MDK Hijos Trust v Nordlicht
2020 NY Slip Op 30793(U)
March 10, 2020
Supreme Court, New York County
Docket Number: 159029/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 49

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MDK HIJOS TRUST, by and through MICHAEL KATZ,
its Managing Trustee,

Plaintiff,

-against-

MARK NORDLICHT, MURRAY HUBERFELD,
DAVID BODNER, BERNARD FUCHS, and
GILAD KALTER,

Defendants.

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Index No.: 159029/2018
Motion Sequence Numbers
002, 006, 007, 008 and 009

DECISION AND ORDER

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HON. O. PETER SHERWOOD,

Plaintiff MDK Hijos Trust ("Plaintiff") seeks to recover damages for, among other claims (as discussed below), fraudulent inducement and breach of fiduciary duty in connection with the Katzes' investment in Platinum Partners Value Arbitrage Fund International Ltd. (PPVA or Platinum) that was managed by Platinum Management LLC (Management), whose principals were individual defendants Mark Nordlicht (Nordlicht), Murray Huberfeld (Huberfeld), David Bodner (Bodner), Bernard Fuchs (Fuchs) and Gilad Kalter (Kalter; collectively with Nordlicht, Huberfeld, Bodner and Fuchs, "Defendants").

In response to Plaintiff's initial complaint of September 28, 2018, each of the Defendants filed a motion to dismiss the complaint (motion sequence numbers 001-005). After Plaintiff filed its first amended complaint on March 8, 2019 (hereinafter, Complaint; NYSCEF Doc. No.

56), all but Fuchs opted to withdraw their motions to dismiss the initial complaint and file new motions (motion sequence numbers 006-009). Fuchs relies on his original papers (motion sequence number 002) but responds to the amended complaint in his reply brief. This order and decision addresses all motions to dismiss, except that of Kalter (motion sequence number 006), because Plaintiff discontinued the action as against him and his estate (due to his recent death) pursuant to a Notice of Discontinuance dated October 28, 2019 (NYSCEF Doc. No. 108).

I. BACKGROUND

The following facts, except as otherwise specified, are taken from the Complaint and Plaintiff's omnibus memorandum of law in opposition to Defendants' motions and are assumed to be true (Omnibus Opp.; NYSCEF Doc. No. 92).

Plaintiff is a trust and the assignee of the claims of the Katz family (Marcos Katz and Adela Kenner de Katz), who invested about $39 million in PPVA (Complaint, ¶¶ 2, 5). PPVA was ostensibly managed by Management but, in reality, was managed by Huberfeld, Bodner and Nordlicht, who were the "primary principals and decision-makers" of Management, and thus of PPVA. Huberfeld was Bodner's protégé and they formed Management and PPVA and appointed Nordlicht to be the investment officer and face of the organization (*id.*, ¶ 13). While Huberfeld initially solicited Marco Katz as an investor and served as Katz's main contact in 2006, Bodner had more power than Huberfeld, and was considered by the Katzes as the leader of the Platinum organization (*id.*, ¶ 14). Prior to 2012, the Katzes' contacts at Platinum expanded from Huberfeld and Bodner to also include Nordlicht and Fuchs, and they continually repeated Huberfeld's and Bodner's earlier representations that PPVA was highly liquid and that the Katzes could redeem their investment in PPVA at any time (*id.*, ¶ 16). Besides representing to investors (including the Katzes) that PPVA was stable and had positive returns that averaged

17% between 2003 through 2015, Management (including Nordlicht, Bodner and Huberfeld) guaranteed the investors liquidity, as they were permitted to redeem on 60 or 90 days' notice and receive payment of 90% of their redemption requests within 30 days thereafter (*id.*, ¶ 19). As a result, the Katzes kept their investment in PPVA, since 2006; and as of May 1, 2015, invested a total sum of approximately $39.9 million (*id.*, ¶¶ 17-18).

