

<b>McBride v KPMG Intl.</b>
2014 NY Slip Op 34013(U)
July 25, 2014
Supreme Court, New York County
Docket Number: 650632/09
Judge: Richard B. Lowe III
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE III  
Justice

PART 56

McBride

-v-

KPM6

INDEX NO. 050632/09  
MOTION DATE 8/14/12  
MOTION SEQ. NO. 000020

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/25/14

HON. RICHARD B. LOWE III, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
DONNA M. McBRIDE, individually and derivatively on  
behalf of Beacon Associates LLC II,

Plaintiff,

Index No. 650632/09

-against-

KPMG INTERNATIONAL; KPMG UK;  
JP MORGAN CHASE & CO.; THE BANK OF NEW YORK  
MELLON; BEACON ASSOCIATES MANAGEMENT  
CORP.; IVY ASSET MANAGEMENT CORP.;  
JOEL DANZIGER; HARRIS MARKHOFF;  
FRIEDBERG, SMITH & CO. P.C.; PAUL KONIGSBERG;  
ANNETTE BONGIORNO; FRANK DIPASCALI;  
ANDREW MADOFF; MARK MADOFF; PETER MADOFF;  
and JOHN DOES 1 through 30,

Defendants,

BEACON ASSOCIATES LLC II,

Nominal Defendant.

-----X  
JAY WEXLER, individually and derivatively on behalf of  
Rye Select Broad Market Prime Fund, L.P.,

Plaintiff,

Index No. 101615/09

-against-

KPMG LLP; KPMG UK; KPMG INTERNATIONAL;  
JP MORGAN CHASE & CO.; THE BANK OF NEW YORK  
MELLON; TREMONT PARTNERS, INC.; TREMONT  
GROUP HOLDINGS, INC.; TREMONT CAPITAL  
MANAGEMENT, INC.; OPPENHEIMER ACQUISITION  
CORPORATION; MASSACHUSETTS MUTUAL LIFE  
INSURANCE; SANDRA L. MANZKE; ROBERT I.  
SCHULMAN; PAUL KONIGSBERG; ANNETTE  
BONGIORNO; FRANK DIPASCALI; ANDREW MADOFF;  
MARK MADOFF; PETER MADOFF; and JOHN DOES  
1 through 30,

Defendants,

Rye Select Broad Market Prime Fund L.P.,

Nominal Defendant.

-----X

DANIEL RYAN; and THERESA RYAN,

Plaintiffs,

Index No. 101616/09

-against-

FRIEHLING & HOROWITZ, P.C.; KPMG UK;  
KPMG INTERNATIONAL; JP MORGAN CHASE & CO.;  
THE BANK OF NEW YORK MELLON;  
PAUL KONIGSBERG; FRANK AVELLINO;  
ANNETTE BONGIORNO; FRANK DIPASCALI;  
ANDREW MADOFF; MARK MADOFF; PETER MADOFF;  
and JOHN DOES 1 through 30,

Defendants.

-----X

MATTHEW GREENBERG, WALTER GREENBERG,  
DORIS GREENBERG, and THE ESTATE OF LEON  
GREENBERG,

Plaintiffs,

Index No. 650633/09

-against-

FRIEHLING & HOROWITZ, P.C.; KPMG UK;  
KPMG INTERNATIONAL; JP MORGAN CHASE & CO.;  
THE BANK OF NEW YORK MELLON;  
PAUL KONIGSBERG; PAUL KONIGSBERG;  
ANNETTE BONGIORNO; FRANK DIPASCALI;  
ANDREW MADOFF; MARK MADOFF; PETER MADOFF;  
and JOHN DOES 1 through 30,

Defendants.

-----X

RICHARD B. LOWE, III, J:

These actions involve the notorious Ponzi scheme of Bernard Madoff (Madoff) through his investment companies, Bernard L. Madoff Investment Securities LLC (BMIS) and Madoff Securities International, Ltd. (MSIL).

The following motions are consolidated for disposition: motion sequence numbers 007 (restored as 026), 010 (restored as 019), and 011 (restored as 020) under Index Number 650632/09 (McBride Action); motion sequence numbers 024 (restored as 041), 026, and 029 under Index Number 101615/09 (Wexler Action); motion sequence number 001 under Index Number 101616/09 (Ryan Action); and motion sequence number 003 under Index Number 650633/09 (Greenberg Action).<sup>1</sup> These motions include the motions to dismiss of the following defendants: KPMG U.K. and KPMG International; Frank Avellino (Avellino); and Paul Konigsberg (Konigsberg). These moving defendants seek dismissal of the first amended complaints in the Wexler and Ryan Actions, and the complaints in the McBride and Greenberg Actions (together, Complaints).

The four Complaints in these actions total 868 pages, and are comprised of 1,720 separately numbered paragraphs and 36 causes of action. However, there is significant overlap in the factual allegations. In many instances the allegations of the Complaints are carbon copies of one another, differing only in the names of certain plaintiffs and defendants. As such, the court does not restate the background facts of these actions, but rather, refers the parties to this court's prior decision in *Wexler v KPMG LLP et al.* (Sup Ct, NY County, April 1, 2014, Lowe, J., index

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<sup>1</sup> Several of these motions are merely duplicates of earlier-filed motions that were marked off the calendar, as it appears that new motion sequence numbers were assigned when the motions were restored to the calendar pursuant to this court's August 15, 2012 order. McBride Action, document number 164.

No. 101615/09), and several other judicial opinions that have set forth the background factual allegations in detail. *See e.g. In re Tremont Sec. Law, State Law, & Ins. Litig.*, 703 F Supp 2d 362 (SD NY 2010); 2013 WL 4730263, 2013 US Dist LEXIS 125550 (SD NY, Sept 3, 2013); 2013 WL 5393885, 2013 US Dist LEXIS 138616 (SD NY Sept 26, 2013); and 542 Fed Appx 43 (2d Cir 2013); *see also Securities Inv. Protection Corp. v Bernard L. Madoff Inv. Sec. LLC*, 443 BR 295 (SD NY 2011), *affd* 512 Fed Appx 18 (2d Cir 2013); *Securities Inv. Protection Corp. v Bernard L. Madoff Inv. Sec. LLC*, 424 BR 122 (SD NY 2010). To the extent that additional facts are relevant to the resolution of the instant motions, they are stated in the following legal analysis.

I. KPMG U.K. and KPMG International

KPMG U.K. moves to dismiss the Complaints in the McBride Action (motion sequence numbers 011 and 020) and the consolidated Wexler Action (motion sequence number 026).

KPMG International moves to dismiss the Complaints in the McBride Action (motion sequence numbers 010 and 019) and the consolidated Wexler Action (motion sequence number 029).

The Complaints in these actions all name KPMG U.K. and KPMG International as defendants.<sup>2</sup> Both KPMG U.K. and KPMG International argue that the Complaints should be dismissed against them for failing to satisfy CPLR 3013, which requires that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material

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<sup>2</sup> The Wexler Action also named KPMG LLP as a defendant, referring to this entity as “KPMG U.S.” (Wexler Complaint, ¶ 56), but the Wexler Action was voluntarily discontinued against KPMG LLP in January 2010. Wexler Action, document number 146. The court, therefore, addresses the motions to dismiss of KPMG U.K. and KPMG International only.

elements of each cause of action or defense.”

The allegations against KPMG U.K. and KPMG International in these four actions are virtually identical. McBride Complaint, ¶¶ 44-46, 175-192, 205-216, 346, 351, 373, 378, 411, 418, 430-435, 437-439; Wexler Complaint, ¶¶ 56-60, 227-284, 416, 422, 445, 451, 467-470, 489, 495, 503-505, 507-512, 514-516; Ryan Complaint, ¶¶ 39-43, 157-173, 175, 177-205, 325, 331, 350, 357, 378-383, 385-387; Greenberg Complaint, ¶¶ 41-45, 159-208, 318, 324, 342, 348, 369-374, 376-378. The Complaints group together KPMG International, KPMG U.K., and KPMG U.S., and at times all other defendants, without explaining how each entity participated in the purported wrongful conduct. Wexler Complaint, ¶¶ 57-58, 73, 227, 411, 416, 419, 427, 445, 451, 460, 489, 495, 507-512, 514-516; Ryan Complaint, ¶¶ 40-41, 56, 157, 325, 331, 350, 357, 378-383, 385-387; Greenberg Complaint, ¶¶ 42-43, 57, 159, 318, 324, 342, 348, 369-374, 376-378; McBride Complaint, ¶¶ 44-45, 59, 320, 346, 351, 356-357, 373, 378, 411, 418, 430-435, 437-439. In addition, the Wexler Complaint refers to “KPMG” as the wrongdoer, without specifying which entity or entities are included in this term. Wexler Complaint, ¶¶ 56, 58-59, 232, 236-237, 240, 245-258, 261, 266, 271-284, 467-470, 503-505. For this reason alone, the Complaints are dismissed against KPMG U.K. and KPMG International. CPLR 3013; *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 (1<sup>st</sup> Dept 1981) (dismissing complaint where the claims were “pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant”).

The Complaints are dismissed against KPMG U.K. and KPMG International for the following independent reasons.

A. KPMG U.K.

KPMG U.K. argues that the Complaints should be dismissed for lack of personal jurisdiction, under CPLR 301 and 302, and for failure to state a cause of action.

1. Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction, the ultimate burden rests with the plaintiff, as the party asserting jurisdiction, to prove that personal jurisdiction exists over each defendant. *Copp v Ramirez*, 62 AD3d 23, 28-29 (1<sup>st</sup> Dept 2009). In opposing the motion to dismiss, the plaintiff is not required to make a prima facie showing of jurisdiction, but rather, need only make a “sufficient start” establishing that personal jurisdiction may exist and that the basis for personal jurisdiction is not frivolous. *Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 (2d Dept 2009), citing *Peterson v Spartan Indus.*, 33 NY2d 463, 467 (1974).

a. CPLR 301 – General Jurisdiction

“Under CPLR 301 the authority of the New York courts [to exercise jurisdiction over a foreign corporation] is based solely upon the fact that the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction.” *Lauffer v Ostrow*, 55 NY2d 305, 309-310 (1982) (internal quotation marks and citations omitted). “Whether a corporation itself may be deemed to be present in the State with permanence and continuity is evaluated using a number of factors . . . including conducting business affairs in New York, and/or maintaining an office, bank accounts, property or employees in the state.” *Steinmetz v Energy Automation Sys., Inc.*, 43 Misc 3d 1210 (A), \*5, 2014 NY Slip Op 50566 (U) (Sup Ct, Kings County 2014), quoting *Kahn v Leo Schachter Diamonds, LLC*, 2013 NY Slip Op 32280 (U), \*9 (Sup Ct, NY County 2013), citing *Landoil*

*Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 (1990) and *Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 537 (1967).

Here, the Complaints contain only the conclusory allegation that “KPMG U.K. does business in New York, New York” (Wexler Complaint, ¶ 57; Ryan Complaint, ¶ 40; Greenberg Complaint, ¶ 42; McBride Complaint, ¶ 44), which is insufficient to assert jurisdiction under CPLR 301. *Miller v Weyerhaeuser Co.*, 179 Misc 2d 471, 476 (Sup Ct, NY County 1999) (conclusory allegations of “doing business” are insufficient to assert jurisdiction under either CPLR 301 or 302 [a] [1]). The remainder of plaintiffs’ allegations support the conclusion that KPMG U.K. is a United Kingdom entity that was not doing business in New York. For instance, plaintiffs allege that “KPMG U.K. . . . is a United Kingdom limited liability partnership, which together with KPMG Audit Plc (collectively ‘KPMG U.K.’) conducts statutory audits and provides other services for clients with offices in the United Kingdom.” Wexler Complaint, ¶ 57; Ryan Complaint, ¶ 40; Greenberg Complaint, ¶ 42; McBride Complaint, ¶ 44. According to plaintiffs, “each of the KPMG member firms are separate legal entities.” Wexler Complaint, ¶ 59; Ryan Complaint, ¶ 42; Greenberg Complaint, ¶ 44; McBride Complaint, ¶ 46. Significantly, the Complaints further allege that “KPMG U.K. audited MSIL, Madoff’s London operation” (Wexler Complaint, ¶¶ 57, 237-238, 422; Ryan Complaint, ¶¶ 40, 331; Greenberg Complaint, ¶¶ 42, 324; McBride Complaint, ¶¶ 44, 378), without alleging that KPMG U.K. had any involvement in New York. In fact, plaintiffs expressly allege that the feeder funds of Madoff’s fraud were audited by New York-based KPMG U.S., not KPMG U.K. Wexler Complaint, ¶¶ 56, 232-234, 244. In short, none of the allegations contained in the Complaints support the conclusion that KPMG U.K. does business in New York. Nor do plaintiffs’ allegations

constitute a “sufficient start” that would warrant jurisdictional discovery. *Shore Pharm. Providers, Inc.*, 65 AD3d at 624.

While it is well settled that an attorney affirmation that is not based upon personal knowledge has no probative value (*Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 606 [1<sup>st</sup> Dept 2010]), here, KPMG U.K. submits the affirmation of its attorney, George Salter (Salter), the contents of which Salter “affirms under penalty of perjury” and claims to be “based on [his] personal knowledge.” Salter affirmation at 1. Salter represents that KPMG U.K. “has offices throughout the United Kingdom, and nowhere else,” and that “KPMG UK has never had an office in the United States and has no agent for service of process in the United States.” *Id.*, ¶ 3. Salter states that “KPMG UK has no employees, offices, property, or bank accounts in New York,” and is “not registered to do business in New York.” *Id.*, ¶ 4. According to Salter, all of KPMG U.K.’s partners “reside in the United Kingdom,” and “[t]he vast majority of [its] revenues are earned in the United Kingdom for services performed in the United Kingdom.” *Id.*, ¶¶ 5-6. Salter further states that “KPMG UK is not an agent of KPMG LLP (US) and KPMG LLP (US) is not an agent of KPMG UK.” *Id.*, ¶ 9. Salter claims that KPMG Audit Plc is a wholly owned subsidiary of KPMG U.K. in the United Kingdom, and that “KPMG Audit Plc was engaged by Madoff Securities International, Ltd. (‘MSIL’) to be its statutory auditor.” *Id.*, ¶ 10. Salter maintains that “the results of KPMG Audit Plc’s audits were reported only to MSIL and the United Kingdom regulatory authorities,” and that “[n]o KPMG UK partner or employee associated with the MSIL audits traveled to the United States on any matters pertaining to MSIL.” *Id.*, ¶¶ 11-12. Salter’s sworn representations on behalf of KPMG U.K., based upon his personal knowledge, are consistent with the allegations of the Complaints, which fail to allege

any basis for exercising jurisdiction over KPMG U.K.

In opposition, plaintiffs rely primarily upon *Matter of First Am. Corp. v Price Waterhouse LLP* (988 F Supp 353 [SD NY 1997], *affd* 154 F3d 16 [2d Cir 1998]) and *Rocker Mgt. L.L.C. v Lernout & Hauspie Speech Prods.* (2005 WL 3658006, 2005 US Dist LEXIS 16857 [D NJ 2005]). In *First Am. Corp.*, the court exercised jurisdiction over Price Waterhouse-United Kingdom (PW-UK) “based on its activities in the United States conducted through PW-US,” a United States accounting firm with its principal office in New York. 988 F Supp at 363.

In support of this holding, the court reasoned as follows:

“In the instant case, as set forth above, PW-UK conducted the U.S. portion of its worldwide audit of BCCI through PW-US. PW-UK issued detailed instructions on how the audit should be conducted, identified specific areas of inquiry and dictated the form and manner in which PW-US would report its findings to London. One of the PW-US partners described the U.S. audits as ‘fill in the blanks exercise’ directed by PW-UK. Had PW-US not been present in New York, PW-UK would undoubtedly have had to send its employees here to perform these activities.

“As set forth above, the domestic agent need not be an official agent or even legally related to the foreign corporation to establish an agency function sufficient to support jurisdiction. However, inquiry into the relationship between the two companies may support the inference of that agency function. Although PW-UK and PW-US have denied any partnership, and asserted that they exist as separate firms bearing the same name, their coordinated activities indicate an affiliation closer than that of unrelated corporations.”

*Id.* (internal citations omitted).

In *Rocker Mgt. L.L.C.*, the court held that KPMG U.K. was subject to both general and

specific jurisdiction.<sup>3</sup> The court’s imposition of general jurisdiction was based, at least in part, upon “KPMG UK’s conduct of business in the United States on its own.” 2005 WL 3658006 at \*7, 2005 US Dist LEXIS 16857 at \*22. Specifically, in exercising jurisdiction, the court reasoned that:

“KPMG UK advertises its close relationship with U.S. offices so as to provide client services wherever and whenever needed and hosts ‘a team of 20 staff in the U.S.A., ... working alongside company executives.’ KPMG UK also sends its own employees to the United States as part of KPMG’s international rotation and global programs. KPMG UK also hosts U.S. GAAP briefing meetings ‘[t]ailored primarily for the overseas operations of *US companies*.’ As for business holdings, KPMG UK holds 60.4% of the shares of the United States-based KPMG Corporate Finance LLC, and has substantial equity interests in other U.S. based corporations.”

2005 WL 3658006 at \*8, 2005 US Dist LEXIS 16857 at \*26 (internal citations omitted). The court in *Rocker Mgt. L.L.C.* also relied upon the reasoning of *First Am. Corp.*, discussed above. 2005 WL 3658006 at \*8, 2005 US Dist LEXIS 16857 at \*25.

Thus, both *First Am. Corp.* and *Rocker Mgt. L.L.C.* involved specific allegations of the foreign accounting firm conducting business in the United States, and, in *First Am. Corp.*, allegations of the foreign accounting firm servicing clients through its New York-based affiliate. The Complaints here are devoid of any such allegations. This is not an instance where KPMG U.K. and KPMG U.S. are alleged to have “coordinated activities,” or where KPMG U.K. is alleged to have performed any services through KPMG U.S. *First Am. Corp.*, 988 F Supp at 363.

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<sup>3</sup> In referring to *Rocker Mgt. L.L.C.*, plaintiffs cite to “2005 U.S. Dist. LEXIS 16776,” a decision addressing KPMG U.K.’s motion to dismiss an amended complaint based upon statute of limitations and failure to state a cause of action. In that decision, the court dismissed the claims asserted against KPMG U.S. For purposes of the instant legal analysis, the court presumes that plaintiffs intended to cite to *Rocker Mgt. L.L.C.*, 2005 WL 3658006, 2005 US Dist LEXIS 16857.

None of plaintiffs' allegations support the conclusion that, without KPMG U.S. or KPMG International, KPMG U.K. would have had to open a New York office or give up MSIL as a client. Rather, according to plaintiffs, KPMG U.K. is a United Kingdom firm that was providing services to MSIL, a London-based company. Plaintiffs simply fail to allege that any KPMG entity acted as agent for KPMG U.K. in New York. Moreover, while the court in *Rocker Mgt., L.L.C.* concluded that "KPMG UK [was] doing business in the United States" sufficient to exercise general jurisdiction in a New Jersey federal court (2005 WL 3658006 at \*8, 2005 US Dist LEXIS 16857 at \*26-27), it made no determination that KPMG U.K. was doing business in New York sufficient to impose general jurisdiction under CPLR 301. *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 (1990) (CPLR 301 requires a finding that the foreign corporation engaged in "a continuous and systematic course of 'doing business' [in New York]"). Therefore, *First Am. Corp.* and *Rocker Mgt. L.L.C.* are distinguishable on their facts.

