

**Leonard Global Macro Fund LLC v North Am.
Globex Fund, L.P.**

2014 NY Slip Op 32393(U)

August 29, 2014

Sup Ct, New York County

Docket Number: 150346/13

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 19

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LEONARD GLOBAL MACRO FUND LLC,

Plaintiff,

Index No. 150346/13

- against -

NORTH AMERICAN GLOBEX FUND, L.P.,
NORTHSTAR INTERNATIONAL GROUP, INC.,
JAMES M. PEISTER, JOHN GEANTASIO,
STRATEGIC ASSET MANAGEMENT, LLC,
KURCIAS, JAFFE & COMPANY LLP, JOSEPH F.
SOFO, CPA and EQUINOXE ALTERNATIVE
INVESTMENT SERVICES (USA), INC. F/K/A
MADISONGREY, LLC,

Defendants.
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NANCY M. BANNON, J.:

Plaintiff Leonard Global Macro Fund LLC brings this lawsuit against defendants North American Globex Fund, L.P. (the Fund), Northstar International Group, Inc. (Northstar), James M. Peister (Peister, collectively referred to herein with the Fund and Northstar, as the Globex Defendants), John Geantasio (Geantasio), Strategic Asset Management, LLC (Strategic), Kurcias, Jaffe & Company LLP (Kurcias Jaffe), Joseph F. Sofo, CPA (Sofo), and Equinox Alternative Investment Services (USA), Inc. f/k/a MadisonGrey, LLC (MadisonGrey) seeking damages for the loss of its investment in the Fund, a now defunct hedge fund. After various defendants moved to dismiss the complaint, plaintiff filed an amended complaint on October 1, 2013. Now before the court are four motions to dismiss the amended complaint by MadisonGrey (seq. no. 004), Strategic (seq. no. 005), Geantasio (seq. no. 006), and a joint motion by Kurcias Jaffe and Sofo (seq. no. 007). The grounds argued are statute of limitations (CPLR 3211 [a] [5]),

documentary evidence (CPLR 3211 [a] [1]), failure to state a claim (CPLR 3211 [a] [7]), and lack of specificity (CPLR 3016 [b]). For the following reasons, the motions are hereby consolidated for disposition, and are granted in part and denied in part.

FACTUAL ALLEGATIONS

The Fund was formed in 2000 by defendant Peister, allegedly attracting about 72 investors, and purportedly grew to managing approximately \$19 million in assets (Am. Cmplt., ¶¶ 21-22). Plaintiff was one of the investors in the Fund, investing its money beginning in January of 2008 (*id.*, ¶¶ 44, 58). Plaintiff alleges that it is a Delaware limited liability company with an office in the State of Illinois (*id.*, ¶ 1). Defendant Northstar was the general partner of the Fund, and Peister was the president, chief executive officer, and controlling shareholder of Northstar, and was authorized to act as an investment manager and trading manager for the Fund (*id.*, ¶¶ 4, 23). Peister, who founded Northstar in 2000, also controlled the Fund (*id.*, ¶¶ 22, 24). Defendant Geantasio served as chief financial officer and/or a manager of Northstar (*id.*, ¶ 6).

Plaintiff alleges that it, in or about 2007, its investment manager began research into a possible investment in the Fund (Am. Cmplt., ¶ 34). Plaintiff was provided with various promotional materials including a "Confidential Private Placement Memorandum," dated January 2005 (the PPM), and exhibits thereto (*id.*, ¶¶ 26, 35). A section of the PPM entitled "Overview" stated:

"[T]he Partnership seeks to provide its Limited Partners with consistent above average returns combined with effective management. Although the strategy and asset allocation utilized by the Partnership is primarily centered on publicly traded companies, the General Partner intends to follow a flexible approach in order to place the Partnership in the best position to capitalize on opportunities in the financial markets"

(*id.*, ¶ 36). The PPM assured investors that the Fund’s portfolio would be invested in “readily liquid securities” (*id.*, ¶ 37). The PPM further provided that the Fund could invest in privately-placed, unregistered and illiquid securities, but that any such investments (i) would not exceed 20% of the Fund’s assets; (ii) would be held in a separate “Side Pocket Account,” and (iii) only those investors who were partners at the time of the investment could participate in these Side Pocket Accounts (*id.*, ¶ 38). Plaintiff also alleges that it was provided with a document entitled the “Globex Fund Due Diligence Questionnaire” (the DDQ), which described the Fund’s investments as comprising liquid equity and futures trading with the balance in Treasuries and Indexes (*id.*, ¶¶ 39, 42).

In January 2008, plaintiff invested approximately \$925,000 in the Fund, based on the representations in the PPM, the DDQ, prior financial reports and other written promotional materials and oral representations by Northstar (Am. Cmplt., ¶¶ 44, 96).

MadisonGrey was allegedly retained by Northstar in 2006 to audit the Fund and to provide audited financial reports directly to Northstar, Fund investors and plaintiff (Am. Cmplt., ¶¶ 15, 40). From January through June 2008, MadisonGrey provided plaintiff with monthly financial statements which showed a 1.85% year to date appreciation in plaintiff’s investment (*id.*, ¶ 48). In July 2008, Northstar replaced MadisonGrey with Strategic (*id.*, ¶ 49). Strategic was “engaged to ‘provide administrative, accounting, consulting, financial, tax and other services to the Globex Fund’” (*id.*). From July 2008 through November 2008, Strategic provided plaintiff with monthly financial statements, which showed a 1.56% year-to-date appreciation in plaintiff’s investment (*id.*, ¶ 50).