Behind the scenes, however, PPVA faced a growing liquidity crisis, which Management (Nordlicht, Huberfeld, Bodner and others) concealed from investors for years. In fact, PPVA's growing concentration in illiquid assets made it increasingly difficult for Management to pay investor redemptions on time each quarter (*id.*, ¶ 21).[1] Internal Platinum documents reflected that PPVA and Management, as early as November 2012, noticed that the redemptions were "daunting" and "relentless." In June 2014, Nordlicht wrote: "It can't go on like this or practically we will need to wind down . . . this is code red ... We can't pay out 25 million in reds [redemptions] per quarter ..." (*id.*). Defendants kept the investors in the dark about PPVA's liquidity crisis, while Management continued to market the investment fund's flexible redemption terms even as it struggled to pay redemptions (*id.*). Management and Nordlicht also deceived the investors by vastly over-valuing Platinum's interest in a small oil company named Golden Gate Oil LLC, and it eventually purchased the remaining interest in that company (52%) for a mere $3.2 million, and yet still touting an enterprise valuation of at least $170 million (*id.*, ¶ 22).

In 2014-2015, PPVA's liquidity crisis worsened and Management resorted to other schemes to keep the fund afloat (*id.*, ¶ 23). For example, faced with relying on short-term

[1] Plaintiff notes that the specifics of its fraud and other allegations are reflected in the complaint filed by the Securities Exchange Commission (SEC) in *SEC v Platinum Management LLC*, No. 1:16-cv-06848-BMC (ED NY Dec. 19, 2016), which are incorporated by reference into the Complaint (Complaint, at 5, n 1).

borrowings at interest rates as high as 19%, Management told PPVA's auditor that the loans were done to complete "investment transactions" – a false explanation given to investors in the fund's audited financials – but Management's internal documents reflected that the purpose of the high interest loans was to ease the fund's liquidity crisis (*id.*).

In mid-March 2015, Nordlicht and other Platinum officials schemed to meet a sudden wave of $70 million in redemptions by pressing the investors to cancel the redemptions or defer them for one quarter, and to launch an aggressive push for new investments, while concealing PPVA's illiquidity (*id.* ¶ 24). Management also treated as fungible investor monies held in separate funds under the "Platinum Partners umbrella," transferring money between funds as needed to meet liquidity demands, which was contrary to promises made to investors in each fund and represented an obvious conflict of interest (*id.*, ¶ 25). In November 2015, Management transferred a majority of PPVA's illiquid assets into what was referred to as a "side pocket," from which no redemptions were possible for three years (*id.*, ¶ 26). In May 2016, Management and Nordlicht used two related entities, B Asset Manager and B Asset Manager II (collectively, BAM), to steal investor cash needed for PPVA expenses, by making BAM enter into a $25 million participation interest in a term loan to a Platinum Partner's wholly-owned portfolio company named "Credit Strategies LLC," whereby the loan required Credit Strategies LLC, in effect, to apply the proceeds to its own debt obligations or general corporate purposes (*id.*, ¶ 27). In June 2016, Nordlicht helped close a transaction involving one portfolio company and PPVA received $37 million in proceeds, but none of the proceeds were paid to investors; instead, $11 million of such proceeds were invested in a different private company - the same type of illiquid investment that caused PPVA's illiquidity – and Nordlicht directed that payments totaling about $900,000 to a handful of parties, mostly insiders (*id.*, ¶ 30). By the end of the month, there was

only $31,000 left in the "PPVA Master Fund account" (*id.*). Such use of proceeds contradicted the repeated promises by Management that such major monetizing events would fund large-scale redemption payments (*id.*).

The Complaint also alleges that, given their status as founding partners and principals of PPVA and Management with access to inside information, Defendants knew about the fraudulent schemes described above. They also knew that during 2012-2016 PPVA was experiencing a liquidity crisis, was unable to meet its redemption obligations, and its assets had been greatly overstated. Yet, as the liquidity crisis worsened, Defendants repeatedly represented to the Katzes that PPVA had sufficient assets to permit them to fully withdraw their investment (*id.*, ¶ 32). In a faxed note to Marcos Katz, Nordlicht represented that the Katzes could withdraw their funds at any time, and based on the organizational structure of PPVA and Management, Nordlicht made this promise "at the instruction and with the approval of" Huberfeld and Bodner (*id.*, ¶¶ 33-34).

At a meeting held on April 1, 2015, Nordlicht, Fuchs and Kalter again represented to the Katzes that PPVA was liquid and could make redemptions, which led the Katzes to believe that PPVA was in sound shape, a fact that Defendants knew was false, given their insider positions (*id.*, ¶ 35). Nordlicht, Fuchs and Kalter failed to disclose the severity of PPVA's liquidity crisis and represented false asset values, as well as misinformation of future events that would affect asset values, including issuance of authorizations and contracts that would elevate the value of PPVA's "China Horizons" investment (*id.*). Fuchs also represented to the Katzes that they should trust him and Nordlicht, because Fuchs and Nordlicht held larger investments in PPVA than the Katzes, a fact that turned out to be false (*id.*). In May 2015, in response to an inquiry from the Katzes' counsel (copying Kalter and Fuchs), PPVA provided a document entitled "Top

20 Investment Detail By Name," which grossly overstated the value of PPVA's assets, while failing to disclose PPVA's liquidity problems (*id.*, ¶ 36).

