "retained by PlusFunds to conduct the SPhinX audit." (Am. Compl. ¶¶ 1144, 1171.)

9. PwC-Cayman's services were provided pursuant to a series of four engagement letters. (*See* Am. Compl. ¶¶ 611-12; First Foukas Decl. Exs. B-E.) Plaintiffs allege that these letters "memorializ[ed] [PwC-Cayman's] agreements with SPhinX and PlusFunds to audit" the relevant SPhinX financial statements. (Am. Compl. ¶¶ 611, 612.) Three of the four engagement letters were signed by Robert Aaron, a SPhinX director. (First Foukas Decl. Exs. B, C, E; Am. Compl. ¶ 82.) The fourth, relating to the 2004 audits, was signed by Chris Aliprandi, the Chief Financial Officer of PlusFunds. (First Foukas Decl. Ex. D; Am. Compl. ¶ 327.)

10. Each letter contained the following clause:

> The contract formed by this engagement letter, when accepted by you, shall be governed by, and construed in accordance with the laws of the Cayman Islands and it is hereby irrevocably agreed and accepted that *the courts of the Cayman Islands shall have exclusive jurisdiction to settle any claim, difference or dispute, including, without limitation, claims for set-off or counterclaims which may arise out of or in connection with such contract*. Each party irrevocably waives any claim that the action has been brought in an inconvenient forum or that such courts do not have jurisdiction.

(First Foukas Decl. Exs. B-E at 7; emphasis added.)

III. The Amended Complaint And The Claims Against PwC-Cayman

11. On March 5, 2008, Plaintiffs filed this action in the Supreme Court of the State of New York for New York County. (First Foukas Decl. Ex. A.) On March 26, 2008, certain defendants (not including PwC-Cayman, which at that time had not yet been served) removed the action to this Court. Plaintiffs filed a motion to remand the action to state court and, on October 23, 2008, the Honorable Gerard E. Lynch issued an order denying Plaintiffs' motion to remand.

12. Plaintiffs filed an Amended Complaint on October 10, 2008. In the Amended Complaint, Plaintiffs allege that certain SPhinX Funds and PlusFunds agents and fiduciaries allowed cash belonging to one of the SPhinX Funds, SPhinX Managed Futures Fund SPC ("SMFF"), to be "diverted" from "protected, customer-segregated accounts to non-regulated offshore accounts" at an entity affiliated with Refco, Refco Capital Markets. (Am. Compl. ¶¶ 5, 6.) Prior to the bankruptcy of Refco in October 2005, the "diverted" cash -- $312 million -- was returned to SMFF. (*Id.* ¶ 12.) However, according to the Complaints, Refco's bankruptcy creditors commenced a preference action against SMFF, and SMFF subsequently returned $263 million as part of the settlement of that action. (*Id.* ¶¶ 12, 14.) Plaintiffs claim that the money returned by SMFF under the settlement was lost due to the misconduct of various third parties, including PwC-Cayman (*see, e.g., id.* ¶ 16), and that the resulting flood of investor redemptions led to the bankruptcy of PlusFunds (*id.* ¶¶ 12-13), and the liquidation of the SPhinX Funds in the Cayman Islands (*id.* ¶ 15).

13. The Complaints allege that "PwC . . . owed SPhinX and PlusFunds professional duties of care in connection with" the SPhinX audits. (Am. Compl. ¶ 607; *see id.* ¶¶ 1143-44, 1147, 1170-71.) Plaintiffs further assert that PwC-Cayman breached these duties and committed various torts by improperly issuing unqualified audit opinions on the SPhinX Funds. (*See, e.g., id.* ¶¶ 708-12, 1149, 1181, 1262, 1277, 1288.) Six counts in the Amended Complaint are asserted against "PwC"[2]: accounting malpractice (Count VI), aiding and abetting breach of

2. In the Amended Complaint, Plaintiffs define the term "PwC" twice: once to mean "PricewaterhouseCoopers," and once to mean the United States firm PricewaterhouseCoopers LLP and PwC-Cayman. (Am. Compl. ¶¶ 24, 44.) PwC-Cayman is the only defendant asserting the present motion.

fiduciary duty (Counts VII and XVIII), fraud/misrepresentation (Count VIII), aiding and abetting fraud (Count XVII), and aiding and abetting conversion (Count XIX).

IV. The Plaintiffs

14. There are three Plaintiffs named in the Amended Complaint: Kenneth Krys, Christopher Stride, and James Sinclair. (Am. Compl. ¶¶ 31, 37.)

15. Plaintiffs Krys and Stride were appointed by the Grand Court of the Cayman Islands to be the Joint Official Liquidators of the SPhinX Funds (the "SPhinX Liquidators"). (Am. Compl. ¶ 31, 35.) They are suing as successors to and in the right of the SPhinX Funds. (*Id.* at ¶ 35.) The SPhinX Liquidators have offices in the Cayman Islands (*see id.* ¶¶ 32-33), and are carrying out the liquidation of the SPhinX Funds in the Cayman Islands.