The accounting firm of Kurcias Jaffe was allegedly retained, as early as 2002, to provide

audited financial reports for the Fund, and defendant Sofo was the engagement partner for Kurcias Jaffe charged with the Fund's account (Am. Cmplt., ¶¶ 11-13, 41).

The first inkling of a problem with the investment occurred when Peister informed plaintiff in an email dated January 7, 2009 that the December returns would be down by about 1% (Am. Cmplt., ¶ 52). In a letter dated February 12, 2009, Peister advised investors that the Fund had experienced significant losses caused by the global financial crisis resulting from the collapse of the mortgage-backed securities markets (*id.*, ¶ 54).

On February 26, 2009, plaintiff sought to redeem its entire investment in the Fund to prevent any further losses (Am. Cmplt., ¶ 57). By letter dated March 26, 2009, Peister acknowledged receipt of plaintiff's redemption request, but cited the "Limitations on Withdrawals" provision of the Fund's limited partnership agreement (the LPA) to deny the request (*id.*, ¶ 58). In this letter, Peister also allegedly stated: "[g]oing forward, we will be evaluating the liquid and illiquid assets in order to release any redemptions to partners" (*id.*, ¶ 59). Plaintiff and its counsel responded to this letter, repeating its redemption request, arguing that since plaintiff's investments were liquid only, they should be easily redeemed and that plaintiff should not have to participate in any write downs or losses from illiquid investments (*id.*, ¶¶ 60-61).

On March 30, 2009, Peister finally provided the December 2008 year-end financial statements prepared by Strategic, which showed a 56.37% year-to-date loss equal to \$558,309 (Am. Cmplt., ¶ 62). In a letter dated April 13, 2009, Peister announced that Northstar was electing to dissolve the Fund (*id.*, ¶ 63). Then, by letter dated June 12, 2009, Peister informed plaintiff that there might have been material inaccuracies in the Fund's 2003-2008 financial

statements (*id.*, ¶ 65).

In a letter dated August 4, 2009, Peister announced that the Securities and Exchange Commission (SEC) was conducting a formal investigation of the Fund and that, as a result, further information about the company would be extremely limited (Am. Cmplt., ¶ 66). Plaintiff alleges that, from January 2009 through the early Spring of 2010, “every possible method to obtain actionable information” both from Peister and the SEC about the financial status of the Fund was attempted by both plaintiff and its legal counsel, but all of its efforts were thwarted or ignored (*id.*, ¶¶ 67-73).

The U.S. Commodity Future Trading Commission (CFTC) was also investigating the Fund. Plaintiff alleges:

“On or about February 3, 2011, the [CFTC] found that between 2001 and 2009 Peister and Northstar defrauded community pool participants of Globex Fund (including Plaintiffs) by fraudulently concealing trading losses, using participants’ funds to make payments to other participants and for business and personal expenses, failing to register Globex Fund as a community pool operator with CFTC, and failing to provide Globex Fund participants with required disclosure forms”

(Am. Cmplt., ¶ 74). Plaintiff also alleges that, according to the CFTC, Northstar and Peister concealed those losses by sending out false monthly account statements and audit reports, and the CFTC consequently sanctioned Peister and Northstar in an amount exceeding \$11 million (*id.*, ¶¶ 75-76).

The amended complaint further alleges that, on or about July 14, 2011, the SEC found that Sofo had allowed the Fund to disseminate materially false financial statements to plaintiff (Am. Cmplt., ¶ 77).

“The SEC found that Sofo, ‘failed to exercise due professional care, professional

skepticism, and failed to obtain sufficient competent evidential matter to support Kurcias Jaffe's unqualified audit opinions"

(*id.*, ¶ 78).

Plaintiff alleges that Strategic has admitted that it suspected that the Fund was a fraud and that it reported its suspicions to the FBI on November 21, 2008 and to the SEC on December 10, 2008 (Am. Cmplt., ¶¶ 81-82). However, in order to avoid having to reveal its suspicions of hedge fund fraud to plaintiff and the other investors, Strategic asked the SEC to send them a "confidential request letter" (*id.*, ¶ 83). Strategic allegedly continued to communicate with plaintiff and provide self-serving answers to its queries for information, while concealing its knowledge that \$15 million of the Fund's assets could not be verified (*id.*, ¶¶ 83-84). Strategic resigned on January 13, 2009 due to the failure of Peister and Geantasio to provide the Fund's 2007 annual audit report (*id.*, ¶ 85).

Plaintiff commenced this lawsuit on January 11, 2013. The amended complaint asserts eleven causes of action. The first four causes of action, asserted only against the Globex Defendants and Geantasio, allege breach of fiduciary duty, breach of contract, unjust enrichment and negligence. The remaining causes of action are: fraud by the Globex Defendants, Geantasio, Kurcias Jaffe and Sofo (fifth); negligent misrepresentation by the Globex Defendants, Geantasio, Kurcias Jaffe and Sofo (sixth); aiding and abetting breach of fiduciary duty against Kurcias Jaffe, Sofo, MadisonGrey and Strategic (seventh); aiding and abetting fraud against MadisonGrey and Strategic (eighth); negligence by Kurcias Jaffe, Sofo, MadisonGrey and Strategic (ninth); malpractice by Kurcias Jaffe, Sofo, MadisonGrey and Strategic (tenth); and conspiracy to conceal fraud and estoppel of the statute of limitations by all defendants (eleventh).

DISCUSSION

On a pre-answer motion to dismiss pursuant to CPLR 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; see also *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]; see also *Erich Fuchs Enters. v American Civ. Liberties Union Found., Inc.*, 95 AD3d 558 [1st Dept 2012]). When documentary evidence under CPLR 3211 (a) (1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d at 88).