In June 2015, relying on Defendants' representations about the Katzes' ability to redeem their investments, Marcos Katz wrote to Huberfeld, Bodner and Nordlicht, instructing them to deliver $1 million to a girls' school in Brooklyn to which he had made a $6 million pledge and to charge his PPVA account; the payment was not made (*id.*, ¶ 37). In July 2015, PPVA provided the Katzes an account statement that falsely showed a $5 million redemption made by them in June 2015, and when the Katzes inquired about the incorrect account statement, Fuchs and Bodner fabricated explanations for PPVA's failure to honor the redemption, and failed to explain the incorrect statement (*id.*, ¶¶ 38-39). In July 2015, the Katzes requested in writing that PPVA confirm its agreement to a specific redemption schedule whereby they would be able to redeem their PPVA investments in full within 90 days after a request, but none of the Defendants and nobody at PPVA or Management responded to the Katzes' request (*id.*, ¶ 40). On August 25, 2015, Marcos Katz wrote to Nordlicht, Huberfeld, Fuchs and Kalter to redeem all shares the Katzes held in PPVA and related funds; Huberfeld and Fuchs suggested a meeting on August 27, 2015, which was later cancelled by them (*id.*, ¶¶ 41-42). Huberfeld and Fuchs never told the Katzes that a full redemption of their shares would be impossible because of PPVA's illiquidity, and the account statements sent to the Katzes after August 25, 2015 were inaccurate because they failed to acknowledge their requested redemption (*id.*). Subsequently, Huberfeld asked Marcos Katz to reconsider his demand for full redemption, and when Marcos requested from Huberfeld a showing of good faith from PPVA in the form of partial payments on the redemption, the Katzes did not receive any response from Huberfeld (*id.*, ¶ 43).

From October 2015 to May 2016, Nordlicht, Bodner, Huberfeld and Fuchs met with the Katzes on various occasions, including several that were held in Mexico City and Acapulco, and in each of the meetings, Defendants represented that the Katzes would be able to redeem their investments (*id.*, ¶¶ 44-49). Defendants also knowingly and falsely inflated the value of the PPVA assets, and mispresented to the Katzes that they were treated fairly (*id.*). On or about May 16, 2016, with the blessings of Bodner and Huberfeld, Nordlicht signed a document entitled "Tentative Agreement," in which they promised that 40% of the Katzes' investments in PPA would be repaid by December 2016 (*id.*, ¶ 49). In sum, Defendants misled the Katzes to believe that PPVA was liquid and its portfolio was sound, facts that they knew were false, given that the amount of redemption requests far exceeded PPVA's greatly overstated assets and the extent of its illiquidity problems (*id.*, ¶ 50).

In June 2016, the United States Attorney's Office for the Southern District of New York brought criminal charges against Huberfeld in connection with a bribery scheme in which he was alleged to have paid "kickbacks" to a union official, so as to obtain the union's retirement fund investments in PPVA when it was experiencing liquidity crisis (*id.*, ¶ 51). Nordlicht and other members of Management were indicted for fraud, and the SEC sued Management, Nordlicht and others for violating federal securities laws (*id.*, ¶ 52). Prior to June 2016, the Katzes were unaware and could not have been aware that Defendants, Management and PPVA were part of a fraudulent scheme, and that Defendants' statements were knowingly false, given their positions within Management and PPVA and their access to "inside information" (*id.*, ¶ 53). The redemption payments were never made. Marcos Katz passed away on July 26, 2016 (*id.*, ¶ 54). Plaintiff, the trust as assignee of the Katzes' claims, is thus owed at least $39 million (*id.*, ¶ 55).

While the Complaint asserts five causes of action (fraudulent inducement, breach of fiduciary duty, negligent misrepresentation, aiding and abetting fraud, as well as aiding and abetting breach of fiduciary duty), the initial complaint asserted only three (breach of fiduciary duty, fraudulent inducement and negligent misrepresentation). At oral argument on these motions held on August 12, 2019, this court instructed the parties to submit supplemental briefs to address specific issues of law (Transcript at 49-54). The supplemental briefs were filed (NYSCEF Doc. Nos. 103, 106 and 107).