16. The Complaints also state that Plaintiff Sinclair is the trustee of the SPhinX Trust, the assignee of claims formerly belonging to the PlusFunds bankruptcy estate. (*Id.* ¶ 37.) The SPhinX Liquidators are the beneficiaries of any recoveries obtained by the SPhinX Trust. (*Id.*)

17. The SPhinX Liquidators also allege that they have been assigned claims by 16 investors in the SPhinX Funds and purport to assert those claims as well. (Am. Compl. ¶ 34.) The Complaints list the assignors as Miami Children's Hospital Foundation, OFI Palmares, Green & Smith Investment Management LLC, Thales Fund Management LLC, Kellner Dileo & Co. LLC, Martingale Asset Management LP, Longacre Fund Management LLC, Arnhold & S. Bleichroeder Advisers LLC, Pictet & CIE, RGA America Reinsurance Company, Deutsche Bank (Suisse) SA, Arab Monetary Fund, Hansard International Ltd., Concordia Advisors LLC, Gabelli Securities Inc., and Citco Global Custody. (*Id.*)

18. The Complaints provide no information about these assignors or their claims. There is no allegation regarding the location of any of the assignors, which SPhinX Funds they

invested in, the dates or amounts of their investments, the nature of their purported reliance upon PwC-Cayman's audit reports, the amount of their damages or why their losses (if any) are distinct from the losses of all other SPhinX investors. Nor do the Complaints provide any details or terms of the purported assignments. The Complaints do not even say what causes of action, if any, the SPhinX Liquidators assert against PwC-Cayman based on the supposedly assigned claims. (*See* Am. Compl. ¶¶ 1151, 1167-68, 1190, 1265-66, 1279-80, 1292-93 (alleging, in each cause of action asserted against "PwC," that SPhinX and PlusFunds were damaged but not mentioning damages of the assignors).)

19. Despite the lack of detail in the Amended Complaint, the Plaintiffs have published information about the reasons for the assignments and the process by which they were made. On February 21, 2008, less than two weeks before the filing of their original complaint, the SPhinX Liquidators sent a letter to all investors and creditors in the SPhinX Funds liquidation, which is being carried out in the Cayman Islands, soliciting the assignments on which the Plaintiffs now rely. (Feb. 21, 2008 Letter from Krys & Associates, attached to Second Declaration of Savvas A. Foukas, executed November 16, 2009 ("Second Foukas Decl.") as Exhibit B.)

20. In that letter, the SPhinX Liquidators stated:

> We are writing to request your assistance in the [SPhinX Liquidators'] litigation strategy. Our US attorneys have indicated that the litigation would be strengthened if creditors and investors would assign their rights and remedies to pursue third parties to the [SPhinX Liquidators], for the benefit of the SPhinX Funds.

(*Id.*) In particular, the SPhinX Liquidators wrote that an "assignment will *eliminate certain defences that some of the defendants may claim in this case.*" (*Id.* (emphasis added).)

21. A form of assignment was attached to the SPhinX Liquidators' letter. That form purported to assign all third party claims related to an assignor's investment in the SPhinX Funds

to Messrs. Krys and Stride, "not individually, but solely in their capacities as the Joint Official Liquidators" of the SPhinX Funds. (Form of Assignment, attached to Second Foukas Decl. as Exhibit C, at 1; *see* Am. Compl. ¶ 18.)

22. It is clear that whatever assignments occurred were part of the "legal strategy" referred to in the letter rather than transactions having economic substance. The assignors apparently received no money or any other form of economic consideration, no additional claim in the liquidation, and no rights of priority with respect to any distribution of funds in the liquidation. (Second Foukas Decl. Ex. C at 1.)

23. The purported assignors agreed to make themselves available on reasonable notice for a deposition and "to attend and give testimony at a trial or trials." (*Id.* at 2.) No jurisdiction or location was specified for a deposition or any trial or trials. Further, the SPhinX Liquidators agreed to pay all travel expenses incurred by the purported assignors in connection with the litigation process. (*Id.*) The purported assignment signed by the Miami Children's Hospital Foundation is identical to the form assignment. (Feb. 26, 2008 Miami Children's Hospital Foundation Assignment, attached to Second Foukas Decl. as Exhibit D.)

CONCLUSIONS OF LAW

I. The Standard For Dismissal Based On A Forum Selection Clause

24. There is a strong federal policy in favor of the enforcement of forum selection clauses. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993). Both the Supreme Court and the Second Circuit have recognized that forum selection clauses have economic value and should be enforced in accordance with the expectations of the parties. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *Bremen*, 407 U.S. at 13-15; *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, ___ F.3d ____, No. 08-1589-CV, 2009 WL 3403172, at *3-4 (2d Cir. Oct. 23, 2009); *Roby*, 996 F.2d at 1363. Judicial non-enforcement thus effectively changes the deal between the parties. *See, e.g., Bremen*, 407 U.S. at 13-15; *Aguas*, 2009 WL 3403172, at *4. Enforcement of forum selection clauses also removes uncertainty, particularly in international transactions. *See Carnival Cruise Lines*, 499 U.S. at 593-94; *Aguas*, 2009 WL 3403172, at *3; *Roby*, 996 F.2d at 1363.

25. Further, "international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals." *Roby*, 996 F.2d at 1363. Federal Courts should "give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause." *Bremen*, 407 U.S. at 12.

26. The Second Circuit has articulated a four-part test for deciding a motion to dismiss on the basis of a forum selection clause. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007). The first part of the inquiry is whether the clause was reasonably communicated. *Id.* at 383. The second step requires the Court to determine whether the clause is

mandatory or merely permissive. *Id.* Third, the Court determines whether the claims and parties in the action are covered by the clause. *Phillips*, 494 F.3d at 383.

27. If the first three factors are met, *i.e.*, if the forum clause was reasonably communicated, has mandatory force, and covers the claims and parties involved in the dispute, it is "presumptively enforceable." *Phillips*, 494 F.3d at 383-84. Such presumptive enforceability can be overcome only where the party resisting enforcement can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15; *see Aguas*, 2009 WL 3403172, at *3; *Phillips*, 494 F.3d at 383-84.