Breach of Fiduciary Duty

The first cause of action alleges that the Globex Defendants and Geantasio breached their fiduciary duties to plaintiff. Geantasio argues that the claim must be dismissed as against him for the following reasons: (1) it is precluded by the Nevada Uniform Limited Partnership Act (NULPA);¹ (2) he did not owe plaintiff any fiduciary duty; and (3) it is time-barred.

¹ In its moving memorandum of law, counsel for defendant Geantasio suggests that it is “reasonable” or “conceivable” for the court to apply Nevada law to plaintiff’s contract and tort claims, since both Northstar and the Fund were formed under the laws of Nevada and both the LPA and PPM contain a Nevada choice of law provision. Defense counsel then refuses to take a position on the choice of law issue and suggests only that there is no material differences between the laws of New York and Nevada (see Geantasio Mem. of Law at 3-5, n 2 & 3). Plaintiff’s counsel, for his part, cites only New York case law, although he relies on a handful of Nevada statutes in an attempt to hold Geantasio liable for the acts and omissions of Northstar and/or the Fund. “The first step in choice of law analysis is determining whether an actual conflict exists between the jurisdictions involved” (*K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006]; see also *Matter of Allstate Ins. Co. (Stolarz--New Jersey Mfrs. Ins. Co.)*, 81 NY2d 219,

As an initial matter, Geantasio argues that plaintiff cannot sue him for breach of fiduciary duty, because plaintiff has failed to make a pre-suit demand on the general partner of the Fund in accordance with section 88.610 of the NULPA. New York has a similar requirement for bringing a derivative claim on behalf of a limited partnership (NY Partnership Law § 115-a; *Otto v Otto*, 110 AD3d 620, 621 [1st Dept 2013]). However, this argument presupposes that plaintiff's injuries are solely derivative in nature, belonging only to the limited partnership as a whole. The very nature of a Ponzi scheme is that later acquired funds are used to pay off previous investors (see *Schneider v Barnard*, 508 BR 533, 542 [ED NY 2014]), and thus not all of the Fund's limited partners may have been defrauded. In addition, the amended complaint adequately pleads facts that would establish demand futility (see Am. Cmplt., ¶¶ 66-73, 74-76).

Both New York and Nevada require that the plaintiff plead the following three elements: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; accord *Klein v Freedom Strategic Partners, LLC*, 595 F Supp 2d 1152, 1162 [D Nev 2009]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; accord *Stalk v Mushkin*, 199 P3d 838, 843 [Nev 2009]). "It exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and domination over him" (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009]; accord *Hoopes v Hammargren*, 725 P2d 238, 223 [1993]). There does not appear to be any conflict in the laws of New York and Nevada on the basic elements of pleading a breach of fiduciary duty claim.

242 [1986]). A "plaintiffs' own subjective claims of reliance on defendants' expertise" is not enough to support a fiduciary duty (*RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010] [citations and internal quotation marks omitted]).

Plaintiff's allegations fail to establish that Geantasio owed it a fiduciary duty. Plaintiff alleges only that Geantasio was the chief financial officer of Northstar, the Fund's general partner (*see* Am. Cmplt., ¶ 6), and he is only mentioned in the DDQ as such (*see* Larsen Affirm., Ex. F: DDQ at 21-22). The only member of the Fund's "management" identified in the PPM is Peister (Ree 11/15/13 Affirm., Ex. C: PPM at 9, 19, 21-22). In addition, the LPA specifically states that "the president and CEO of the General Partner, James M. Peister controls all of the [Fund's] operations and activities" (Ree Affirm., Ex. C). Thus, Geantasio was not a partner or executive of the Fund (*see Hynes v Sbarro, Inc.*, 2011 NY Slip Op 31355[U] [Sup Ct, Suffolk County 2011] [when a corporation is the general partner of a limited partnership, the former chief executive officer of the corporation did not owe a fiduciary duty to the limited partners]). Plaintiff fails to allege any facts which would establish that Geantasio controlled or dominated plaintiff's investment in the Fund. Therefore, the fiduciary duty claim against Geantasio fails (*accord Vital Spark Found., Inc. v North Am. Globex Fund, L.P.*, Sup Ct, NY County, Jan. 31, 2013 at 24, Coin, J., index No. 650415/12 [dismissing breach of fiduciary duty claim by other Fund investors against Geantasio for failure to state a claim for relief]).

In the amended complaint, it is alleged that section 91.250 of Nevada's Revised Statutes renders Geantasio personally liable when "acting for a corporation such as Northstar acting as a General Partner to a Partnership" (Am. Cmplt., ¶ 87). However, this statute explicitly provides that it "is not intended to create any rights or remedies upon which actions may be brought by

private persons against persons who violate the provisions of this chapter” (Nev Rev Stat § 91.010). Plaintiff also relies on Section 87.138, however that section merely provides that a corporate officer is not individually liable to the corporation or its stockholders or creditors unless the officer’s act or failure to act constituted a breach of his fiduciary duty (Nev Rev Stat § 87.138). Likewise, section 90.660 only applies to the sale and purchase of securities in the state of Nevada (Nev Rev Stat § 90.830 [1]).

Although the court finds that the first cause of action should be dismissed against Geantasio for failure to state a claim for relief, the court also addresses his statute of limitations defense since it raises issues that implicate the other claims in this lawsuit.

Geantasio argues that all of plaintiff’s claims are subject to the borrowing statute (CPLR 202) since plaintiff is a nonresident, that the breach of fiduciary duty claim is subject to a three-year statute of limitations under both the laws of New York and Delaware, and is time-barred.² Plaintiff does not disagree that the borrowing statute applies, but contends that the claim is timely under New York and Illinois law, which apply a six-year and five-year statute of limitations, respectively.