II. APPLICABLE LEGAL STANDARDS

In considering a CPLR 3211 (a) (7) motion to dismiss, the court must determine whether the pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are to be afforded a liberal construction, and the courts are to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While factual allegations are given a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential treatment (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). However, when the movant offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*see Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). When a complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to

the presumption of truth and the favorable inference is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]).

With respect to a motion to dismiss based on the statute of limitations defense under CPLR 3211 (a) (5), the defendant must establish a prima facie case that the plaintiff's time to commence an action has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether it commenced the action within the applicable limitations period, or whether an exception or tolling applies (*see Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018]).

III. DISCUSSION

As noted, Fuchs opted to apply his motion to dismiss the initial complaint to the Complaint (motion sequence number 002). Accordingly, the court will first address Fuchs' motion to dismiss and the related brief in support (Fuchs Brief; NYSCEF Doc. No. 19), Plaintiff's opposition thereto (Plf. Opp.; NYSCEF Doc. No. 59), and Fuchs' reply (Fuchs Reply; NYSCEF Doc. No. 62).

A. Fuchs' Motion to Dismiss (Mo. Seq. No. 002)

Plaintiff's initial complaint asserted three causes of action – breach of fiduciary duty, fraudulent inducement and negligent misrepresentation – and Fuchs sought to dismiss these claims pursuant to CPLR 3211 (a) (7) and CPLR 3016 (b) (Fuchs Brief at 2-8).

1. Breach of Fiduciary Duty

With respect to the breach of fiduciary duty claim, Fuchs argues that the initial complaint contained no allegation of what specifically he did wrong, and that CPLR 3016 (b) requires a complaint to "particularize the facts allegedly giving rise to the fiduciary duties and the specific

misconduct of the defendant breaching that duty" (Fuchs Brief at 2). Fuchs also argues that, even though the initial complaint stated that Management was a registered investment advisor, there was no allegation that "Fuchs himself was an investment advisor or that he was an investor advisor to the Katzes". Accordingly, a fiduciary relationship did not exist "where the complaint only alleges an arms-length business relationship involving sophisticated business people" (*id.* at 3; citing cases). In sum, the Katzes "just made a bad investment in a company that failed," and that there was no fiduciary relationship to warrant the imposition of liability upon him for the Katzes' loss (*id.* at 4).

To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty owed by the defendant, a breach of that duty and resulting damages (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]). Opposing the motion, Plaintiff contends that the Complaint, which amended the initial complaint, states that Fuchs was a principal of Management and acted as an agent of Management and PPVA (Plf. Opp. at 6). Plaintiff also contends that Management, as investment advisor, owed fiduciary duties to its clients (including the Katzes). Because Fuchs was a principal and agent of an "undisputed fiduciary and acted and made representations on its behalf," Fuchs was also a fiduciary of the Katzes (*id.* at 7, citing, inter alia, *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007] [holding investment advisors as owing fiduciary duties to their clients and may be subject to tort liability for failing to exercise reasonable care, irrespective of their contractual duties]). Plaintiff further contends that each Defendant (including Fuchs), as insiders, possessed superior expertise or knowledge of the operations of Management and PPVA, the Katzes relied upon that special knowledge and expertise and, as a result, Fuchs likewise owed the Katzes a fiduciary duty (Plf. Opp. at 7; citing *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998] ["it is not