II. The Clauses Are Presumptively Enforceable

28. The Second Circuit has not stated definitively which law applies to the first three parts of the *Phillips* test, which go to interpretation of the scope of forum selection clauses, when, as in the present case, there is a contractual choice of law. *See Phillips*, 494 F.3d at 385. The Court need not reach the choice of law question here since the parties agree that the result would be the same under either federal or Cayman Islands law. (*See* Nov. 4, 2009 Hearing Tr., attached to Second Foukas Decl. as Exhibit A, at 33:20-25 ("On this question, I submit to you it really doesn't make any difference. . . . the outcome is the same."); PwC-Cayman Memo. of Law at 5 n.5.) Accordingly, the Court may apply general contract law principles and federal precedent to decide the first three parts of the *Phillips* inquiry. *See Phillips*, 494 F.3d at 386.

A. The First And Second *Phillips* Factors Are Met: The Clauses Are Mandatory And Were Reasonably Communicated

29. Plaintiffs do not dispute that the clauses, which provide that "the courts of the Cayman Islands *shall have exclusive jurisdiction*" (First Foukas Decl. Exs. B-E at 7 (emphasis

added)), are mandatory rather than permissive. *See Phillips*, 494 F.3d at 386 (clause conferring "exclusive jurisdiction" is mandatory).

30. Similarly, Plaintiffs do not dispute that the forum selection clauses were reasonably communicated. A forum selection clause is reasonably communicated if it is stated in clear and unambiguous terms. *See Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995). Here, the forum selection clauses appear in standard font in the text of each engagement letter, and are phrased in clear and unambiguous terms. (*See* First Foukas Decl. Exs. B-E at 7.)

B. The Third *Phillips* Factor Is Met: The Clauses Cover All Claims By Plaintiffs Against PwC-Cayman, Whether Pleaded In Contract Or Tort

31. The next step of the inquiry is determining whether the claims and parties in the action are covered by the clauses. *See Phillips*, 494 F.3d at 383. Here, the clauses are broad enough to cover all claims asserted against PwC-Cayman.

32. The scope of a forum selection clause is not limited to claims for breach of the contract that contains the clause. *See, e.g., Roby*, 996 F.2d at 1361; *Cfirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 329 (S.D.N.Y. 2008). The legal characterizations Plaintiffs assign to their claims are not determinative because the courts "refuse to allow a party's solemn promise to be defeated by artful pleading." *Roby*, 996 F.2d at 1360. Rather, "[w]hether a forum selection clause encompasses other claims depends principally on how broadly the clauses are worded." *Cfirstclass Corp.*, 560 F. Supp. 2d at 329.

33. Here, the clauses apply to "*any* claim, difference or dispute . . . which may *arise out of or in connection with*" PwC-Cayman's engagement. (First Foukas Decl. Exs. B-E at 7 (emphasis added).) Plaintiffs do not dispute that these clauses are broad enough to cover each of the causes of action asserted against PwC-Cayman. (*See* Nov. 4, 2009 Hearing Tr. at 32:7-9 ("I am not going to argue that's a very narrow clause. It is a broader than narrow clause.").)

34. Indeed, similar broadly worded clauses have been consistently interpreted to cover both contract and tort claims, such as those alleged in the Amended Complaint. *See, e.g.*, *Roby*, 996 F.2d at 1361 (securities fraud and RICO claims were claims "related to" or "in connection with" agreements); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 434 & n.4 (S.D.N.Y. 2007) (state law tort claims were "plainly encompasse[d]" by "expansive language" covering actions "in connection with" plan). As the Seventh Circuit observed when dealing with a broadly worded clause, "[r]egardless of the duty sought to be enforced in a particular cause of action, if the duty arises from the contract, the forum selection clause governs the action." *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993); *see Cfirstclass Corp.*, 560 F. Supp. 2d at 329.

35. All the claims asserted against PwC-Cayman are based on its performance of services under the engagement letters. Plaintiffs allege that PwC-Cayman "issued engagement letters memorializing [its] agreements with SPhinX and PlusFunds" to provide audit services. (Am. Compl. ¶ 611; *see id.* ¶ 612.) Plaintiffs further allege that, "[a]s a result of this engagement," PwC-Cayman owed duties of care to SPhinX and PlusFunds. (*Id.* ¶ 1143; *see id.* ¶¶ 607, 1147, 1170-71.) Plaintiffs claim that PwC-Cayman committed the torts alleged in the Complaint by improperly performing the audit services it was engaged to provide. (*See, e.g.*, *id.* ¶¶ 708-12, 1149, 1181, 1262, 1277, 1288.)

36. Thus, all of Plaintiffs' claims against PwC-Cayman "arise out of or in connection with" PwC-Cayman's engagement to provide audit services. Indeed, apart from the relationship created by the engagement letters, PwC-Cayman had no other relationship with the SPhinX Funds or PlusFunds. *See Starad Inc. v. Lawson Software, Inc.*, 2004 WL 2093512, at *2 (S.D.N.Y. Sept. 16, 2004) ("So far as can be discerned from the complaint, there is no

relationship between [the plaintiff] and the defendants *other than* the one that is not merely related to, but centered on, the agreements containing the forum selection clause."); *Kelly v. Bear, Stearns & Co.*, No. 080832, 2001 WL 1807360, at *3 (Pa. C.P. Dec. 18, 2001) (dismissing statutory and tort claims because the court would not "ignore[] the reality that the Engagement Letters, and only the Engagement Letters, constitute the basic source of any duty [defendant] owed to the plaintiffs"), *aff'd*, 813 A.2d 914 (Pa. Super. Ct. 2002). Accordingly, all claims asserted against PwC-Cayman are within the scope of the forum selection clauses.