The court notes that plaintiffs also cite to *Gelfand v Tanner Motor Tours, Ltd.* (385 F2d 116 [2d Cir 1967]), *Sleigh Corp. v Bureau Van Dijk* (1996 WL 219638, 1996 US Dist LEXIS 5746 [SD NY 1996]), and *Tuxedo Network, Inc. v Hughs Communications Carrier Servs.* (753 F Supp 514 [SD NY 1990]). All of these cases involved the defendant's New York representative providing services in New York on the defendant's behalf. Therefore, these cases are distinguishable on their facts. Significantly, none of the cases cited by plaintiffs involved a foreign entity servicing a foreign client in a foreign office. Compare *Howard v Klynveld Peat Marwick Goerdeler*, 977 F Supp 654, 662, 663 (SD NY 1997) (the defendant's "public relations materials suggest[ed] that [defendant was] a global firm or an international network of member firms," but the court declined to exercise jurisdiction because the plaintiff "failed to present any

support for her assertion that a relationship exists” between the defendant and its New York member firm’s office “that would justify the attribution of [the New York firm’s] acts to [the defendant] for jurisdictional purposes), *affd* 173 F3d 844 (2d Cir 1999).

For the foregoing reasons, the allegations of the Complaints are insufficient to impose general jurisdiction over KPMG U.K. under CPLR 301. For clarity, the court’s conclusion is not that general jurisdiction over KPMG U.K. cannot be obtained under any circumstances, but rather, that the Complaints are devoid of allegations that would make a “sufficient start” establishing that personal jurisdiction may exist and that the basis for such jurisdiction is not frivolous. *Shore Pharm. Providers, Inc.*, 65 AD3d at 624.

b. CPLR 302 – Specific Jurisdiction

Plaintiffs do not dispute KPMG U.K.’s assertion that it is not subject to jurisdiction under CPLR 302 (a) (1). Instead, plaintiffs argue that, “[g]iven the above” (presumably referring to their agency argument in the context of general jurisdiction), New York’s long-arm statute applies to impose specific jurisdiction over KPMG U.K., pursuant to CPLR 302 (a) (3).

Plaintiffs’ Omnibus Opp Brief at 66.

CPLR 302 (a) (3) allows the court to exercise personal jurisdiction over a non-domiciliary who:

“commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have

consequences in the state and derives substantial revenue from interstate or international commerce . . . .”

Under CPLR 302, “[t]he activities of a representative of a non-domiciliary in New York will be attributed to the non-domiciliary for the purpose of long-arm jurisdiction if the non-domiciliary requested the performance of those activities in New York and benefitted therefrom.” *Kappas v T.W. Kutter, Inc.*, 192 AD2d 402, 402 (1<sup>st</sup> Dept 1993).

As discussed above, however, plaintiffs fail to allege any activities of a KPMG U.K. representative in New York that are attributable to KPMG U.K., or any benefit therefrom received by KPMG U.K. Therefore, plaintiffs’ allegations do not support the exercise of specific jurisdiction based upon an agency theory. *See Polansky v Gelrod*, 20 AD3d 663, 664 (3d Dept 2005) (conclusory allegations of agency insufficient to establish jurisdiction); *Howard*, 977 F Supp at 663 (declining to exercise specific jurisdiction based upon acts committed by defendant’s New York representative, where that theory was already rejected as a basis for general jurisdiction).

In support of exercising specific jurisdiction, plaintiffs cite the following allegations of the Complaints: “[d]efendants, and each of them, are subject to the jurisdiction of this Court by virtue of their business dealings and transactions in New York, by having caused injuries through their acts and omissions within this County and throughout the State of New York” (McBride Complaint, ¶ 28; Wexler Complaint, ¶ 27; Ryan Complaint, ¶ 27; Greenberg Complaint, ¶ 27); “[e]ach defendant transacts business, has an agent, and/or is found within the State of New York, County of New York,” and “[t]he unlawful conduct alleged in this complaint was carried out and caused injury in the State of New York, County of New York” (McBride Complaint, ¶ 31;

Wexler Complaint, ¶ 29; Ryan Complaint, ¶ 29; Greenberg Complaint, ¶ 29); and “[a]s a result of the wrongful conduct of . . . KPMG . . . , the limited partnership has suffered and continues to suffer tremendous economic loss and other damages” (Wexler Complaint, ¶ 475). However, these conclusory allegations do not support the court exercising personal jurisdiction over KPMG U.K. *Sheldon v Kimberly-Clark Corp.*, 105 AD2d 273, 275 (2d Dept 1984) (“plaintiff’s complaint and his attorney’s affirmations consist of only bare conclusory allegations,” which “are not enough to constitute the ‘sufficient start’ necessary to merit further discovery”), *appeal dismissed* 65 NY2d 691 (1985), *disagreed with on other grounds Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 469 (1988); *Badger v Lehigh Val. R.R. Co.*, 45 AD2d 601, 602 (4<sup>th</sup> Dept 1974) (declining to exercise personal jurisdiction where “[t]he amended complaint contains purely conclusory allegations in an effort to satisfy the jurisdictional contacts within New York State”).

Here, the crux of plaintiffs’ allegations against KPMG U.K. is that it “was in a prime position to *witness* millions in investor funds laundered from Madoff’s New York Accounts to MSIL and back.” Plaintiffs’ Omnibus Opp Brief at 10 (emphasis added); Wexler Complaint, ¶¶ 238-242. However, plaintiffs do not cite to any legal authority to support the conclusion that witnessing wrongful conduct is sufficient to confer long-arm jurisdiction under CPLR 302 (a). As discussed above, the allegations of the Complaints support the conclusion that KPMG U.K. was a United Kingdom entity retained to perform work for a United Kingdom entity, and that the work was performed in the United Kingdom. Thus, any tortious act concerning KPMG U.K.’s audit of MSIL would be reasonably expected to cause injury in the United Kingdom, not New York. CPLR 302 (a) (ii). Therefore, plaintiffs fail to allege that KPMG U.K. “regularly does or

solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.” CPLR 302 (a) (3) (i). For the same reasons, the Complaints also fail to allege any “tortious act” by KPMG U.K. that it “should reasonably expect . . . to have consequences in [New York].” CPLR (a) (3) (ii).

The court notes that plaintiffs also cite allegations of the McBride, Ryan, and Greenberg Complaints that purport to attribute their injury to certain specified defendants, but without naming KPMG U.K. (or any other KPMG entity). McBride Complaint, ¶ 397; Ryan Complaint, ¶ 372; Greenberg Complaint, ¶ 363. Therefore, these allegations fail to identify any injury to persons or property within New York that are attributable to KPMG U.K. CPLR 302 (a) (3).

For the foregoing reasons, plaintiffs fail to allege facts sufficient to exercise personal jurisdiction over KPMG U.K. Because CPLR 302 (a) (3) does not authorize jurisdiction over KPMG U.K., the court need not consider Federal due process. *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 (2000), citing *Ingraham v Carroll*, 90 NY2d 592 (1997). The court also does not address KPMG U.K.’s alternative argument that the actions should be dismissed under the doctrine of forum non conveniens. KPMG U.K. Opening Brief at 12 n 7.

Plaintiffs request that, if their arguments are “deficient in any manner,” they be permitted “to engage in jurisdictional discovery to rectify any such deficiencies.” Plaintiffs’ Omnibus Opp Brief at 67 n 25. Because the Complaints are devoid of any legal basis that would support exercising personal jurisdiction over KPMG U.K., their request is denied. The request is denied for the additional reason that each cause of action asserted against KPMG U.K. is dismissed for failure to state a cause of action, as discussed below.

## 2. Failure to State a Cause of Action

Although the court need not reach the merits of KPMG U.K.'s alternative bases for dismissal, if it did, the claims asserted against KPMG U.K. would be dismissed for the independent reason that they fail to state a cause of action. The Complaints assert causes of action against KPMG U.K. for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting fraudulent inducement.

Each of these aiding and abetting causes of action requires the plaintiff to allege the existence of the underlying wrongful conduct, the defendant's knowledge, and the defendant's substantial assistance in achieving the wrongful conduct. *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 (1<sup>st</sup> Dept 2009) (aiding and abetting fraud); *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 23 (2d Dept 2008) (aiding and abetting breach of fiduciary duty); *Gray & Assoc., LLC v Speltz & Weis LLC*, 22 Misc 3d 1124 (A), 2009 NY Slip Op 50275 (U), \*11 (Sup Ct, NY County 2009) (aiding and abetting breach of fiduciary duty and fraud). "Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability." *Kaufman v Cohen*, 307 AD2d 113, 125 (1<sup>st</sup> Dept 2003); *Sterling Natl. Bank v Ernst & Young, LLP*, 9 Misc 3d 1129 (A), 2005 NY Slip Op 51850 (U), \*7 (Sup Ct, NY County 2005) ("[a] high degree of scienter is necessary to extend fraud liability under an aiding and abetting theory"), citing *National Westminster Bank v Weksel*, 124 AD2d 144, 150 (1<sup>st</sup> Dept 1987). "Substantial assistance exists 'where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.'" *Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476.

“Where liability for fraud is to be extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016 (b) be strictly adhered to.” *National Westminster Bank*, 124 AD2d at 149; *see also Front, Inc. v Khalil*, 103 AD3d 481, 483 (1<sup>st</sup> Dept 2013) (cause of action for aiding and abetting breach of fiduciary duty requires pleading “with the requisite particularity” under CPLR 3016 [b]). CPLR 3016 (b) requires that “the circumstances constituting the wrong shall be stated in detail” for causes of action based upon fraud and breach of trust.