mandatory that a fiduciary relationship be formalized in writing, and any inquiry into whether such obligation exists is necessarily fact-specific;" and "a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge"]; *Liddle & Robinson v Shoemaker*, 276 AD2d 335, 336 [1st Dept 2000] [reversing dismissal of breach of fiduciary duty claim because whether there was a fiduciary relationship should be left for the trier of fact]). Plaintiff also points out that the Complaint sets forth specific allegations against Fuchs: on April 1, 2015, Fuchs and others represented to the Katzes that PPVA was sufficiently liquid so that they could make redemptions; in early May 2015, Fuchs failed to disclose to the Katzes that PPVA had liquidity issues and that the value of PPVA's assets were greatly overstated; in July 2015, Fuchs and Bodner fabricated explanations for PPVA's failure to honor the Katzes' redemption request; in August 2015, Fuchs and others failed to respond to the Katzes' request for a full redemption and failed to explain the inaccurate account statement; in October 2015, Fuchs and Huberfeld pleaded with the Katzes not to redeem their shares and misrepresented PPVA's financial health; and at meetings held in Mexico City and Acapulco, Fuchs and others continued to falsely represent to the Katzes that they would be able to redeem their investments (Plf. Opp. at 9; referencing Complaint, ¶¶ 35-49). Plaintiff further contends that damages attributable to the misconduct of Fuchs (and other Defendants) may "reasonably be inferred" from the allegations that each of them breached his fiduciary duty, and that at the pre-answer stage of the litigation, Plaintiff does not have to plead further to state damages (*id.* at 10; citing *Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009]). Thus, Plaintiff contends that these allegations sufficiently allege that Fuchs (and others) committed misconduct and breached fiduciary duties owed to the Katzes.

In reply, Fuchs does not address or distinguish the cases cited by Plaintiff; instead, he simply argues that a fiduciary duty "will not be found to exist where the complaint only alleges an arms-length business relationship involving sophisticated business people or where the parties are adversaries," and that "advice alone is not enough to impose a fiduciary duty" (Fuchs Reply at 3; citing *EBC I, Inc., Goldman Sachs & Co.*, 91 AD3d 211, 214-215 [1st Dept 2011] [*EBC*]). The argument is unpersuasive, as the *EBC* case is inapplicable. First, until this lawsuit was filed, the Katzes and Fuchs were not adversaries, and Fuchs does not allege otherwise. Second, in *EBC,* the defendant was the lead underwriter of the initial public offering and the plaintiff was the official committee of unsecured creditors appointed by the bankruptcy court in the issuer's subsequent bankruptcy, where the committee was granted standing to prosecute litigation on behalf of the bankrupt estate (91 AD3d at 213). The First Department held that the underwriter did not have a fiduciary duty to the issuer to advise it as to its IPO price because it is settled law that an underwriter-issuer relationship is non-fiduciary due to the nature of the underwriting commitment (*id.* at 215-216). This case does not involve an underwriting contract, and *EBC*'s holding and rationale is thus inapplicable. Notably, the First Department also stated that a breach of fiduciary duty claim may survive, for pleading purposes, where "the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone" (*id.* at 214). Here, the breach of fiduciary duty claim is not based on a written agreement with Defendants. Instead, it is based on the allegations that Defendants (including Fuchs) failed to disclose to the Katzes that PPVA had liquidity issues and that the value of PPVA's assets were grossly overstated, as well as the allegations that each Defendant held superior expertise or knowledge regarding the operations of Management and PPVA, and that the Katzes relied on

that special knowledge and expertise when making their investments. Importantly, the court in *EBC* was ruling on a motion for summary judgment. This is a motion to dismiss where a lesser showing is required of the party opposing the motion. The complaint must be accepted as true and the plaintiff must be afforded every favorable inference, and "in the absence of a conclusive document, neither the lack of evidentiary submissions to support the plaintiff's claims nor the defendant's denials are dispositive" (*Goldin v TAG Virgin Is., Inc.*, 149 AD3d 467, 467 [1st Dept 2017]). Furthermore, the court should not, in determining a motion to dismiss, consider whether the plaintiff can "ultimately establish its allegations" (*J. P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citation omitted]). The Complaint adequately states a breach of fiduciary duty claim against Fuchs.

2. Fraudulent Inducement

The elements of a fraudulent inducement claim are that the defendant made a misrepresentation or an omission of material facts, which was false and known to be false by the defendant when made, for the purpose of inducing the plaintiff's reliance, and the plaintiff justifiably relied on the misrepresentation, thus suffering damages (*see Loreley Fin. [Jersey] No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 465-466 [1st Dept 2014]). The Complaint alleges that each Defendant made misrepresentations and omissions of material facts with the intent of inducing the Katzes to invest in PPVA and/or to keep them invested in PPVA; that each Defendant knew his statements were false because of the over-inflated value and illiquid nature of the PPVA assets and that PPVA did not have sufficient funds to pay the Katzes' redemptions; the Katzes justifiably relied on the false statements and material omission; and suffered monetary damages as a result (Complaint,¶¶ 57-61; setting forth the allegations and elements in support of the fraudulent inducement claim).