C. All Parties Are Bound By The Clauses

37. The final step in determining whether the forum selection clauses are presumptively enforceable is whether the parties involved in the dispute are covered by the clauses. *Phillips*, 494 F.3d at 383. Here, there is no serious dispute that PwC-Cayman is entitled to enforce the terms of its own engagement letters.

38. However, Plaintiffs argue that PlusFunds is a separate plaintiff and is not bound because it did not sign the contracts at issue (actually a PlusFunds officer did sign one of the four engagement letters -- *see* ¶ 9, *supra*), and that the SPhinX Liquidators themselves effectively avoided their otherwise binding forum selection obligation by taking assignments from certain SPhinX investors. For the reasons set forth below, these objections are unavailing.

1. The SPhinX Liquidators are bound by the clauses

39. Plaintiffs do not seriously dispute that Messrs. Krys and Stride, as the SPhinX Liquidators, are bound by the obligations in the engagement letters entered into by the SPhinX Funds, and may not assert claims outside the courts of the Cayman Islands. (*See* Nov. 4, 2009 Hearing Tr. at 19:12-14 ("We're stuck with that contract. We don't argue that we're stuck with the SPhinX/PwC Cayman contract . . . .").)

40. However, the SPhinX Liquidators point to purported assignments by SPhinX investors, and argue that they may prosecute the assigned claims in New York, even though, (i) claims of the SPhinX Liquidators must be brought in the Cayman Islands, and (ii) the purported assignors are not parties to this action. (*See* Pls. Opp. at 7 n.6, 19.) This argument both ignores the plain language of the contracts and would exalt form over substance for the purpose of creating an artificial exception to the strong policy favoring enforcement of contractual forum selection clauses.

41. The question the Court must address is whether the actual parties before it are bound by the clauses. *See Phillips*, 494 F.3d at 383. The Plaintiffs here are the SPhinX Liquidators, not any investors, and the SPhinX Liquidators are indisputably bound to bring "*any claim*" in the courts of the Cayman Islands. The phrase "any claim" means just that, and does not contemplate exceptions. Nor is there any question that any assigned claims "arise out of or in connection with" PwC-Cayman's engagement. Therefore, any claims the SPhinX Liquidators assert, including the claims purportedly obtained through assignment, are covered by the clauses.

42. An examination of the nature of the assignments further supports this conclusion. The assignments make clear that Messrs. Krys and Stride possess the claims, "not individually, but solely in their capacities" as SPhinX Liquidators, the same "capacities" in which they assert all other claims. (Second Foukas Decl. Ex. C at 1.) Like the claims they assert as successors to the SPhinX Funds, the purportedly assigned claims will benefit the SPhinX Funds liquidation, which is pending in the Cayman Islands. (*Id.*; Am. Compl. ¶ 18.)

43. Further, it is plain that the assignments were made as part of the SPhinX Liquidators' "litigation strategy." (Second Foukas Decl. Ex. B.) The assignments were solicited by the SPhinX Liquidators less than two weeks before they filed their complaint, and their

solicitation made no attempt to disguise the fact that the purpose of the assignments were requested as part of a "litigation strategy" in an attempt to "*eliminate certain defences that some of the defendants may claim in this case.*" (*Id.* (emphasis added).) The assignors apparently received no money, no additional claim in the liquidation, and no rights of priority with respect to any distribution of funds in the liquidation, or any other form of economic consideration. (Second Foukas Decl. Ex. C at 1.)

44. Thus, the assignments were entered into for the purpose of aiding the SPhinX Liquidators in avoiding certain defenses. For purposes of the present motion, it is not necessary to decide whether the assignments will succeed in avoiding such defenses as *in pari delicto*, unclean hands or contributory negligence. However, given the strong federal policy in favor of the enforcement of forum selection clauses and the importance of these clauses in international commerce as articulated by the Supreme Court and Second Circuit over the past three decades, *see Bremen*, 407 U.S. at 9-10; *Aguas*, 2009 WL 3403172, at *3; *Roby*, 996 F.2d at 1363, a party cannot escape a forum selection clause through the type of legal "strategy" employed by the SPhinX Liquidators here. *See Aguas*, 2009 WL 3403172, at *4 (courts should apply forum selection clauses to prevent "parties to contracts from using evasive, formalistic means lacking economic substance to escape contractual obligations" and finding that "a forum selection clause is integral to the obligations of the overall contract, and a successor in interest should no more be able to evade it than any other obligation under the agreement"); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 126 (S.D.N.Y. 1997) ("[I]f defendants were correct and a party could escape the effect of a forum selection clause by assigning or subrogating its rights, such a clause would serve little purpose, which certainly is not in line with the Supreme Court's view of the importance of such clauses."); *cf. Airlines Reporting Corp. v. S & N Travel, Inc.*, 58

F.3d 857, 864 (2d Cir. 1995) (holding an assignment collusive and thus invalid for purposes of establishing diversity jurisdiction).

45. Accordingly, the SPhinX Liquidators are bound by the forum selection clauses to bring all claims they purport to assert against PwC-Cayman, including any assigned claims, in the Cayman Islands.