“When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations” (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999], citing *Antone v General Motors Corp., Buick Motor Div.*, 64 NY2d 20, 27–28

² Both Strategic and MadisonGrey argue that plaintiff’s claims must be timely under the laws of Delaware, Illinois and New York. Counsel for Kurcias Jaffe and Sofo appear to agree with plaintiff that its claims need only be timely under New York and Illinois law.

[1984]). When an injury suffered by a plaintiff is primarily economic in nature, the cause of action accrues “where the plaintiff resides and sustains the economic impact of the loss” (*Global Fin. Corp.*, 93 NY2d at 529).

There is no dispute that plaintiff is a Delaware limited liability company (Am. Cmplt., ¶ 1; Ramme Reply Affirm., Ex. A), and that it is not a resident of New York. While plaintiff claims to have “an office in the State of Illinois” (Am. Cmplt., ¶ 1), it is apparently not registered to do business in that state (Ramme Reply Affirm., ¶ 4). Indeed, most of the documentary evidence in the record identifies plaintiff’s place of business as Troy, Michigan (*see Larsen Affirm.*, Exs. C, D, E, & I), although the court notes that plaintiff also appears to have an office and at least one employee in Chicago, Illinois (Carpenter Aff., Ex. C).

The law in the First Department is unsettled on whether state of incorporation or principal place of business controls for purposes of the borrowing statute. Earlier case law had held that, for purposes of CPLR 202, “a corporation is a resident of the state which creates it” (*American Lumbermens Mut. Cas. Co. of Ill. v Cochrane*, 129 NYS2d 489, 491 [Sup Ct, NY County], *affd* 284 App Div 884 [1st Dept 1954], *affd* 309 NY 1017 [1956]). However, in 2010, the First Department ruled that a legal malpractice claim brought by a limited liability company accrued in California, which was the company’s principal place of business (*see Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580, 580-581 [1st Dept 2010]). In 2012, the court released *Oxbow Calcining USA Inc. v American Indus. Partners* (96 AD3d 646, 651 [1st Dept 2012]), ruling that a corporate plaintiff sustains the economic impact of a loss either in the state of its incorporation or its principal place of business. The First Department then ruled that since a factual issue existed regarding the principal place of business of the plaintiff, a ruling on

the defendant's motion to dismiss pursuant to CPLR 202 was premature and should have been denied without prejudice to renewal after further discovery. And, as recently as March of this year, the First Department ruled that a nonresident corporation sustained the economic impact of its lost investment in Connecticut, the state of its principal place of business, rather than in Delaware, the state of its incorporation (*Gordon Group Inv., LLC v Kugler*, 2012 NY Slip Op 33358[U], at *12-14 [Sup Ct, NY County], *mod* 115 AD3d 433 [1st Dept 2014]).

In this case, any ruling on the defendants' borrowing statute defense is premature since there is an issue of fact as to where the plaintiff's principal place of business is located. Accordingly, the court can only rule on defendants' motions to dismiss to the extent of applying New York's statute of limitations. To the extent that the defendants' motions to dismiss are premised on the argument that a shorter limitations period of another jurisdiction applies to the claims in the amended complaint pursuant to CPLR 202, and render the plaintiff's claims untimely, the motions are denied without prejudice to renewal after further discovery.

New York law does not provide any single limitations period for breach of fiduciary duty claims. Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies, but a lawsuit seeking only money damages has been viewed as an "injury to property," to which a three-year statute of limitations applies (*see* CPLR 214 [4]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003] [citations omitted]).

Nevertheless, "a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" unless the fraud claim is only "incidental" and is being used to litigate a stale claim (*Kaufman v Cohen*, 307 AD2d at 119 [citations omitted]; *see also*

Ingham v Thompson, 88 AD3d 607, 608 [1st Dept 2011]).

Plaintiff argues that all of its claims accrued, at the earliest, in late January of 2009 (Pls. Mem. of Law, at 12). Geantasio also argues that plaintiff's claims accrued by 2009, when it began making requests for redemption and information and such requests were ignored. Since this lawsuit was commenced within six years of January 2009, the first cause of action is timely under New York law.

Breach of Contract

The second cause of action is based on the claim that the PPM, the Subscription Agreement and the LPA constitute "a valid and binding contract between the parties" (Am. Cmplt., ¶ 99), which was breached by the "Defendants and/or their authorized agents and/or affiliates . . . by acting together in concert to conceal accurate information and to prevent, obstruct, or obviate redemption [sic] Plaintiff's investments in the Globex Fund" (*id.*, ¶ 103).

In both Nevada and New York, an essential element of a breach of contract claim is that the defendant was a party to the contract which was allegedly breached (*see US Bank N.A. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]; *accord Bernard v Rockhill Dev. Co.*, 734 P2d 1238, 1240 [Nev 1987]). The claim is dismissed as to Geantasio, since he is not a party to the PPM, the Subscription Agreement or the LPA (*accord, Vital Spark Found., Inc. v North Am. Globex Fund, L.P.*, *supra* at 23 [dismissing investor's breach of contract claim against Geantasio]).

Unjust Enrichment

The third cause of action alleges that "Defendants" have been enriched by plaintiff's investment of assets in the Fund without honoring its redemption requests (Am. Cmplt., ¶ 107).

Unjust enrichment occurs when a person has and retains benefits that, in equity and good conscience, belong to another (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *accord Leasepartners Corp. v Robert L. Brooks Trust Dated November 12, 1975*, 942 P2d 182, 187 [Nev 1997]). The claim is not sufficiently pled against Geantasio. The amended complaint does not allege how Geantasio was enriched at plaintiff's expense or that he retained any of the plaintiff's investment.