In his motion to dismiss, Fuchs argues that because the initial complaint alleged that he only acted as an agent of Management and PPVA, "he could not have known that the alleged statements were false when made since he was in no position to know the true intentions of the principals [other Defendants] nor the actual assets of PPVA" (Fuchs Brief at 5). This argument is moot because the Complaint now states, *inter alia*, that Fuchs was a principal of Management and acted as an agent of Management and PPVA. Fuchs also argues that the Complaint only alleges, based on information and belief, that Defendants knew their statements were false when made and intended to induce the Katzes to invest and keep such investments in PPVA, but the Complaint fails to reveal the source of information, and this claim cannot stand (*id.* at 7). This argument is unavailing. CPLR 3016 (b) simply requires that a complaint allege "the basic facts" to establish a fraud claim, and the requirement "should not be confused with unassailable proof of fraud," which is met when the alleged facts are "sufficient to permit a reasonable inference of the alleged conduct" (*Sargiss v Magarelli*, 12 NY3d 527, 530-531 [2009], quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008] [Pludeman]). Here, the Complaint contains a "rational basis" for inferring that the alleged misrepresentation was knowingly made because it alleges that Defendants, including Fuchs, made misrepresentations when PPVA was in fact suffering a liquidity crisis and was unable to pay redemptions (*see Houbigant, Inc. v Deloitte v Touche LLP*, 303 AD2d 92, 98 [1st Dept 2003] [complaint did not need not to prove scienter; sufficient that it contained "some rational basis for inferring that the alleged misrepresentation was knowingly made"]).

Fuchs additionally argues that the Katzes received "printed materials regarding the status of PPVA and there is no allegation that Fuchs had anything to do with their contents." They were induced to invest because of the representations made by Nordlicht, Huberfeld and

Bodner and "could not have justifiably relied on any of Fuchs' statements regarding the PPVA status" (Fuchs Reply at 1-2; referencing Complaint, ¶¶ 19, 34). The argument is unavailing because the more relevant and operative allegations in support of this claim are stated in paragraphs 57-61 of the Complaint, as noted above which Fuchs ignored.

Fuchs further argues there can be no justifiable reliance because the Katzes, by exercising "ordinary intelligence and reasonable investigation," could have discovered the true facts, since "by demanding redemption and allegedly meeting roadblocks," they were "put on notice as to the true nature of things and should have inquired deeper [than] merely taking the defendants' representations at face value" (Fuchs Reply at 2). This argument is insufficient. While it is true that a heightened degree of diligence is needed when a party to whom a misrepresentation is made has hints of its falsity, "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]; *Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 580-581 [1st Dept 2015] [same]). The Complaint adequately alleges a fraudulent inducement claim against Fuchs.

3. Negligent Misrepresentation

The New York Court of Appeals has held that "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). The Court also held that, in the absence of obligations arising from the speaker's professional status (such as an attorney or engineer by virtue of his training and expertise that gives rise to a special

relationship of confidence and trust with his clients), there must be an "identifiable source of a special duty of care" in order to impose tort liability in a commercial case (*id.* at 264).

Fuchs argues that because the initial complaint only alleged that he was "a mere agent," he had no special or privity relationship with the Katzes, and thus this claim must fail (Fuchs Brief at 7). He also argues that "there are not sufficient allegations" in the Complaint that he owed or had a fiduciary or special relationship to the Katzes (Fuchs Reply at 3; citing *Mandarin Trading, Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] for the proposition of law that this claim requires "the existence of a fiduciary relationship or one involving special confidence and trust and reasonable reliance"); that paragraph 34 of the Complaint "admits" that he had nothing to do with the Katzes investing in PPVA; and thus there "could be no reasonable reliance on anything Fuchs told them" (Fuchs Reply at 3). These arguments too are unavailing. As discussed above, the Complaint alleges that Fuchs was a principal and agent of Management and PPVA, and he does not deny such allegation. The Complaint also alleges, as an "identifiable source of a special duty of care," that each Defendant was in a special relationship of trust and confidence with the Katzes because each was an advisor to the Katzes on their investments; that each also had a special relationship with the Katzes based on his unique expertise in investments generally and PPVA in particular; that the Katzes relied on the misrepresentations or omissions when they invested and maintained their investments in PPVA; that each misstated and withheld material facts regarding PPVA's assets and liquidity as well as the Katzes' ability to redeem their investment; and that the Katzes justifiably relied on such misrepresentations and non-disclosures to their detriment and suffered monetary losses (Complaint, ¶¶ 69-75). Thus, the Complaint adequately sets forth the elements of this claim. In such regard, Fuchs' reliance on paragraph 34 (which alleges that Nordlicht, Huberfeld and Bodner induced the Katzes to invest in PPVA) is