As a preliminary matter, all of the aiding and abetting claims in the Wexler Action are based upon underlying claims that were dismissed in this court’s previous order. *See Wexler*, Sup Ct, NY County, April 1, 2014, Lowe, J., index No. 101615/09. As there is no underlying wrongful conduct to support the aiding and abetting claims in the Wexler Action, the aiding and abetting claims in that action are dismissed against KPMG U.K. *Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476.

In any event, in all of the Complaints, plaintiffs’ allegations of KPMG U.K.’s knowledge are based upon KPMG U.K. serving as MSIL’s auditor, the “indications of fraud” identified in the pleadings, and KPMG U.K.’s failure to conduct “proper due diligence.” Wexler Complaint, ¶¶ 416, 422, 445, 451, 489, 495; Ryan Action, ¶¶ 325, 331, 350, 357; Greenberg Action, ¶¶ 318, 324, 342, 348; McBride Action, ¶¶ 346, 351, 373, 378, 411, 418. These allegations fail to plead knowledge for the same reasons that the Wexler Complaint failed to allege scienter against the Tremont defendants, as discussed in this court’s previous decision. *See Wexler v KPMG LLP et al.*, Sup Ct, NY County, April 1, 2014, Lowe, J., index No. 101615/09, at 27-30. At most, these

general allegations suggest KPMG U.K.'s constructive knowledge, which are insufficient to sustain plaintiffs' aiding and abetting claims. *Kaufman*, 302 AD2d at 125. These allegations also fail to satisfy the particularity requirement of CPLR 3016 (b). Nor do they explain how KPMG U.K. substantially assisted the alleged underlying wrongful conduct, or how KPMG U.K.'s actions proximately caused harm to plaintiffs.

Although not raised by KPMG U.K., the court notes that the aiding and abetting claims against KPMG U.K. also fail for the same reason that these claims are dismissed against *Konigsberg*, as discussed below in Point III (A). Specifically, the allegations against KPMG U.K. are not related to the misconduct of the "primary violator[s]," but rather, the allegations against KPMG U.K. deal with the primary wrongdoing of Madoff, BMIS, and MSIL, none of whom are defendants in the instant action. *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 (1<sup>st</sup> Dept 2007) ("a 'person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator'"); *Kirschner v Bennett*, 648 F Supp 2d 525, 544 (SD NY 2009).

For the foregoing reasons, plaintiffs' causes of action against KPMG U.K. for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting fraudulent inducement are dismissed.

The Wexler Complaint asserts causes of action against KPMG U.K. for professional negligence and negligent misrepresentation (in the fifth and eighth causes of action, respectively).

"Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the

accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance."

*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 (1985). "To show linking conduct, a plaintiff must demonstrate some form of direct contact between the accountant and the plaintiff, such as a face-to-face conversation, the sharing of documents, or other substantive communication between the parties." *CRT Invs., Ltd. v Merkin*, 29 Misc 3d 1218 (A), 2010 NY Slip Op 51868 (U), \*12 (Sup Ct, NY County 2010) (internal quotation marks and citations omitted), *affd* 85 AD3d 470 (1<sup>st</sup> Dept 2011).

Here, the Wexler Complaint is devoid of any allegations of "linking conduct." *Id.* Moreover, the negligent misrepresentation and professional negligence causes of action do not mention KPMG U.K., let alone identify any wrongdoing by KPMG U.K. In his opposition brief, Wexler claims that his professional negligence claim is based upon allegations that "KPMG . . . fail[ed] to render services in accordance with professional standards of care, including Generally Accepted Auditing Standards ('GAAS'), fail[ed] to exercise professional skepticism, certifi[ed] financial statements that were not prepared in accordance with GAAP, and issu[ed] unqualified clean audit opinions." Plaintiffs' Omnibus Opp Brief at 44; Wexler Complaint, ¶ 467. Similar allegations of an accountant deviating from professional standards of care, including GAAS and generally accepted accounting principles, were rejected in *CRT Invs., Ltd.*, where the court held that "work in the course of the audit was performed pursuant to professional standards applicable in the context of any audit, and was not undertaken pursuant to any specific duty owed to

plaintiffs.” 29 Misc 3d 1218 (A), 2010 NY Slip Op 51868 (U) at \*13 (stating that, “[w]here, like in the instant case, direct contact between the accountant and the plaintiff is minimal or nonexistent, the plaintiff cannot recover for the accountant’s negligence”). For these reasons, the negligent misrepresentation and professional negligence causes of action against KPMG U.K. in the Wexler Action are dismissed.

Plaintiffs also assert causes of action against KPMG U.K. for conversion and unjust enrichment. “A cause of action alleging conversion of funds must allege ‘legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant[s] exercised an unauthorized dominion over such funds to the exclusion of the plaintiff’s rights.’” *Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 (2d Dept 2009). “The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff.” *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 (2012).

The conversion and unjust enrichment causes of action are asserted against all defendants, and these claims are identical in all four actions presently before the court. The conversion cause of action alleges that “Plaintiff is the rightful owner of monies paid to the Defendants for investment in BMIS,” that “Plaintiff’s interest in these monies is superior to any interest these Defendants have in these monies,” and that, “[i]n unlawfully taking Plaintiff’s monies and controlling and expending the funds for their own purposes, Defendants converted funds belonging to Plaintiff.” McBride Complaint, ¶¶ 430-432; Wexler Complaint, ¶¶ 507-509; Ryan Complaint, ¶¶ 378-380; Greenberg Complaint, ¶¶ 369-371. According to the Complaints, “Defendants intentionally exercised dominion and control over such funds in a manner

inconsistent with and in willful disregard of Plaintiff's interest," which allegedly caused damages. McBride Complaint, ¶¶ 433-434; Wexler Complaint, ¶¶ 510-511; Ryan Complaint, ¶¶ 381-382; Greenberg Complaint, ¶¶ 372-373.

The unjust enrichment cause of action alleges that "Defendants . . . received money or property belonging to or provided by Plaintiff," that "Defendants benefitted from the receipt of the money," and that "Defendants should be required to pay back Plaintiff the amount of the unjust enrichment." McBride Complaint, ¶¶ 437-439; Wexler Complaint, ¶¶ 514-516; Ryan Complaint, ¶¶ 385-387; Greenberg Complaint, ¶¶ 376-378.

The conversion and unjust enrichment causes of action do not identify KPMG U.K. Nor do the Complaints identify any wrongdoing by KPMG U.K. that would support either cause of action. Plaintiffs do not respond to KPMG U.K.'s arguments concerning unjust enrichment. Plaintiffs' sole opposition to the conversion claims is that "KPMG UK's misconduct relating to its failure to appropriately audit MSIL constituted a serious interference with Plaintiff's rightful possession of their funds." Plaintiffs' Omnibus Opp Brief at 50. However, plaintiffs do not allege any specifically identifiable funds or that KPMG U.K. received any funds, let alone any funds belonging to plaintiffs. Accordingly, plaintiffs' conversion and unjust enrichment causes of action asserted against KPMG U.K. are dismissed.

For the foregoing reasons, the Complaints are dismissed in their entirety against KPMG U.K.

B. KPMG International

The Complaints in these actions allege that KPMG U.K. and KPMG U.S. acted as agents of KPMG International, and that, therefore, KPMG International is vicariously liable for their

auditing misconduct. KPMG International argues that neither KPMG U.K. nor KPMG U.S. acted as agents, and that the pleadings fail to allege that KPMG International controlled the audits. KPMG International argues that, because all claims against it are based upon a theory of vicarious liability, the failure to allege such an agency relationship requires dismissal of the Complaints. Plaintiffs do not dispute that their claims against KPMG International are based solely upon vicariously liability. Plaintiffs' Omnibus Opp Brief at 38-39, 40, 67-71. Rather, plaintiffs counter that KPMG International is liable under an agency theory, because it exercised apparent authority over its member firms and had the right to make management and policy decisions.

“Underlying the doctrine of vicarious liability--the imputation of liability to defendant for another person's fault, based on defendant's relationship with the wrongdoer--is the notion of control. The person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences.” *Kavanaugh v Nussbaum*, 71 NY2d 535, 546 (1988). In *Kavanaugh*, the Court stated that “vicarious liability . . . generally turns on agency or control in fact, or apparent or ostensible agency.” *Id.* at 547. “Agency is a legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act.” *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 (2d Dept 1993). The agent must be acting with the principal's “express, implied, or apparent authority.” *Id.*

As a preliminary matter, as the Complaints are dismissed against KPMG U.K. and discontinued against KPMG U.S., there is no underlying liability against these entities, as

purported agents, that could be attributable to KPMG International. For this reason alone, the claims against KPMG International, all of which are based upon vicarious liability, are dismissed.

In any event, the Complaints do not allege the existence of an agreement that would manifest KPMG International's consent to allow KPMG U.K. or U.S. to act as agents, subject to KPMG International's control. Rather, plaintiffs claim that their "single most powerful allegation is that KPMG Int'l advertises KPMG as a single cohesive unit of financial service firms able to provide top quality auditing, advisory and tax services across borders." Plaintiffs' Opp Brief at 69; Wexler Complaint, ¶¶ 56-60, 120, 227-30, 245-47, 258; Ryan Complaint, ¶¶ 39-43, 157-160, 175, 187; Greenberg Complaint, ¶¶ 41-45, 159-162, 177, 190; McBride Complaint, ¶¶ 44-46, 106, 175-178, 192. However, plaintiffs fail to explain how operating as "a single cohesive unit" evidences KPMG International's control or KPMG U.K. or U.S.'s consent to act on behalf of KPMG International. Nor do plaintiffs submit any legal authority in support of this argument.