2. PlusFunds is bound by the clauses

46. The forum selection clauses also cover claims asserted by PlusFunds and its successor, Plaintiff Sinclair. Plaintiffs argue that PlusFunds should not be bound because it was not a party to the engagement letters. This argument ignores both the allegations in Plaintiffs' own pleading and the relevant legal standards.

47. PlusFunds is bound because the Amended Complaint explicitly alleges that the engagement letters were not agreements between only PwC-Cayman and the SPhinX Funds, but rather "memorializ[ed] [PwC-Cayman's] agreements with SPhinX *and PlusFunds*." (Am. Compl. ¶¶ 611, 612 (emphasis added).) Plaintiffs further allege that "PwC was retained by PlusFunds to conduct the SPhinX audit" (*id.* ¶¶ 1144, 1171), and it is the alleged relationship formed by these agreements that forms the basis of PlusFunds' claims. (*See, e.g., id.* ¶¶ 607 (PlusFunds was owed a professional duty of care "in connection with the audits of SPhinX's financial statements"), 1147 ("PwC . . . owed both the SPhinX Funds and PlusFunds a duty to exercise due professional care in the course of the engagements to audit the SPhinX Funds.").) PlusFunds seeks damages on account of the allegedly improper services that PwC-Cayman performed pursuant to the engagements. (*See, e.g., id.* ¶¶ 708-12, 1149, 1181, 1262, 1277, 1288.)

48. It is well-settled that a party seeking to obtain the benefits of a contract must also accept its burdens, including contractual forum selection. *See Ana Distribution Inc. v. CMA-*

CGM (America) Inc., 329 F. Supp. 2d 565, 567 (S.D.N.Y. 2004) (applying forum selection clause to non-signatory consignee bringing suit under contract because "consignee is bound by all the terms of the contract on which it sues"); *Shugrue v. Ins. Co. of State of Pennsylvania*, 180 B.R. 53, 56 (S.D.N.Y. 1995) ("[W]ell-settled principles of estoppel dictate that where a party seeks the benefits of a contract, it cannot disaffirm its burdens.").

49. The allegations that PlusFunds was owed duties under the engagements and may claim damages based upon alleged non-performance have been formally asserted three times, in the original Complaint, in the Amended Complaint and, most recently, in the proposed Second Amended Complaint. Plaintiffs are bound by the assertions made repeatedly in their own pleadings, which now constitute three layers of judicial admissions. *See, e.g., Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003). Accepting Plaintiffs' allegations as true, the engagement letters are PwC-Cayman's "agreements with SPhinX and PlusFunds," and, therefore, PlusFunds is bound by the forum selection clauses in those letters just the same as SPhinX.

50. Even if PlusFunds had not asserted rights and damages under the engagement letters, it would still be bound by the forum selection clauses because of its close relationship to the contracts. Even if not a formal contracting party, a party will be bound by a valid forum selection clause if the party is "'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993) (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) and *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983)).

51. The "closely related" standard has been repeatedly applied by the district courts in this Circuit. *See, e.g., Thibodeau v. Pinnacle FX Invs.*, No. 08-CV-1662, 2008 WL 4849957, at

*5 n.4 (E.D.N.Y. Nov. 6, 2008) (principals of signatory corporation were closely related to contracting party); *Cfirstclass Corp.*, 560 F. Supp. 2d at 329 (successor to signatory was closely related); *Burrows Paper Corp. v. Moore & Assocs.*, 07-CV-62, 2007 WL 2089682, at *3 (N.D.N.Y. July 20, 2007) (finding third-party beneficiary closely related as it would "defy logic" to allow non-signatory to seek enforcement of the agreement but avoid its obligations); *Weingrad v. Telepathy, Inc.*, No. 05 Civ. 2024, 2005 WL 2990645, at *5-6 (S.D.N.Y. Nov. 7, 2005) (finding non-signatories closely related where they allegedly acted in concert); *Nanopierce Tech., Inc. v. Southridge Capital Mgmt. LLC*, No. 02 Civ. 0767, 2003 WL 22882137, at *5-6 (S.D.N.Y. Dec. 4, 2003) (enforcing forum selection clause against non-signatory officer); *see also Roby*, 996 F.2d at 1359-60 (binding non-signatories to a forum selection clause).

52. Despite the wide acceptance of this standard, Plaintiffs, in their opposition, argued that it "would be surprising, indeed, if the Second Circuit were to adopt a 'closely related' standard" as articulated in *Hugel*. (Pls. Opp. at 13.) PwC-Cayman argued to the contrary, that the Second Circuit would join courts from around the country by adopting the "closely related" standard in contractual forum selection cases.

53. On October 23, 2009, the Second Circuit issued its opinion in *Aguas Lenders Recovery Group, LLC v. Suez, S.A.*, in which the court stated that it found "ample support for the conclusion that the fact that a party is a non-signatory to an agreement is insufficient, standing alone, to preclude enforcement of a forum selection clause." 2009 WL 3403172, at *4. To support that proposition, the Second Circuit cited with approval and quoted *Hugel* and other cases applying the "closely related" standard. *Aguas*, 2009 WL 3403172, at *4; *see, e.g.*, *Marano Enters. of Kansas v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757-78 (8th Cir. 2001) (binding non-signatories where they were "closely related" and had arguably acquiesced in forum

selection clause by bringing suit with signatories). After *Aguas*, there can be no dispute that forum selection clauses will be enforced even against non-signatories where they meet the "closely related" standard.