misplaced, as the Complaint also alleges, *inter alia*, that all Defendants made misrepresentations to the Katzes so that they would "initially invest and later maintain their investment in PPVA" (Complaint, ¶ 69). Furthermore, Fuchs' reliance on *Mandarin Trading* is misplaced because, as pointed out by Plaintiff in its opposition papers, that case did not also involve an allegation of breach of fiduciary duty by Defendants (Plf. Opp. at 15, n 10). Accordingly, this claim survives Fuchs' motion to dismiss.

4. Aiding and Abetting Breach of Fiduciary Duty And Aiding and Abetting Fraud

To plead aiding and abetting breach of fiduciary duty, the complaint must allege a breach of fiduciary duty, defendant's knowledge of the breach, and defendant's substantial assistance in the breach (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 24-25 [1st Dept 2015]). Where the defendant does not owe the plaintiff a fiduciary duty, an allegation that the defendant aided and abetted the fiduciary in the breach by concealing his own conduct from the plaintiff or that he knew of the breach and allowed it to happen is insufficient as a matter of law (*see Kaufman v Cohen,* 307 AD2d 113, 126 [1st Dept 2003]). On the other hand, to plead an aiding and abetting fraud claim, the complaint must allege that there was an underlying fraud; that the aiding and abetting defendant had actual knowledge of the fraud; and that the defendant provided substantial assistance to the commission of fraud (*Oster v Kirschner*, 77 AD3d 51, 55 (1st Dept 2010]).

Fuchs argues that he did not owe the Katzes a fiduciary duty, and thus the principal element of this claim is not met; and even if there was a duty, "there are insufficient allegations that Fuchs had actual knowledge" of the breach of duty or fraud (Fuchs Brief at 4-5). Fuchs also argues that the Complaint only alleges his having constructive knowledge of the fraud or breach of duty based on his "alleged close relationship with Nordlicht and Management and his access

to [inside] information," but that having constructive knowledge of the fraud or breach is not enough (*id.* at 4-5, citing, inter alia, *Kaufman*, 307 AD2d at 125). Fuchs further argues that the "substantial assistance" allegation in the Complaint only states that Defendants, "as a group," solicited the Katzes' investments, concealed PPVA's liquidity problems and failed to disclose PPVA's inability to allow the Katzes to redeem their investments, without providing a "detailed statement as to what Fuchs did," which renders the Complaint inadequate for asserting an aiding and abetting breach of fiduciary duty or fraud claim against him (Fuchs Reply at 4-5).

These arguments are unpersuasive. First, as discussed, the Complaint adequately states breach of fiduciary duty and fraud claims against Fuchs. Also, while the Complaint alleges that given Fuchs' close relationship with Nordlicht and access to inside information of Management and PPVA, it also alleges that the aiding and abetting defendants "actually knew" of Nordlicht's breach of fiduciary duty and fraud, and "they knew that PPVA was illiquid, could not satisfy investors' redemption requests and had greatly overvalued assets" (Complaint, ¶¶ 77-79; 82-84). Thus, the Complaint does not merely allege "constructive knowledge" on the part of Fuchs. Further, the First Department has held that "group pleading" is permissible in certain circumstances. In a case where the complaint referenced the eight seller-shareholders as "Individual Defendants" alleging that all made the same misrepresentation, the claims in the complaint were held to be sufficiently particularized as to any of the individual defendants (*see 47-53 Chrystie Holdings LLC v Thuan Tam Realty Corp.*, 167 AD3d 405, 406 [1st Dept 2018] [allowing fraud allegation against "individual defendants" who were alleged to have made the same false representation]). Moreover, at the motion to dismiss stage in that case, the First Department ruled it was "reasonable to infer that the individual [defendants] knew whether this closely held corporation maintained corporate documents and thus that they participated in the

alleged wrongful conduct" (*id.* at 407, citing *Pludeman*, 10 NY3d at 491-492). Thus, despite Fuchs' argument that "group pleading" is not allowed, the First Department has ruled otherwise, in arguably similar circumstances.