The pleadings allege that KPMG International "exercise[d] substantial control over the manner in which KPMG U.K. conducted its professional affairs," that KPMG International "created and implemented the policies and procedures followed by its member firms," and that "KPMG U.K. shares with KPMG U.S. common systems and policies for managing its business and for meeting and complying with international and national audit requirements." Wexler Complaint, ¶ 56; McBride Complaint, ¶ 44; Ryan Complaint, ¶ 40; Greenberg Complaint, ¶ 42. KPMG International also allegedly established "general professional standards and auditing procedures," and, according to plaintiffs, KPMG "member firms must follow the rules set down

by KPMG International and obey its directives.” McBride Complaint, ¶ 46; Wexler Complaint, ¶ 59; Ryan Complaint, ¶ 42; Greenberg Complaint, ¶ 44. In addition, KPMG International allegedly “resolves disputes and institutes controls to insure consistency of work.” *Id.* The Complaints refer to KPMG International’s “Annual Review 2008,” and language attributed to KPMG International concerning its “global strategy” and “mov[ement] toward a more globally integrated organization.” McBride Complaint at 110 and ¶ 175; Wexler Complaint at 136 and ¶ 227; Ryan Complaint at 99 and ¶ 157; Greenberg Complaint at 99 and ¶ 159.

As a preliminary matter, plaintiffs fail to identify any legal authority that would support a finding of “substantial control” over any of KPMG International’s member firms based upon these facts. Wexler Complaint, ¶ 56; McBride Complaint, ¶ 44; Ryan Complaint, ¶ 40; Greenberg Complaint, ¶ 42. Plaintiffs’ allegations of substantial control “consist of bare legal conclusions,” and, therefore, are insufficient to support their claims. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1<sup>st</sup> Dept 2003). In any event, KPMG International submits as documentary evidence a printout from its website which provides, in pertinent part, that “KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm third parties, nor does KPMG International have any such authority to obligate or bind any member firm.” Warnot affirmation, exhibit D. Moreover, the “Annual Review 2008” provides, in pertinent part, as follows:

“KPMG International is a Swiss cooperative with which member firms of the KPMG network of independent firms are affiliated. KPMG International performs a coordinating role but provides no services to clients. All services are provided to clients by member firms or by other independent firms licensed to use the KPMG name. Each KPMG firm is separate and legally distinct.”

*Id.*, exhibit E at 49. This documentary evidence expressly disclaims KPMG International’s consent to allow KPMG U.K. or KPMG U.S. to act as agents, and also undermines plaintiffs’ conclusory allegations that KPMG International controlled these member firms. *Star Energy Corp. v RSM Top-Audit*, 2008 WL 5110919 at \*2, 2008 US Dist LEXIS 99825 at \*6 (SD NY 2008) (“[t]here is no agency relationship where the alleged principal has no right of control over the alleged agent”).

Moreover, the pleadings expressly allege that “KPMG U.S. and KPMG U.K. served as the auditor for numerous entities with relationships to Madoff” (Wexler Complaint, ¶¶ 232), that “KPMG U.S. was the independent auditor for the Rye Select Broad Market Prime Fund” (*id.*), and that “KPMG U.K. audited MSIL, Madoff’s London operation” (*id.*, ¶ 57). *See also id.*, ¶¶ 22, 416, 445, 451, 460, 489, 495; Ryan Complaint, ¶¶ 40, 325, 331, 350, 357; Greenberg Complaint, ¶¶ 42, 318, 324, 342, 348; McBride Complaint, ¶¶ 44, 346, 351, 373, 378, 411, 418. Plaintiffs fail to identify any nonconclusory allegations in the pleadings suggesting that KPMG International, as opposed to KPMG U.S. and KPMG U.K., conducted or participated in any of the audits at issue herein. *Id.* As stated in *Nuevo Mundo Holdings v Pricewaterhouse Coopers LLP*, “courts have declined to treat different firms as a single entity, holding them liable for one another’s acts, simply because they shared an associational name and/or collaborated on certain aspects of a transaction.” 2004 WL 112948 at \*3, 2004 US Dist LEXIS 780, \*8 (SD NY 2004). In *Nuevo Mundo Holdings*, the plaintiff failed to allege an agency relationship where none of its allegations “suggest[ed] that the defendants ever participated in the decision as to how the audit reports submitted by [the defendant accounting firms] were completed, and certainly none which would support an inference that the defendants were either aware of, or in fact contributed to, the

decision to alter those audit reports.” *Id.* at \*5, \*\*16. To the extent that the pleadings allege KPMG International’s control over its member firms generally, “allegations of generalized control are insufficient to state a plausible claim of coordinating-entity control over its member firms in the auditing context.” *Anwar v Fairfield Greenwich Ltd.*, 728 F Supp 2d 372, 461 (SD NY 2010); *see also Star Energy Corp.*, 2008 WL 5110919 at \*5, 2008 US Dist LEXIS 99825 at \*14 (complaint dismissed where the plaintiff failed to adequately allege that purported principal had control over the audits performed by the agent).

For the foregoing reason, the Complaints fail to allege an agency relationship that would give rise to vicarious liability. Plaintiffs do not dispute that vicarious liability is their sole theory of liability against KPMG International. Plaintiffs Opp Brief at 67-71. Nor do plaintiffs dispute KPMG International’s assertion that the failure to allege facts to support a finding of vicarious liability requires dismissal of all claims against KPMG International. Plaintiffs Opp Brief at 67-71. Having failed to allege such facts, the Complaints against KPMG International are dismissed in their entirety.

## II. Frank Avellino

Avellino is named as a defendant in the Ryan Action only. He moves (in motion sequence number 001 in the Ryan Action) to dismiss the Ryan Complaint for failure to state a cause of action and failure to comply with the heightened pleading standard of CPLR 3016 (b).

The Ryan Complaint asserts the following causes of action against Avellino: fraud (first cause of action); aiding and abetting fraud (second cause of action); breach of fiduciary duty (third cause of action); aiding and abetting breach of fiduciary duty (fourth cause of action); negligent misrepresentation (sixth cause of action); conversion (seventh cause of action); and

unjust enrichment (eighth cause of action).

A. Fraud

In order to state a cause of action for fraud, the pleading must allege “the representation of a material existing fact, falsity, scienter, deception and injury.” *Century 21 v Woolworth Co.*, 181 AD2d 620, 625 (1<sup>st</sup> Dept 1992). Under CPLR 3016 (b), “the circumstances constituting the wrong shall be stated in detail,” and “conclusory allegations” of fraud are insufficient. *Greschler v Greschler*, 51 NY2d 368, 375 (1980).

The Ryan Complaint alleges that Avellino began raising money for Madoff in 1962. Ryan Complaint, ¶ 215. In 1977, Avellino and nonparty Michael Bienes allegedly “took over the accounting firm, Alpern & Heller (Saul Alpern was Madoff’s father-in-law), and formed Avellino & Bienes (‘A&B’), located in Manhattan.” *Id.*, ¶ 80, 215. In 1980, Michael Bienes moved to Florida, while Avellino remained in New York raising money for BMIS. *Id.* According to the Ryan Complaint, A&B “organized investment pools for Madoff, an early feeder fund, and provided account statements and investment tax accounting services.” *Id.*, ¶ 216. The plaintiffs in the Ryan Action allege that, “[t]hrough Alpern,” they “joined an investment pool that invested in BMIS under Alpern’s name,” and that they “sent their first check to Alpern,” “contribut[ing] about \$100,000 to this venture.” *Id.*, ¶¶ 265-266. In 1987, Saul Alpern allegedly transferred to A&B the investment accounts of plaintiffs Daniel and Theresa Ryan (Ryan Plaintiffs). *Id.*, ¶ 217. A&B allegedly managed the Ryan Plaintiffs’ investment through the late 1980s, but in 1990, A&B and/or Avellino allegedly “directed [the Ryan] Plaintiffs to transfer their accounts directly to BMIS.” *Id.*, ¶¶ 217, 266, 311. According to the Ryan Complaint, “A&B investors were urged by Madoff, Defendant Frank Avellino and Michael Bienes to

reinvest in Madoff.” *Id.*, ¶ 81.

A&B was allegedly “investigated by the SEC in 1992 for raising \$440 million without being registered and licensed.” *Id.*, ¶ 218. According to the Ryan Complaint, “Avellino told the investigators that the money was being managed by Madoff; that he (Avellino) promised investors 13.5 to 20 percent returns; and if Madoff fell short of those returns, A&B made up the difference.” *Id.* The SEC allegedly accepted this explanation and settled with A&B, and “Avellino agreed to shut down A&B, undergo an audit, and pay a fine.” *Id.* The Ryan Complaint avers that, after the 1992 settlement, Avellino “continued to have funds invested with BMIS,” and that he “set up a web of foundations and partnerships which were invested with BMIS.” *Id.*, ¶ 219.

The Ryan Plaintiffs allege that Avellino’s former housekeeper, Nevena Ivanova (Ivanova), filed a lawsuit against him, which “indicates that Avellino continued to funnel funds to BMIS and was closely involved with BMIS to the very end.” *Id.*, ¶ 220. According to the Ryan Plaintiffs, Ivanova alleged that Avellino raised \$200,000 from her husband in 2006, and in 2008 Ivanova “asked Avellino to return her investment, which at the time stood at \$124,000,” but Avellino “put her off for months.” *Id.* The Ryan Complaint alleges that, on December 1, 2008, 10 days *before* the BMIS Ponzi scheme became public, Avellino told Ms. Ivanova that her money was lost.” *Id.* (emphasis in original).