Negligence

The fourth cause of action is based on the allegations that the "Defendants had a duty to invest and trade Plaintiff's investment in the Globex Fund in a reasonable and prudent manner" (Am. Cmpl., ¶ 112), which duty was breached and plaintiff lost its investment (*id.*, ¶¶ 113-115). Even assuming that Geantasio, as the chief financial officer of Northstar, owed a duty of care to the limited partners of the Fund, the claim is time-barred. In New York, negligence actions must be brought within a three-year limitation period (CPLR 214 [4]; *Chase Scientific Research v NIA Group*, 96 NY2d 20, 28-31 [2001]).

Here, any claim of negligence against Genatasio in the investment of plaintiff's funds accrued in January of 2008 when plaintiff first invested in the Fund. Even accepting plaintiff's argument that its claims accrued in January 2009, the statute of limitations on a negligence claim expired in January 2012 (*accord Vital Spark Found., Inc. v North Am. Globex Fund, L.P.*, *supra* at 25-26 [dismissing investor's negligence claim against Geantasio as time-barred]).

Plaintiff argues that it was unable to discover the material facts underlying the Ponzi scheme until the CFTC and SEC released their orders, on February 3, 2011 and July 14, 2011, respectively, and that the statute of limitations should be tolled until the release of the SEC's July

14, 2011 order. Indeed, the final cause of action of the amended complaint, asserted against all of the defendants, alleges that they were all under a fiduciary duty to disclose the wrongful conduct and that they conspired to conceal the Ponzi scheme from plaintiff (Am. Cmplt., ¶¶ 177-180).

A defendant may be equitably estopped from asserting the statute of limitations as a defense if the plaintiff can, by clear and convincing evidence, establish that it failed to commence an action in a timely fashion due to fraud, deception or misrepresentation by the defendant (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]; *Bayuk v Gilbert*, 57 AD3d 227, 227-228 [1st Dept 2008]). However, the complaint must allege both the tort that is the basis of the action "and later acts of deception by which the defendants concealed their wrongdoing" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 [2012]). Thus, where the same alleged wrongdoing that underlies the plaintiff's equitable estoppel argument is also the basis of their tort claims, equitable estoppel will not lie (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]; *Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013]; *Knobel v Shaw*, 90 AD3d 493, 494 [1st Dept 2011]; *Kaufman v Cohen*, 307 AD2d at 122).

The amended complaint is completely devoid of any allegations of misconduct on the part of any of the defendants, with the possible exception of Peister, other than mere silence, that prevented the plaintiff from commencing this lawsuit, and thus any reliance on the doctrine of equitable estoppel is misplaced. In addition, by its own admission, plaintiff was aware, as early as 2009, that the Fund had experienced significant losses, that its redemption request would not be honored, that its money may have been improperly invested in illiquid securities, that the Fund was dissolving, that there might have been material inaccuracies in the 2003-2208 financial

statements, and that the SEC was conducting an investigation (Am. Cmplt., ¶¶ 52-66). Even assuming that the SEC or CFTC investigations created a wall of silence, as plaintiff alleges, those investigations were completed by July 14, 2011, and yet plaintiff waited another year and a half before commencing this action. Accordingly, the fourth cause of action is dismissed as against Geantasio, pursuant to CPLR 3211 (a) (5).

Fraud

The fifth cause of action alleges that the Globex Defendants, Geantasio, Kurcias Jaffe and Sofo are all guilty of intentionally defrauding plaintiff.

To plead a claim for fraud, a plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Although CPLR 3016 (b) also requires that “the circumstances constituting the wrong shall be stated in detail,” the statute requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]; *Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 987 NYS2d 299, 301-302 [1st Dept 2014]). CPLR 3016 (b)’s pleading requirement “should not be confused with unassailable proof of fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

Defendant Geantasio argues that a fraud claim has not been properly stated against him, because plaintiff merely groups him with the “Globex Defendants” and fails to allege that he made any false material misrepresentations, plaintiff’s justifiable reliance or proximate cause.

The court disagrees. The amended complaint describes a Ponzi scheme, whereby investors were induced to invest by false oral misrepresentations, false promotional materials such as the PPM and allegedly audited financials, and, after their initial investment, provided with false account statements and financial statements for the Fund which intentionally concealed substantial trading losses (*see* Am. Cmpl., ¶¶ 117-123).

Geantasio was allegedly the chief financial officer of Northstar, the Fund's general partner. Plaintiff alleges that Geantasio, a certified public accountant, allegedly "performed daily scans of the equity markets to ensure that Globex Fund's trades met Northstar/Globex Fund criteria," monitored the Fund's open equity positions, performed research, and reported directly to Peister (*id.*, ¶ 7). He, along with Peister, on information and belief, communicated regularly with investors, auditors, and other service providers regarding the fund (*id.*, ¶ 8). Plaintiff further alleges that, in the DDQ, Geantasio was described as one of the "senior managers" of Northstar (*id.*, ¶ 39), and that, in an email dated August 20, 2008, plaintiff's principal was encouraged to contact Geantasio with any questions about plaintiff's investment (Larsen Affirm., Ex. H thereto.) Plaintiff also relies on the PPM, which represented that Geantasio: had years of experience preparing and reviewing audited financial statements; was "responsible for maintaining accountability by performing random internal reconciliations, as well as assisting the outside independent auditors at the [Fund's] year-end;" was "responsible for supervising the research teams at Northstar and assisting in recommending the asset allocations for the [Fund]"; and had "developed and implemented the system of internal accounting controls . . . designed to provide reasonable assurance that all assets are safeguarded . . ." (Am. Cmpl., ¶¶ 30-33).