54. Plaintiffs also argue that PlusFunds did not have a sufficiently close relationship with the SPhinX Funds to allow it to be bound by the forum selection clauses. (*See* Pls. Opp. at 13 (asserting PlusFunds "had only a contractual relationship" with SPhinX); Nov. 4, 2009 Hearing Tr. at 22:5-7 (comparing PlusFunds to "a broker or a money manager or somebody who manages somebody else's assets").) This argument cannot stand up to the allegations in Plaintiffs' own pleading.

55. PlusFunds alleges that it was more than a mere business associate of or contractual counterparty to SPhinX. PlusFunds allegedly "created" the SPhinX Funds. (Am. Compl. ¶¶ 2, 100.) PlusFunds was "intertwined" with the SPhinX Funds, and was responsible for carrying out their operations, including the retention of professionals and the execution of relevant documents. (Am. Compl. ¶ 138; *see id.* ¶ 133.) In particular, PlusFunds was responsible for retaining PwC-Cayman and negotiating the letters of engagement. (Am. Compl. ¶¶ 1144, 1171.) Indeed, the Chief Financial Officer of PlusFunds actually signed one of the engagement letters. (First Foukas Decl. Ex. D at 8.)

56. In these circumstances, PlusFunds was closely related to the dispute such that it was foreseeable that PlusFunds would be bound by the forum selection clauses. *See Hugel*, 999 F.2d at 209-10; *see also In re Refco, Inc. Sec. Litig.*, 07 MDL 1902 (GEL), 2008 WL 2185676, at *5 & n.6 (S.D.N.Y. May 21, 2008) (enforcing arbitration agreement against non-signatory where it accepted services performed under the contract); *Deloitte & Touche v. Gencor Indus.*, 929 So. 2d 678, 683-84 (Fla. Dist. Ct. App. 2006) (enforcing forum selection clause in engagement letter

for auditing services against non-signatory); *Kelly*, 2001 WL 1807360, at *2 (enforcing forum selection clause against non-signatory "because the claims asserted clearly arise out of the only possible relationship plaintiffs had with [defendants] – the Engagement Letters"). Accordingly, PlusFunds is bound by the forum selection clauses. This conclusion is particularly compelling given that PlusFunds chose to bring suit along with the SPhinX Liquidators who are indisputably bound by the forum selection clauses. *See Marano*, 254 F.3d at 758.

57. In light of the foregoing, PlusFunds, like the SPhinX Liquidators, is bound by the contractual covenant to bring claims against PwC-Cayman in the Cayman Islands.

III. Plaintiffs Cannot Show That Enforcement Would Be Unreasonable And Unjust

58. The fourth *Phillips* factor addresses final enforceability where a forum selection clause is found presumptively enforceable pursuant to the first three factors. To overcome enforceability, Plaintiffs must make a "strong showing" that enforcement would be "unreasonable and unjust" or the clauses are invalid due to "fraud or overreaching." *Bremen*, 407 U.S. at 15; *see Phillips*, 494 F.3d at 383-84. The Second Circuit in *Phillips* explained that the party resisting enforcement must show that:

> (1) [the clause's] incorporation was the result of fraud or overreaching; (2) the law to be applied in the selected forum is fundamentally unfair; (3) enforcement contravenes a strong public policy of the forum state; or (4) trial in the selected forum will be so difficult and inconvenient that the plaintiff effectively will be deprived of his day in court.

Phillips, 494 F.3d at 392 (citing *Roby*, 996 F.2d at 1363).

59. Plaintiffs did not discuss the *Phillips* standard in their opposition brief. Instead, they relied heavily upon the decision of the English House of Lords in *Donohue v. Armco, Inc.* [2001] UKHL 64. (*See* Pls. Opp. at 7-8; Nov. 4, 2009 Hearing Tr. at 50:2-20.)

60. The Second Circuit has, however, held that "federal law should be used to determine whether an otherwise mandatory and applicable forum selection clause is enforceable under *Bremen* . . . because enforcement of forum clauses is an essentially procedural issue." *Phillips*, 494 F.3d at 384. Plaintiffs' reliance on English authorities is, therefore, misplaced and the Court must evaluate enforcement under the *Phillips* standard.[3]

61. Plaintiffs do not argue that the clauses were the result of fraud or overreaching, or that litigation in the courts of the Cayman Islands would be fundamentally unfair. *See Phillips*, 494 F.3d at 392. Instead, Plaintiffs make two arguments against enforcement. First, Plaintiffs argue that requiring them to litigate their claims against PwC-Cayman in the Cayman Islands would be inefficient and inconvenient for them given that they have sued numerous other defendants in New York. (Pls. Opp. at 4-11.) Second, Plaintiffs argue that enforcement of the clauses would violate public policy because the engagement letters contain certain limited release and indemnification provisions. (Pls. Opp. at 20-24.) Neither argument meets the high standard set by *Phillips*.

A. Plaintiffs' Convenience Concerns Are Insufficient

62. Given the strong federal policy in favor of the enforcement of forum selection clauses, both the Supreme Court and the Second Circuit have held that claims of inefficiency and inconvenience are not sufficient to defeat enforcement of a valid forum selection clause. *See Bremen*, 407 U.S. at 16; *Phillips*, 494 F.3d at 393. Instead, the party resisting enforcement must

---

3. Furthermore, *Donohue* involved an "anti-suit injunction," which in England, as in the United States, is a highly discretionary decision involving serious questions of comity and reluctance to interfere with a proceeding already pending in a foreign court. *Donohue v. Armco Inc.* [2001] UKHL 64 ¶¶ 16, 19(4); *cf. Ibeto Petrochemical Ltd. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007) ("principles of international comity and reciprocity require a delicate touch in the issuance of anti-foreign suit injunctions").

demonstrate that "trial in the selected forum will be so difficult and inconvenient that the plaintiff *effectively will be deprived of his day in court*." *Id.* at 392 (emphasis added).