The Ryan Complaint alleges that Avellino made false representations to the Ryan Plaintiffs “regarding the BMIS investment scheme and its performance.” *Id.*, ¶ 312. However, the Ryan Plaintiffs fail to identify any representations attributable to Avellino. *Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 599 (1<sup>st</sup> Dept 2013) (dismissing fraud claim where the

plaintiff failed to “identify false representations of material facts on which he relied”). The nebulous allegation that the Ryan Plaintiffs were “directed” or “instructed” to transfer their accounts to BMIS fails to identify any misrepresentation, and the pleading fails to specify whether this purported direction or instruction was issued by A&B or Avellino. *Id.*, ¶¶ 217, 266, 311. Nor do the Ryan Plaintiffs’ allegations show falsity, scienter, deception, or injury that is attributable to Avellino. To the extent that the Ryan Plaintiffs attempt to allege scienter based upon statements made to Ivanova, these statements were allegedly made by Nancy Avellino, who is not a party in the Ryan Action. Woodfield affirmation, exhibit A, ¶ 90. The Ryan Plaintiffs fail to provide a legal basis for attributing the statement of a nonparty to Avellino for purposes of alleging scienter. The conclusory allegations against Avellino, and allegations grouping his purported fraudulent conduct with other defendants, also fail to “comply with the specificity requirements of CPLR 3016 (b).” *Franklin v Winard*, 199 AD2d 220, 220 (1<sup>st</sup> Dept 1993). Accordingly, the first cause of action of the Ryan Complaint for fraud is dismissed against Avellino.

B. Aiding and Abetting Fraud

The Ryan Plaintiffs’ argue in their opposition brief that their cause of action for aiding and abetting fraud is asserted against Avellino, among others. Omnibus Opp Brief at 26. On the merits, however, the Ryan Plaintiffs fail to explain how their cause of action for aiding and abetting fraud applies to Avellino. Instead, the Ryan Plaintiffs’ arguments focus on Avellino’s purported substantial assistance concerning their claim for aiding and abetting breach of fiduciary duty. *Id.* at 39-40.

In any event, on its face, the cause of action for aiding and abetting fraud relies upon

fiduciary duties allegedly owed by Avellino and Avellino’s “false affirmative representations and intentional omissions of material facts to the Plaintiffs” (Ryan Complaint, ¶ 320), without identifying any such duties, misrepresentations, or omissions that would support the aiding and abetting claim. The Ryan Complaint also fails to sufficiently allege Avellino’s knowledge of the fraud or his substantial assistance. *Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476. For these reasons, the Ryan Plaintiffs’ second cause of action for aiding and abetting fraud is dismissed against Avellino.

C. Breach of Fiduciary Duty

The third cause of action for breach of fiduciary duty does not name Avellino personally. Ryan Complaint, ¶¶ 338-342. However, this cause of action is asserted against the “Individual BMIS Defendants” (*id.* at 177), which is defined to include, among others, Avellino. *Id.*, ¶ 51. Yet, other allegations of the Ryan Complaint refer to the “Individual BMIS Defendants and Avellino,” thereby suggesting that Avellino is not included among the “Individual BMIS Defendants.” *See e.g.* Complaint, ¶ 320 (“[t]he Individual BMIS Defendants and Avellino owed fiduciary duties to the Plaintiffs”). In any event, the Ryan Plaintiffs do not dispute that the third cause of action is not asserted against Avellino (Omnibus Opp Brief at 26, 31-34), and the Ryan Complaint does not allege facts that would support this cause of action against Avellino. Therefore, to the extent that the third cause of action of the Ryan Complaint is asserted against Avellino, it is dismissed.

D. Aiding and Abetting Breach of Fiduciary Duty

This cause of action alleges that “Avellino had actual knowledge of the Individual BMIS Defendants’ breach of fiduciary duty based on Avellino’s knowledge of and active role in the

BMIS fraud.” Ryan Complaint, ¶ 348. According to the Ryan Plaintiffs, Avellino was “an insider and participant in the BMIS fraud,” and he “knew that the BMIS fraud was ending,” because “[a] mere ten days before the BMIS Ponzi scheme became public in December 2008, Avellino told his former housekeeper that her money was lost.” *Id.* Avellino allegedly “substantially assisted the Individual BMIS Defendants’ breach of fiduciary duty based on [his] active role in the BMIS fraud by recruiting investors such as Plaintiffs to invest with BMIS, funneling money into the Ponzi scheme, and making false affirmative misrepresentations and intentional omissions of fact to Plaintiffs and other investors.” *Id.*, ¶ 354.

The Ryan Complaint relies upon the allegation, in a separate action commenced by Nevena Ivanova, that Avellino informed her that “her money was lost” 10 days before the Ponzi scheme became public. *Id.*, ¶¶ 220, 348. However, Avellino submits a copy of the second amended complaint in that separate action, which alleges only that “Nancy Avellino advised plaintiff [Nevena Ivanova], during the early part of December 2008, that plaintiff’s personal property (\$124,000.00 dollars) was ‘lost’ and could not be returned.” Woodfield affirmation, exhibit A, ¶ 90. Significantly, this alleged statement is not attributed to Frank Avellino, but rather, it is attributed to Nancy Avellino, who is not a party in the Ryan Action. As discussed above, the Ryan Plaintiffs fail to provide any legal basis for attributing the alleged statement of a nonparty to Avellino. Moreover, according to the Ryan Complaint, the BMIS Ponzi scheme became publicly known on December 11, 2008 (Ryan Complaint, ¶¶ 286, 288), which is consistent with the allegation that Nevena Ivanova was informed of her “lost” investment “during the early part of December 2008.” Woodfield affirmation, exhibit A, ¶ 90. In other words, Ivanova’s pleading does not allege that Avellino knew about Madoff’s Ponzi scheme before it

became public, but rather, leaves open the possibility that Avellino informed Ivanova of her “lost” investment after the Ponzi scheme became public.

In any event, even assuming the relevance of, and the potential negative inference to be drawn from, the factual allegations contained in an unverified pleading in an unrelated action, concerning statements made by an individual who is not a party in the instant action, the Ryan Complaint contradicts its own allegation that Avellino “recruit[ed] investors such as Plaintiffs to invest with BMIS.” Ryan Complaint, ¶ 354. The Ryan Complaint affirmatively alleges that the Ryan Plaintiffs invested their funds with Saul Alpern, Madoff’s father-in-law, and that the investment account was subsequently transferred to A&B, and, thereafter, to BMIS. *Id.*, ¶¶ 217, 266. The Ryan Complaint fails to identify any misrepresentations or omissions by Avellino, or any substantial assistance by him, that would support the aiding and abetting claim. For the foregoing reasons, the Ryan Plaintiffs fail to state a cause of action for aiding and abetting breach of fiduciary duty against Avellino, and that cause of action is dismissed against him.

E. Negligent Misrepresentation

“A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007); *see also Kimmell v Schaefer*, 224 AD2d 217, 218 (1<sup>st</sup> Dept 1996) (elements of [n]egligent misrepresentation include “an awareness by the maker of an untrue statement that it is to be used for a particular purpose,” reliance, and linking conduct), *affd* 89 NY2d 257 (1996).

As with the Ryan Plaintiffs’ fraud, breach of fiduciary duty, and aiding and abetting

claims, their cause of action for negligent misrepresentation fails to allege any misrepresentations. Nor does the Ryan Complaint explain how the Ryan Plaintiffs relied on any such information, or the existence of a duty that would support the negligent misrepresentation claim. Accordingly, the negligent misrepresentation cause of action is dismissed against Avellino.

F. Conversion & Unjust Enrichment

The conversion and unjust enrichment causes of action identify neither Avellino nor any wrongdoing by him that would support either cause of action. The Ryan Complaint does not allege that the Ryan Plaintiffs paid any money to Avellino. Rather, it alleges that, in 1990, “A&B directed Plaintiffs to transfer their accounts directly to BMIS” (Ryan Complaint, ¶¶ 217, 266), and that “A&B investors were urged by Madoff, Defendant Frank Avellino and Michael Bienes to reinvest in Madoff.” *Id.*, ¶ 81. In short, the Ryan Complaint fails to allege that Avellino exercised “unauthorized dominion over” funds belonging to the Ryan Plaintiffs, “to the exclusion of the [Ryan Plaintiffs’] rights.” *Zendler Constr. Co., Inc.*, 59 AD3d at 440. Nor does the Ryan Complaint allege that Avellino “interfere[d]” with the Ryan Plaintiffs’ “right of possession.” *Richman v Harleysville Worcester Ins. Co.*, 85 AD3d 651, 652 (1<sup>st</sup> Dept 2011). Accordingly, the conversion cause of action is dismissed against Avellino.

The Ryan Plaintiffs argue that Avellino “profited from [his] connection with Madoff . . . , shift[ing] his focus from accounting to the lucrative task of raising money for BMIS.” Omnibus Opp Brief at 52; Ryan Complaint, ¶ 215. According to the Ryan Plaintiffs, this “task was accomplished by making knowingly false representations and intentional omissions of material facts to Plaintiffs and other investors.” Omnibus Opp Brief at 52; Ryan Complaint, ¶ 312. As

discussed above, however, the Ryan Complaint fails to identify any representations or omissions attributable to Avellino. Nor does the Ryan Complaint identify any money or property belonging to the Ryan Plaintiffs that Avellino either received or benefitted from. In essence, this is not a “[t]ypical case[.]” where “the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled,” but rather, the unjust enrichment claim merely duplicates the dismissed tort claims. *Corsello*, 18 NY3d at 790 (“unjust enrichment is not a catchall cause of action to be used when others fail,” and it “is not available where it simply duplicates, or replaces, a conventional contract or tort claim”). Accordingly, the unjust enrichment cause of action is dismissed against Avellino.

For the foregoing reasons, the Ryan Action is dismissed in its entirety against Avellino.

### III. Paul Konigsberg

Paul Konigsberg is named as a defendant in all four actions presently before the court. Konigsberg moves to dismiss the McBride Complaint (in motion sequence numbers 007 and 026 in the McBride Action). Konigsberg also moves to dismiss the Wexler, Ryan, and Greenberg Complaints (in motion sequence numbers 024 and 041 in the Wexler Action, and motion sequence number 003 in the Greenberg Action).