Accepting all of these allegations as true, plaintiff has raised a reasonable inference that,

Geantasio, as the chief financial officer of Northstar, and a certified public accountant in charge of “maintaining accountability” and “internal accounting controls,” could not have been unaware of the Ponzi scheme being perpetrated at the Fund or at least acted with reckless disregard for the true state of affairs (*accord Touchtone Group, LLC v Rink*, 913 F Supp 2d 1063, 1080 [D Col 2012]).

Kurcias Jaffe and Sofo also argue that the fraud claim against them is legally deficient, because the amended complaint fails to allege, with the requisite particularity, the details concerning their fraud – more specifically, their knowledge that the statements contained in their audit opinions were incorrect, their knowledge of the Ponzi scheme and their intention to deceive Fund investors.

As the First Department explained,

“In a fraud case against an auditor, a showing of gross negligence or recklessness will permit the trier of fact to draw the inference that a fraud was in fact perpetrated. However, the showing need not be of an evidentiary nature; CPLR 3016 (b) requires only that a claim of fraud be pleaded in sufficient detail to give adequate notice, particularly in situations where it may be impossible to state in detail the circumstances constituting the fraud, inasmuch as the surrounding circumstances are sometimes peculiarly within the knowledge of the party against whom the claim is being asserted”

(*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 302-303 [1st Dept 2005] [citations omitted]; *see also Foothill Capital Corp. v Grant Thornton, L.L.P.*, 276 AD2d 437 [1st Dept 2000] [allegations that an accounting firm failed to independently verify information provided to it by its client, even though it had notice of particular circumstances raising doubts as to the veracity of the information, stated a cause of action for gross negligence and recklessness sufficient to give rise to an inference of fraud]). However, an allegation of ordinary negligence is not enough (*see Rotterdam Ventures v Ernst & Young*, 300 AD2d 963, 965 [3d Dept 2002]).

There is no doubt that the fraud claim against Kurcias Jaffe and Sofo is based on the alleged “findings” of the SEC in its administrative proceeding against Sofo. However, the SEC order was the result of an offer of settlement by Sofo which was accepted by the SEC (*see* Bruno Aff., Ex. B: SEC Order at 1). The SEC order specifically states:

“Solely for the purpose of these proceedings and any other proceedings by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him . . . , Respondent [Sofo] consents to the entry of this Order”

(*id.*) Counsel for Kurcias Jaffe and Sofo argues that the SEC order is “inadmissible” and that the allegations of the amended complaint upon which it is based cannot be considered by the court in determining whether plaintiff has stated a claim against his clients.

There is no doubt that the SEC order has no evidentiary value and no collateral estoppel effect in this litigation (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 309-310 [1st Dept 2006]; *see also Lipsky v Commonwealth United Corp.*, 551 F2d 887, 893–94 [2d Cir 1976] [consent judgment between SEC and a private corporation is not the result of an actual adjudication of any of the issues, and thus, “can not be used as evidence in subsequent litigation between that corporation and another party”]). In *Lipsky*, the Second Circuit went further, ruling that “neither [an SEC] complaint nor references to [an SEC] complaint which results in a consent judgment may properly be cited in the pleadings” (551 F2d at 893). And in *In re Platinum & Palladium Commodities Litig.* (828 F Supp 2d 588, 594 [SD NY 2011]), the court struck all references to a CFTC order, and the findings contained therein, because the order had been entered pursuant to an offer of settlement by the respondent. The court then dismissed the complaint for failure to state a cause of action, but with leave to plead.

Without the allegations of the amended complaint regarding the SEC order (*see Am. Cmpl.*, ¶¶ 77-79, 121, 124, 134, 137, 172), plaintiff merely pleads a case of ordinary negligence on the part of Kurcias Jaffe and Sofo. Therefore, the fraud claim is dismissed as against Kurcias Jaffe and Sofo, with leave to replead after removing all references to the SEC Order although it is appropriate to plead “independently sourced and appropriately supported facts that track (‘piggyback on’) [the] inadmissible document’s factual allegations” (*Marvin H. Maurras Revocable Trust v Bronfman*, 2013 WL 5348357, *16-17, 2013 US Dist LEXIS 136770, *51 [ND Ill, Sept. 24, 2013, Nos. 12-CV-3395 & 12-CV-6019 (GF)]).

One final argument raised by Sofo is that since the contractual obligations to provide audit services for the Fund was entered into by Kurcias Jaffe, not Sofo personally, he is not a proper defendant in this lawsuit. Sofo relies on *Savoy Record Co. v Cardinal Export Corp.* (15 NY2d 1, 4 [1964]). While such an argument might support dismissal of a contract claim against Sofo, it does not warrant dismissal of a fraud claim. It is well settled that a corporate representative may be personally liable for committing a fraud on the company’s behalf (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]; *see also Sterling Natl. Bank v Ernst & Young LLP*, 62 AD3d 584 [1st Dept 2009] [accounting firm and audit partner sued for fraud resulting from the issuance of unqualified audit reports of a company engaged in a Ponzi scheme]).

Accordingly, Geantasio’s motion to dismiss the fifth cause of action, pursuant to CPLR 3211 (a) (7) and 3016 (b), is denied. The claim is dismissed against Kurcias and Sofo, with leave to replead.