63. Plaintiffs argue that it would "be more efficient and fair" to litigate the claims against PwC-Cayman in this Court since the "center of gravity of this case is in the United States" and the claims against PwC-Cayman are but "a small piece of this litigation" which involves many other parties. (Pls. Opp. at 8-11.) Even if this were true, it would not establish that Plaintiffs would be deprived of their day in court.

64. The Second Circuit has mandated enforcement of forum selection clauses in nearly identical circumstances. In *Phillips*, the plaintiff brought claims against five defendants in the Southern District, asserting claims for breach of contract against one defendant and for trademark and copyright infringement against all defendants. 494 F.3d at 383. The contract between the plaintiff and the defendant against whom the breach of contract claim was asserted called for proceedings arising out of the contract to be brought in England. *Id.* at 382. Only the contract claim against the single defendant was covered by the forum selection clause. *Id.* at 387-92. Like Plaintiffs here, the plaintiff in *Phillips* argued that none of the witnesses or documents were located in England (nor, unlike here, were any of the parties). *Id.* at 392-93; *see Effron*, 67 F.3d at 11 (enforcing forum selection clause requiring U.S. plaintiff to litigate in Greece).

65. Nonetheless, the Second Circuit enforced the forum selection clause, requiring one claim against one defendant to proceed in England while the remaining claims against all defendants remained in New York. The *Phillips* Court stated that the plaintiff may have shown that litigation in England "may be more costly or difficult, but not that it is impossible." *Phillips*, 494 F.3d at 393. The court recognized that "the commencement of separate proceedings in two

countries is a likely inconvenience to the parties" but concluded that "our twin commitments to upholding forum selection clauses where these are found to apply and deferring to a plaintiff's proper choice of forum constrain us in the present context to treat Phillips' claims separately." *Id.* Accordingly, the forum selection clause was enforced despite the existence of "fractured litigation." *Id.*; *see also Street, Sound Around Elecs. Inc. v. M/V Royal Container*, 30 F. Supp. 2d 661, 662-663 (S.D.N.Y. 1999) (rejecting argument that forum selection clause should not be enforced due to "undue expense and a risk of inconsistent verdicts" resulting from "multiple parallel proceedings").

66. *Phillips* mandates rejection of Plaintiffs' arguments regarding the inefficiency and inconvenience of litigating in the Cayman Islands. As in *Phillips*, the fact that dismissal of the claims against PwC-Cayman may lead to "fractured litigation" with additional costs and hardships does not establish that Plaintiffs would "be deprived of [their] day in court." 494 F.3d at 392-93.[4]

67. Even if such concerns could suffice to set aside a forum selection clause, Plaintiffs have not shown that litigation of the claims against PwC-Cayman in the Cayman Islands would actually be inconvenient in any meaningful sense. Plaintiffs argue that enforcing the forum selection clauses would "hinder the resolution" of the Refco MDL (Pls. Opp. at 10),

---

4. In addition to their reliance on English law, Plaintiffs cite *Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst*, 154 F. Supp. 886 (S.D.N.Y. 1957). (Pls. Opp. at 5-6; Nov. 4 Hearing Tr. at 56:25.) *Chemical Carriers* dates from the pre-*Bremen* era in which forum selection clauses, "particularly those calling for exclusive jurisdiction in a foreign court, [were] not looked upon with favor," 154 F. Supp. at 888, and courts felt free to disregard contractual forum selection based on claimed inconvenience, *id.* at 889. This is not the law after *Bremen* and *Phillips*. *See Bremen*, 407 U.S. 1 at 16 ("it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable"); *Phillips*, 494 F.3d at 393 (rejecting convenience arguments where the plaintiff "has not alleged any circumstances – whether affecting him personally or a component of his case or prevailing in England generally – that would prevent him from bringing suit in England").

but by Plaintiffs' own admission their claims against PwC-Cayman, which has not been named in any other action, make up only "a small piece of this litigation" (*id.* at 11). The Refco MDL will proceed at the same pace with or without PwC-Cayman, and while Plaintiffs may "have hired United States counsel to bring these claims in the United States" (*id.* at 10), that does not establish that litigation in the Cayman Islands is impossible. *See Phillips*, 494 F.3d at 393.

68. The courts of the Cayman Islands are far more convenient to Plaintiffs than were the courts of England in *Phillips* or the courts of Greece in *Effron*. PwC-Cayman and the SPhinX Liquidators are both located in the Cayman Islands. Indeed, the SPhinX Liquidators are currently involved in court proceedings in the Cayman Islands over the liquidation of the SPhinX Funds, and they have retained Cayman counsel in those proceedings.

69. Nor is there any significant risk of "inconsistent adjudication," where PwC-Cayman is not a party to any other Refco lawsuit, and all claims against PwC-Cayman arising out of anything related to SPhinX would be before a single contractually-designated tribunal in the Cayman Islands.