The Complaints allege that Konigsberg is a licensed CPA and attorney, and was a founding partner of Konigsberg Wolf & Co., P.C. (KWC), where he is the senior tax partner and served as Madoff’s personal accountant. McBride Complaint, ¶¶ 52, 239; Wexler Complaint, ¶¶ 66, 298; Ryan Complaint, ¶¶ 49, 225; Greenberg Complaint, ¶¶ 51, 222. In this capacity, Konigsberg allegedly “had access to the financial statements and information of the Madoff family,” and also “had a close personal relationship with Madoff and is the only non-Madoff

family member to own an interest in MSIL,” the entity “used to transfer funds out of the United States so that the Madoff family and friends could finance their lifestyles.” *Id.* Specifically, the Complaints aver that MSIL’s “principal owners” were Madoff family members (Bernie, Ruth, Peter, Mark, and Andrew Madoff), but that Konigsberg “owned some nonvoting shares.” McBride Complaint, ¶¶ 52, 145; Wexler Complaint, ¶¶ 66, 161; Ryan Complaint, ¶¶ 49, 137; Greenberg Complaint, ¶¶ 51, 139.

The Complaints allege that “MSIL was used by Madoff and his family to launder billions of dollars of money between New York and London.” McBride Complaint, ¶ 235; Wexler Complaint, ¶ 294; Ryan Complaint, ¶ 221; Greenberg Complaint, ¶ 218. KWC was not only Madoff’s “personal accountant[,],” but was also allegedly “responsible for signing off on Madoff’s family investment books in 2006 and 2007 when the Ponzi scheme neared its collapse.” McBride Complaint, ¶ 236; Wexler Complaint, ¶ 295; Ryan Complaint, ¶ 222; Greenberg Complaint, ¶ 219. Konigsberg was allegedly “receiving at least \$360,000 annually from Madoff for accounting duties,” and “according to the *New York Times*, Madoff frequently referred business from his investment clients to Konigsberg.” *Id.* Konigsberg allegedly “worked for at least six other families who invested in Madoff’s Ponzi scheme.” *Id.*

The Complaints aver that, “[f]rom 1989-1992, Steven Mendelow, a principal at [KWC], operated an unregistered investment firm named Telfran Ltd. that functioned as a feeder fund to aid Madoff in laundering money.” McBride Complaint, ¶ 238; Wexler Complaint, ¶ 297; Ryan Complaint, ¶ 224; Greenberg Complaint, ¶ 221. The Complaints claim that, “[i]n 1992, the SEC brought a case against Mendelow for funneling \$88 million dollars directly to Madoff.” *Id.* Konigsberg allegedly knew that Steven Mendelow operated this unregistered investment firm.

McBride Complaint, ¶¶ 343, 371, 408; Wexler Complaint, ¶¶ 413, 441, 486; Ryan Complaint, ¶¶ 323, 347; Greenberg Complaint, ¶¶ 316, 340.

According to the Complaints, “Konigsberg’s relationship with Madoff goes back 25 years.” McBride Complaint, ¶ 239; Wexler Complaint, ¶ 298; Ryan Complaint, ¶ 225; Greenberg Complaint, ¶ 222. Konigsberg is also allegedly “the most prominent accountant in Madoff’s inner-circle having served as director on the board of directors for many major companies,” and he “knowingly played a key and important role in concealing the transfers between Madoff’s New York and London accounts.” *Id.* According to the Complaints, Konigsberg “knew or turned a blind eye to the fraud.” *Id.* Konigsberg allegedly sold his home in Palm Beach, Florida, one year before Madoff confessed that he was running the Ponzi scheme. McBride Complaint, ¶ 240; Wexler Complaint, ¶ 299; Ryan Complaint, ¶ 226; Greenberg Complaint, ¶ 223. Konigsberg allegedly “profited greatly from his relationship with Madoff as he obtained many high profile clients from Madoff,” and “[i]n his role as an advisor to the Madoff family,” Konigsberg allegedly “knew of the fraud and he actively aided and abetted the furtherance of that scheme.” McBride Complaint, ¶ 52; Wexler Complaint, ¶ 66; Ryan Complaint, ¶ 49; Greenberg Complaint, ¶ 51.

The Complaints assert causes of action against Konigsberg for aiding and abetting fraud and fraudulent inducement, aiding and abetting breach of fiduciary duty, conversion, and unjust enrichment.

A. Aiding and Abetting Claims

Each of the Complaints assert substantially the same causes of action against Konigsberg for aiding and abetting fraud and aiding and abetting breach of fiduciary duty. McBride

Complaint, ¶¶ 339-357, 367-367-384; Wexler Complaint, ¶¶ 409-428, 438-457; Ryan Complaint, ¶¶ 320-336; 344-361; Greenberg Complaint, ¶¶ 313-329, 337-352. The McBride and Wexler Complaints also each assert the same cause of action against Konigsberg for aiding and abetting fraudulent inducement. McBride Complaint, ¶¶ 405-424; Wexler Complaint, ¶¶ 483-501.

“[A] ‘person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the *primary violator*.’” *Bullmore*, 45 AD3d at 464 (emphasis added). “‘Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the *primary* breach of fiduciary duty.’” *Id.* (emphasis added); *Kolbeck v LIT Am., Inc.*, 939 F Supp 240, 245 (SD NY 1996) (“[t]o analyze a claim of secondary liability, the court first must determine the contours of the primary violation on which the secondary liability is alleged to be based”), *affd* 152 F3d 918 (2d Cir 1998).

*Kirschner* (648 F Supp 2d 525) illustrates the distinction between aiding and abetting the primary wrong, and a secondary violation that does not arise out of the primary wrong. *Kirschner* involved a fraud committed by Refco, a company that served as a clearinghouse for exchange-traded derivatives and brokerage services for its customers (FX customers). In order to prop up its financial condition and conceal its uncollectible debt, Refco converted hundreds of millions of dollars in losses and expenses into receivables. Refco then “disappeared the receivables,” using what the parties referred to as “round-trip loans,” whereby Refco used related companies to issue multi-million dollar loans to third party customers, who then circulated the loaned funds back through Refco. *Kirschner*, 648 F Supp 2d at 529. These transactions created the appearance that, at the end of each financial reporting period, Refco’s books showed

“apparently legitimate loans to third-party customers, and the . . . receivables would be gone,” but within days of booking the loans, Refco would unwind the transactions, repay the loans, and return the uncollectible receivables to Refco’s books. *Id.* at 530. In short, Refco used these transactions to loan itself money, through third parties, in order to conceal its losses and expenses, which enabled Refco to carry out a what appeared to be a legitimate leveraged buyout and initial public offering. This conduct was allegedly aided by various professional defendants, including Refco’s auditors and tax advisors. Shortly after the public offering, the “receivables” were revealed, and Refco and its subsidiaries and affiliates declared bankruptcy. *Id.* at 531.

Refco’s bankruptcy trustee, on behalf of the FX customers, commenced an action in New York Supreme Court against certain Refco insiders, professionals, and advisors for losses resulting from the diversion of assets from their accounts, and Refco’s use of those funds to bankroll the fraud. The trustee asserted claims against Refco’s attorneys and accountants for, among other things, aiding and abetting Refco’s fraud. These entities allegedly served as: Refco’s outside auditor, who issued clean audit opinions of Refco’s financial statements; Refco’s principal outside counsel, who provided tax and corporate governance advice; and another accounting firm that prepared Refco’s tax returns and provided tax advice with respect to numerous Refco transactions (together, Professional Defendants). The case was removed to federal court, as it was related to Refco’s bankruptcy proceeding, and the Professional Defendants moved to dismiss the complaint.

In granting the motion to dismiss the aiding and abetting claims, the court acknowledged the plaintiff’s allegations that the Professional Defendants’ “kn[ew] of or participat[ed] in the . . . ‘customer scheme’ that siphoned the FX customers’ assets,” which was “‘designed to hide

financial problems at Refco and its affiliates from the public and from investors.” *Id.* at 545.

The court reasoned, however, that the plaintiff “must offer facts sufficient to demonstrate that the defendants had actual knowledge of wrongful conduct *that harmed the FX customers* – the alleged fraudulent siphoning of their funds – not actual knowledge of different wrongful conduct that might have harmed others, such as Refco’s shareholders.” *Id.* (emphasis in original). In concluding that the plaintiff failed to allege actual knowledge, the court stated:

“arguments by the Trustee that the complaint ‘raises a strong inference that [the defendants were] aware of the magnitude of the . . . [r]eceivable[s]’ or that ‘Refco lacked the financial health it presented to the outside world’ (Pl. Opp. at 50), are insufficient to support the Trustee’s aiding and abetting claims against *these* defendants in *this* action.”

*Id.* (emphasis in original).

With respect to substantial assistance, the court held that, although the Professional Defendants allegedly “provided services that rendered concrete assistance to the Refco insiders in making and concealing the round-trip loans, and obscuring the company’s true financial condition,” the plaintiff failed to allege “conduct on the part of the Professional Defendants that in any way assisted in the alleged unauthorized diversion of FX Customers’ assets that underlies the tort claims asserted here.” *Id.* (internal citation omitted). The court reasoned that, “[e]ven if, as the Trustee alleges, the Professional Defendants helped effectuate the round-trip loans that transformed Refco’s uncollectible losses into receivables owed to Refco by third-parties . . . such aid is not tantamount to the defendants’ knowing about, or doing anything to facilitate, the looting of customer accounts.” *Id.* As the court succinctly stated, “the only allegations that matter are those that support the contention that the Professional Defendants had actual

knowledge of, as well as substantially assisted in, the siphoning of the FX customers' assets" (*id.*), and these allegations were lacking. Thus, while assuming that the diversion of funds from the FX customers' accounts involved fraud, breach of fiduciary duty, or conversion, the court concluded that the plaintiff failed to allege that the Professional Defendants "had actual knowledge of and substantially assisted in *this* putative scheme." *Id.* at 546 (emphasis in original).