Negligent Misrepresentation, Negligence and Malpractice

The sixth cause of action, asserted against the Globex Defendants, Geantasio, Kurcias Jaffe and Sofo, repeats the same allegations as the plaintiff's fraud claim but is based on a theory of negligent misrepresentation (Am. Cmplt., ¶¶ 130-141). The ninth and tenth causes of action purport to assert negligence and malpractice claims against Kurcias Jaffe, Sofo, MadisonGrey and Strategic. Each of the defendants moves for dismissal of these claims based on the expiration of the statute of limitations.

A claim for negligent misrepresentation is subject to a three-year statute of limitations (*United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 410 [1st Dept 2014]). Plaintiff alleges that it received the PPM, the DDQ and other investment-related documents in 2007 and that it invested in the Fund in January 2008 in reliance on these documents, Northstar, Peister, Geantasio and the Fund's auditors and outside administrators (*see* Am. Cmplt., ¶¶ 45-47). Thus, any claim based on negligent misrepresentation was time-barred as of January 2011. The sixth cause of action is dismissed as against Geantasio, Kurcias Jaffe and Sofo.

Negligence is governed by a three-year statute of limitations (CPLR 214 [4]). "A cause of action alleging professional malpractice, i.e., that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession, is governed by the three year Statute of Limitations applicable to negligence actions" (*Fred Smith Plumbing & Heating Co. v Christensen*, 233 AD2d 207, 208 [1st Dept 1996]). A claim alleging accountant malpractice accrues when the malpractice is committed, i.e., upon the receipt of the accountant's work product (*Williamson v PricewaterhouseCoopers, LLP*, 9 NY3d 1, 7-8 [2007]).

On February 13, 2009, Kurcias Jaffe sent a letter to the Fund, its partners and investors stating that it had resigned as the auditor of the Fund for the year ending December 31, 2007

"because of our inability to complete the audit based upon the information provided by the Company" (Knopf Affirm., Ex. 3). The statute of limitations for negligence and/or malpractice claims by Kurcias Jaffe and Sofo expired on February 14, 2012. MadisonGrey was replaced as the outside auditor in June 2008 and Strategic resigned on January 13, 2009 (Am. Cmplt., ¶ 85; Carpenter Aff., Ex. J). Accordingly, the ninth and tenth causes of action are dismissed against Kurcias Jaffe, Sofo, MadisonGrey and Strategic, pursuant to CPLR 3211 (a) (5).

Aiding and Abetting the Globex Defendants' Breach of Fiduciary Duty

In the seventh cause of action, plaintiff sues Kurcias Jaffe, Sofo, MadisonGrey, and Strategic for aiding and abetting the Globex Defendants' breaches of fiduciary duty.

A claim for aiding and abetting a breach of fiduciary duty claim has three elements: (1) a breach by a fiduciary of obligations to another; (2) knowing inducement or participation in the breach; and (3) resulting damages (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]; *Kaufman v Cohen*, 307 AD2d at 125). Courts refer to the knowing inducement or participation element as "substantial assistance" (*Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Kaufman v Cohen*, 307 AD2d at 126). The defendant must have had actual, not constructive, knowledge of the breach of fiduciary duty, and conclusory allegations that the aider or abettor knew or should have known about the breach are insufficient (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006]).

Again, without reliance on the SEC order, the amended complaint does not state a claim for aiding and abetting a breach of fiduciary duty against Kurcias Jaffe and Sofo. There are no

allegations concerning how they affirmatively assisted, or at least knowingly helped conceal, the underlying Ponzi scheme. The seventh cause of action is dismissed against Kurcias Jaffe and Sofo with leave to replead.

The aiding and abetting a breach of fiduciary duty claim is also deficient as against Strategic, which replaced MadisonGrey as the Fund's outside administrator in July 2008 (Am. Cmplt., ¶ 49). The amended complaint is devoid of any allegations as to how Strategic actively participated in or helped conceal the Ponzi scheme. According to evidence plaintiff itself submits, Strategic performed no audit functions and merely prepared and sent to investors three or four monthly financial statements at the end of 2008, which, as it advised the plaintiff and other investors in the accompanying cover letters, were "based on statements and information provided solely by the Fund's Management" (*see* Larsen Affirm., Ex. C thereto). The cover letters for the October and November 2008 account statements contained the additional notification to plaintiff that Strategic "has not verified portfolio account balances nor pricing of securities" (Carpenter Aff., Ex. C). Plaintiff has admitted that, from its first investment with the Fund in January 2008, it was provided with only "informal unaudited, unverified monthly financial reports regarding the status of Plaintiff's investment in the Globex Fund" (Am. Cmplt., ¶ 51).

According to the amended complaint itself, it was Strategic that first suspected fraud and reported its suspicions to both the FBI and the SEC in November and December 2008 (Am. Cmplt., ¶¶ 81-82). Strategic became suspicious after Northstar and Peister refused to provide an acceptable audit for 2007 and would not verify funds held by a related entity, the North American Globex Group, Inc., which was holding approximately 95% of the Fund's assets (Carpenter Aff.,

Exs. E and F). On January 13, 2009, Strategic resigned as the Fund's outside administrator (Am. Cmpl., ¶ 85; Carpenter Aff., Ex. J). Plaintiff's sole basis for suing Strategic is for not sharing its suspicions of hedge fund fraud with plaintiff, allegedly at a time when plaintiff could have tried to recoup its investment. "[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v Cohen*, 207 AD2d at 126). Strategic owed no fiduciary duties to the individual investors of the Fund. Even if Strategic had concealed its suspicions of hedge fund fraud at the Fund from plaintiff in January of 2009, there are no allegations to suggest that this caused plaintiff any damage. Plaintiff's own suspicions caused it to seek an unsuccessful redemption of its investment on February 26, 2009.