70. Plaintiffs' concerns about inconvenience to potential witnesses from the purported assignors of claims now asserted by the SPhinX Liquidators are also insufficient. First, the Second Circuit has held that concerns about transporting witnesses to foreign courts are insufficient to defeat enforcement of forum selection clauses. *See Phillips*, 494 F.3d at 393 (requiring litigation in England even though no parties or witnesses were located there); *Effron*, 67 F.3d at 11 (requiring U.S. plaintiff to litigate in Greece despite "complaints about the difficulty of transporting witnesses abroad"). Further, these purported assignors are all alleged to have been investors in Cayman Islands hedge funds and responded to a solicitation by Cayman Islands liquidators to assign their claims. It therefore cannot be said that these entities have no

connection to the Cayman Islands.[5] In any event, as the purported assignments make clear, the SPhinX Liquidators have agreed to cover any travel expenses incurred by the assignors. (Second Foukas Decl. Ex. C at 2.) Thus, even if the actual appearance of witnesses from these entities were required in the Cayman Islands (something that Plaintiffs have not established), this is not a reason to deny enforcement of otherwise valid forum selection clauses.

71. Even assuming for the sake of argument that requiring Plaintiffs to honor the clauses and litigate their claims against PwC-Cayman in the Cayman Islands will be less convenient, Plaintiffs have not met their burden of showing that litigation in the Cayman Islands would be impossible. *See Phillips*, 494 F.3d at 392-93.

B. Plaintiffs' Public Policy Argument Is Without Merit

72. Plaintiffs also argue that enforcement of the clauses would violate public policy because the engagement letters contain certain limited release and indemnification provisions that would be enforced in the Cayman Islands and there is, Plaintiffs claim, a strong public policy in New York against such provisions. (Pls. Opp. at 20-24; Nov. 4, 2009 Hearing Tr. at 18:8-22.) This argument is also insufficient.

73. First, the fact that the law in the chosen forum is different or less favorable is insufficient to defeat enforcement of forum selection clauses. The Second Circuit has held that forum selection clauses "must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum." *Roby*, 996 F.2d at 1360-61.

---

5. Indeed, while the Amended Complaint does not provide the location of the purported assignors, they apparently include many foreign entities, including the Arab Monetary Fund and Deutsche Bank (Suisse) SA. Complaints from such entities of inconvenience in traveling to a foreign jurisdiction are far from compelling. Even the Miami Children's Hospital Foundation can claim little inconvenience as Miami is closer to the Cayman Islands than to New York.

Thus, the fact that some of Plaintiffs' claims "might be eliminated or severely restricted" is irrelevant. (Pls. Opp. at 20.) "Instead, the question is whether the application of the foreign law presents a danger that [Plaintiffs] 'will be deprived of *any* remedy or treated unfairly.'" *Roby*, 996 F.2d at 1363 (citations omitted). Indeed, in *Bremen*, the Supreme Court rejected the argument that enforcement of the forum selection clause in that case was contrary to public policy because of the prospect that contractual provisions purporting to exculpate the defendant from liability would be enforced in England. 407 U.S. at 15-16.

74. In any event, a release or indemnification clause in a freely negotiated contract between sophisticated entities (like the clauses in the engagement letters at issue here) does not violate any public policy of New York. *See, e.g.*, *Bradley v. Feiden*, 8 N.Y.3d 265, 275 (2007) ("When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence" particularly where the agreement is between "sophisticated parties.") (citations omitted); *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Serv., Ltd.*, 81 N.Y.2d 821, 823 (1993) ("New York law generally enforces contractual provisions absolving a party from its own negligence.") (citations omitted); *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 211-13 (1971) (enforcing clause indemnifying party from "all claims, suits, loss, cost and liability").[6]

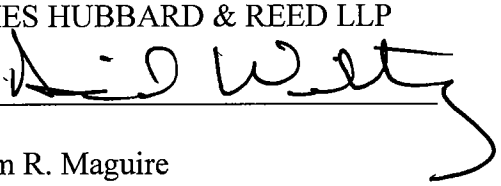
6. Plaintiffs' reliance on SEC regulations (Pls. Opp. at 24 n.12; Nov. 4, 2009 Hearing Tr. at 18:17) is misplaced as this case does not involve a publicly-traded company or an SEC registrant but rather relates to audits of private Cayman Islands hedge funds.

75. Thus, no strong public policy of New York would be violated by enforcing the forum selection clauses and requiring Plaintiffs' claims regarding audit reports issued by a Cayman Islands accounting firm on Cayman Islands hedge funds to be litigated in the Cayman Islands.

Dated: New York, New York
November 16, 2009

Respectfully submitted,

HUGHES HUBBARD & REED LLP

By: 

William R. Maguire
David W. Wiltenburg
Savvas A. Foukas
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Attorneys for Defendant PwC-Cayman

Cross References to Paragraphs Cited in
Proposed Findings of Fact and Conclusions of Law

Original Complaint	Amended Complaint	Proposed Second Amended Complaint
2	2	2
5	5	5
6	6	6
12	12	12
13	13	13
14	14	14
15	15	15
16	16	16
—	18	18
22	24	24
29	31	31
30	32	32
31	33	33
32	34	34
33	35	35
35	37	37
42	43	43
43	44	44
80	82	82
100	95	95
103	98	98
104	99	99
105	100	100
136	133	136
139	136	139
140	137	140
141	138	141
309	327	331
543	607	644
547	611	650
548	612	651
551	614	653
554	617	656
623	708	760
624	709	761
625	710	762
626	711	763
627	712	764
981	1143	1245
982	1144	1246
984	1147	1249

APPENDIX A

RJH

986	1149	1251
988	1151	1253
1004	1167	1271
1005	1168	1272
1030	1170	1274
1031	1171	1275
1041	1181	1285
1050	1190	1294
1113	1262	1366
1116	1265	1369
1117	1266	1370
1128	1277	1381
1130	1279	1383
1131	1280	1384
1139	1288	1392
1141	1292	1396
1142	1293	1397