Similarly, here, plaintiffs assert allegations that Konigsberg knew of, and assisted in, Madoff's scheme through his business and personal relationship with Madoff and ownership interest in MSIL, but these allegations are insufficient to support plaintiffs' claims that Konigsberg aided and abetted the wrongdoing of the primary defendants herein. Each aiding and abetting claim against Konigsberg is based upon the following identical allegations. The Complaints allege that Konigsberg "had actual knowledge" of the fraud and breach of fiduciary duty "based on his part ownership of MSIL . . . , his firm's role as Madoff's personal accountant, his close relationship with Madoff, and his knowledge of the indications of fraud . . . ." McBride Complaint, ¶¶ 343, 371, 408; Wexler Complaint, ¶¶ 413, 441, 486; Ryan Complaint, ¶¶ 323, 347; Greenberg Complaint, ¶¶ 316, 340. These claims also rely upon Konigsberg's alleged knowledge that Steven Mendelow operated a Madoff feeder fund that was used for money laundering, and that the SEC brought a case against Medelow in 1992 for funneling funds to Madoff. *Id.* Konigsberg allegedly knew, as an owner of MSIL, that:

"MSIL did not conduct trades for BMIS' advisory business, despite BMIS' claims that MSIL did; that MSIL actually conducted trades for the individual Madoff defendants; and that BMIS transferred money between London and its JP Morgan and Bank of New York accounts to create the appearance of trading in London for BMIS'

advisory business.”

*Id.*

The Complaints’ allegations of Konigsberg’s substantial assistance are also identical, claiming that, “[a]s Madoff’s personal accountant, [KWC] signed off on Madoff’s family investment book in 2006 and 2007 when the Ponzi scheme neared its collapse, which substantially assisted the continuation of the fraud.” McBride Complaint, ¶¶ 355, 382, 422; Wexler Complaint, ¶¶ 426, 455, 499; Ryan Complaint, ¶¶ 329, 355; Greenberg Complaint, ¶¶ 322, 346. The Complaints allege that, “[a]s a long-time friend of Madoff, Konigsberg also received referrals from Madoff of Madoff’s wealthy clients.” *Id.*

However, the primary wrongdoers in the Complaints are the feeder funds that were used to invest in BMIS, or BMIS and Madoff themselves. Specifically, in the McBride Action, plaintiff invested in “the Beacon Fund, an investment fund managed by Beacon Associates,” and the Beacon Fund then invested funds with Madoff and BMIS. McBride Complaint, ¶¶ 27, 33-34, 37-42, 279, 283-284. In the Wexler Action, plaintiff invested in the “Rye Select Broad Market Prime Fund, L.P.,” which was managed by Tremont Partners, Inc., and the Rye Select Broad Market Prime Fund, L.P. then invested funds with Madoff and BMIS. Wexler Complaint, ¶¶ 31-32, 38-43, 71, 348. In the Greenberg and Ryan Actions, plaintiffs allegedly invested with BMIS directly. Greenberg Complaint, ¶¶ 31-35, 261-262; Ryan Complaint, ¶¶ 31-33, 265-266.

In the McBride and Wexler Actions, the primary wrongdoing was fraud committed by the Beacon Fund and the Tremont entities, respectively, in misrepresenting facts concerning plaintiffs’ investments, and breach of fiduciary duty based upon failing to perform diligence on Madoff and BMIS. In the Ryan and Greenberg Actions, the primary wrongdoing was the fraud

and breach of fiduciary duty perpetrated by certain BMIS insiders. In all four of the instant actions, the allegations against Konigsberg are not related to the misconduct of these primary wrongdoers. None of the Complaints allege that Konigsberg had actual knowledge of the fraud or breach of fiduciary duty in connection with the plaintiffs' investments, or any involvement with investment activities relating to plaintiffs. Rather, the allegations concerning Konigsberg deal with the primary wrongdoing of Madoff, BMIS, and MSIL, none of whom are defendants in the instant actions. Allegations that Konigsberg had knowledge of, and assisted in, Madoff's scheme are insufficient to support plaintiffs' claims that Konigsberg aided and abetted the wrongdoing of the primary defendants herein. *Kirschner*, 648 F Supp 2d at 545-546.

Moreover, even assuming the truth of plaintiffs' allegations and giving them "the benefit of every possible favorable inference," as the court must (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), they do not show that Konigsberg had actual knowledge. Plaintiffs allege that Konigsberg had an ownership interest in MSIL, but they fail to identify the extent of this ownership interest and concede that Konigsberg owned "nonvoting shares" only. McBride Complaint, ¶¶ 52, 145; Wexler Complaint, ¶¶ 66, 161; Ryan Complaint, ¶¶ 49, 137; Greenberg Complaint, ¶¶ 51, 139. Nor do plaintiffs allege that Konigsberg had any control over MSIL, or that he actually knew MSIL or Madoff were involved in improper trading or fraud. At most, plaintiffs' allegations show that Konigsberg, through KWC and his relationship with Madoff, may have had constructive knowledge of Madoff's fraud, which is insufficient to support the aiding and abetting claims. *Bullmore*, 45 AD3d at 464. With respect to substantial assistance, plaintiffs fail to allege any work performed by Konigsberg, as opposed to KWC, why Konigsberg should be responsible for this work, or how KWC's work furthered Madoff's fraud or

proximately caused plaintiffs losses. Nor do plaintiffs' allegations satisfy the particularity requirement of CPLR 3016 (b). For the foregoing reasons, plaintiffs' causes of action against Konigsberg for aiding and abetting fraud, aiding and abetting fraudulent inducement, and aiding and abetting breach of fiduciary duty are dismissed.

B. Conversion and Unjust Enrichment

The Complaints assert identical conversion and unjust enrichment causes of action against Konigsberg. The conversion claim is based upon the allegation that plaintiffs are "the rightful owner[s] of monies paid to the Defendants for investment in BMIS." McBride Complaint, ¶ 430; Wexler Complaint, ¶ 507; Ryan Complaint, ¶ 378; Greenberg Complaint, ¶ 369. However, the Complaints fail to allege any facts suggesting that Konigsberg exercised unauthorized dominion or control over these funds to the exclusion of plaintiffs' rights. *Zendler Constr. Co., Inc.*, 59 AD3d at 440. Rather, in the Wexler and McBride Complaints, plaintiffs allegedly invested their money with the Rye Select Broad Market Prime Fund, L.P. and the Beacon Fund, respectively. Wexler Complaint, ¶¶ 31, 32, 39, 42, 71, 348, 349; McBride Complaint, ¶¶ 33, 34, 279, 283-286. The Ryan and Greenberg Complaints allege that plaintiffs invested with BMIS directly or indirectly. Ryan Complaint, ¶¶ 31-33, 265-266; Greenberg Complaint, ¶¶ 31-35, 261-262. Thus, the allegations of the Complaints negate Konigsberg's dominion or control over plaintiffs' funds, thereby warranting dismissal of the conversion causes of action against him. *Zendler Constr. Co., Inc.*, 59 AD3d at 440; *see also Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 (1<sup>st</sup> Dept 2010) (conversion not established where "[p]laintiff failed to establish that [the defendant] ever assumed or exercised control over any property belonging to the [plaintiff]").

Nor do the Complaints allege that Konigsberg received any benefit from plaintiffs, as the Complaints do not allege that Konigsberg was involved in the investment of their funds. As discussed above, plaintiffs do not allege that Konigsberg received their funds or any consideration relating to their investments. In short, other than their conclusory allegation that “[d]efendants benefitted from the receipt of the money” (McBride Complaint, ¶ 438; Wexler Complaint, ¶ 515; Ryan Complaint, ¶ 386; Greenberg Complaint, ¶ 377), plaintiffs fail to explain how Konigsberg received any benefit from their investments. Plaintiffs also fail to identify any dealings they had with Konigsberg that could support this cause of action, or plead any recovery against him that they could be awarded. Accordingly, Konigsberg’s motions to dismiss the unjust enrichment causes of action are granted. *Corsello*, 18 NY3d at 790; *see also Abacus Fed. Sav. Bank*, 75 AD3d at 473 (unjust enrichment not established where the “plaintiff failed to show how [the defendant] was personally enriched at the expense of the [plaintiff], or that she herself benefitted from the fraudulent scheme”); *CDR Créances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 (1<sup>st</sup> Dept 2007) (unjust enrichment claim “properly dismissed for failure to identify any improper benefit bestowed on [the defendants]”); *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 (2d Dept 2005) (“the plaintiff’s allegation that the appellants received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment”).

For the foregoing reasons, the Complaints are dismissed in their entirety against Konigsberg.

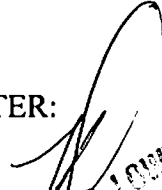
Accordingly, it is hereby

ORDERED that the motions of defendants KPMG U.K. (motion sequence numbers 011

and 020 under Index Number 650632/09, and motion sequence number 026 under Index Number 101615/09), KPMG International (motion sequence numbers 010 and 019 under Index Number 650632/09, and motion sequence number 029 under Index Number 101615/09), Frank Avellino (motion sequence number 001 under Index Number 101616/09), and Paul Konigsberg (motion sequence numbers 007 and 026 under Index Number 650632/09, motion sequence numbers 024 and 041 under Index Number 101615/09, and motion sequence number 003 under Index Number 650633/09) to dismiss the complaints herein are granted, and the complaints in the actions under Index Numbers 650632/09 and 650633/09 and the first amended complaints under Index Numbers 101615/09 and 101616/09 are dismissed in their entirety against said defendants, with costs and disbursements to these defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the actions are severed and continued against the remaining defendants.

Dated: July 25, 2014

ENTER:  
  
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HON. RICHARD E. LOWE III  
J.S.C.