MadisonGrey also seeks dismissal of the seventh cause of action for failure to state a claim for relief. The amended complaint alleges that MadisonGrey was "retained by Northstar to audit the Globex Fund and to provide audited financial reports directly to Northstar, the Globex Fund investors and Plaintiffs" and had been the Fund's administrator since 2006 (Am. Cmpl., ¶¶ 15, 40). MadisonGrey allegedly provided monthly statements to plaintiff from January 2008 through June 2008 showing a 1.85% year-to-date appreciation (*id.*, ¶ 48). The amended complaint alleges that MadisonGrey "knew or should have known that the Globex Defendants were supplying them with materially false information," which MadisonGrey then provided directly to the plaintiffs (*id.*, ¶ 145).

Counsel for MadisonGrey claims that his client performed no audit functions and was the outside administrator for only six months from January to June 2008 (*see Hiler Reply Affirm.*, ¶ 2). It is well settled that unsupported statements from counsel are not admissible evidence.

Nevertheless, MadisonGrey's monthly statements to plaintiff have been offered as evidence by the plaintiff (*see* Larsen Affirm., Ex. E), and, similar to Strategic's monthly statements, the MadisonGrey statements explicitly state the following:

“This report represents un-audited financial information based upon accounting policies contained in the Fund's operating documents as interpreted by Fund management. Certain estimates and other information, including, but not limited to valuation of investments, used by MadisonGrey in preparation of this report may have been provided by Fund management without independent verification.”

(*id.*; *see also* Am. Cmplt., ¶ 51 [“From plaintiff's first investment in the Globex Fund in January 2008 through December 2008, Plaintiff's were provided with unaudited, unverified monthly financial reports . . .”]). Thus, plaintiff's claim against MadisonGrey is premised only on the theory that they passed on to the investors incorrect information about the Fund's assets and value, and that they should have known of or suspected a Ponzi scheme. This is insufficient to support a claim for aiding and abetting a breach of fiduciary duty.

All moving defendants seek dismissal of the seventh cause of action based on the expirations of the statute of limitations. In New York, aiding and abetting claims are subject to the same statute of limitations analysis as the underlying tort (*New York State Workers' Compensation Bd. v SGRisk, LLC*, 116 AD3d 1148, 1154 [3d Dept 2014]; *Ingham v Thompson*, 88 AD3d at 608; *Rostuca Holdings v Polo*, 231 AD2d 402, 403 [1st Dept 1996]). Accordingly, the seventh cause of action is governed by a six-year statute of limitations, and is not untimely.

Aiding and Abetting Fraud

MadisonGrey and Strategic are also being sued for aiding and abetting the fraud allegedly perpetrated by the Globex Defendants, Geantasio, Kurcias Jaffe and Sofo (Am. Cmplt., ¶¶ 151-158).

“A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance” (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]; see also *High Tides, LLC v DeMichele*, 88 AD3d 954, 960 [2d Dept 2011]). Aiding and abetting fraud “is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud” combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud (*National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]; see also *CDR Créances S.A.S. v First Hotels & Resorts Invs., Inc.*, 101 AD3d 485, 486–487 [1st Dept 2012]). “Aiding and abetting fraud must be pleaded with the specificity sufficient to satisfy CPLR 3016(b)” (*High Tides, LLC v DeMichele*, 88 AD3d at 960).

For the reasons stated above, plaintiff fails to allege facts that would support a finding that either MadisonGrey or Strategic, as the Fund’s outside administrators, had actual knowledge of the Ponzi scheme and provided substantial assistance to the Globex Defendants.

CONCLUSION AND ORDER

In summary, the court finds that the only viable claim against Geantasio is the fraud claim. All claims against Kurcias Jaffe and Sofo are dismissed, except plaintiff is granted leave to replead the fraud and aiding and abetting a breach of fiduciary duty claims against these defendants. All claims against MadisonGrey and Strategic are dismissed.

For the foregoing reasons, it is

ORDERED that the defendants’ motions to dismiss the amended complaint are granted to the following extent:

-- the first, second, third, and fourth causes of action are dismissed against defendant John Geantasio;

-- the fifth cause of action is dismissed against defendants Kurcias Jaffe & Company LLP and Joseph F. Sofo, CPA, with leave to replead removing all references to the SEC order;

-- the sixth cause of action is dismissed against defendants John Geantasio, Kurcias Jaffe & Company LLP, Joseph F. Sofo, CPA, Equinox Alternative Investment Services (USA), Inc. f/k/a MadisonGrey, LLC and Strategic Asset Management, LLC;

--the seventh cause of action is dismissed against defendants Kurcias Jaffe & Company LLP and Joseph F. Sofo, CPA, with leave to replead removing all references to the SEC order;

-- the seventh and eighth causes of action are dismissed against defendants Equinox Alternative Investment Services (USA), Inc. f/k/a MadisonGrey, LLC and Strategic Asset Management, LLC;

-- the ninth and tenth causes of action are dismissed against defendants Kurcias Jaffe, Joseph F. Sofo, CPA, Equinox Alternative Investment Services (USA), Inc. f/k/a MadisonGrey, LLC and Strategic Asset Management, LLC;

--the eleventh cause of action is dismissed against all moving defendants;

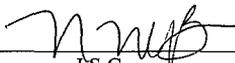
-- and the motions are denied in all other respects; and it is further

ORDERED that plaintiff is granted leave to serve a second amended complaint so as to replead the fifth and seventh causes of action within thirty (30) days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that the remaining defendants, who are not in default, shall serve and file an answer to the second amended complaint within twenty (30) days of service of said pleading.

Dated: August 29th 2014

ENTER:


 HON. NANCY M. BANNON
 J.S.C.