The Complaint adequately alleges aiding and abetting breach of fiduciary duty and fraud claims as against Fuchs. Accordingly, Fuchs' motion to dismiss all claims is denied in its entirety.

B. Other Defendants' Motions to Dismiss (Mo. Seq. Nos. 007, 008 and 009)

Motion sequence numbers 007, 008 and 009 were filed by defendants Bodner, Huberfeld and Nordlicht (hereinafter, Other Defendants), respectively, and the briefs in support of the motions are referred to as Bodner Brief, Huberfeld Brief and Nordlicht Brief (NYSCEF Doc. Nos. 79, 86 and 74). In opposition to these motions, Plaintiff filed its omnibus brief (Omnibus Opp.; NYSCEF Doc. No. 92). Thereafter, the Other Defendants filed replies: Bodner Reply, Huberfeld Reply and Nordlicht Reply (NYSCEF Doc. Nos. 102, 101 and 95, respectively). Many of the arguments of the Other Defendants are similar to those advanced by Fuchs. The aiding and abetting fraud and aiding and abetting breach of fiduciary duty (addressed above) claims are not asserted against Nordlicht.

1. Lack of Standing

Huberfeld argues that Plaintiff, the trust purporting to be the assignee of the Katzes' claims, lacks standing because the assignment document referenced an assignment made solely by Adela, not Marcos, and the assignment is governed by Cayman Islands law, not New York law (Huberfeld Brief at 22). In effect, Huberfeld argues that, because Marcos is deceased, and without a "valid assignment," Plaintiff may not sue on behalf of the Katzes based on alleged

misrepresentations, particularly where the Complaint alleges that much of the misrepresentations were made directly to Marcos, as opposed to Adela (*id.*). Nordlicht makes a similar argument (Nordlicht Brief at 25-26).

Plaintiff contends that the fact that Marcos is not a signatory to the assignment does not affect Plaintiff's standing as it is "reasonable to infer" that Adela had the authority to assign the entirety of her claims and those of her husband to Plaintiff, and Plaintiff must be afforded "the benefit of every possible inference" (Omnibus Opp. at 4; citing cases). Plaintiff also contends that, despite the Other Defendants' argument that these claims must be dismissed absent proof of legal standing under Cayman Islands law, "proof is not required at the motion to dismiss stage" so long as Plaintiff adequately alleged its standing in the Complaint (*id.*; citing cases).

The court addressed the standing issue at oral argument on these motions and rejected it (*see* Transcript at 18-21 [noting that Defendants' argument was premature because it was raised at the pleading stage under CPLR 3211]).

2. Impact of Martin Act

Nordlicht argues that the breach of fiduciary, fraud, and negligent misrepresentation claims are preempted by the Martin Act (General Business Law, Article 23-A) where a "significant component" of the representations that induced a plaintiff to invest arose from alleged violations of securities laws (Nordlicht Brief at 26-27; citing cases). Nordlicht also argues that the law is "well settled" that there is "no private cause of action under the Martin Act," and the claims in the Complaint seeking to recover damages are thus precluded by the Martin Act (*id.* at 27-28; citing cases).

The Court of Appeals has held that common law claims, such as breach of fiduciary and fraud, are not pre-empted by the Martin Act because "an injured investor may bring a common-

law claim that is not entirely dependent on the Martin Act for its viability" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]). The Court explained that "the Martin Act is not impaired by private common-law actions that have a legal basis independent of the statute because proceedings by the Attorney General and private actions further the same goal -- combating fraud and deception in securities transactions" (*id.*). Here, it is clear from the Complaint that Plaintiff's common-law claims are not depended solely on the statute, and Nordlicht does not argue otherwise. Further, in his reply, Nordlicht fails to address the holding and rationale of the Court of Appeals; instead, he argues that Plaintiff's claims are primarily based on allegations of breach of contract, and then inexplicably concludes that such claims "must be dismissed because of the Martin Act prohibitions" (Nordlicht Reply at 9-11). This argument has no merit.

3. Timeliness of Claims

Both Huberfeld and Nordlicht argue that the claims are barred by the applicable statute of limitations (Huberfeld Brief at 19-21; Nordlicht Brief at 23-25). Notably, the Bodner does not raise this defense.

The statute of limitations for a fraud claim is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable diligence have discovered [the fraud]" (CPLR 213 [8]; 203 [g]). The statute of limitations for aiding and abetting fraud is the same as that for fraud (*see New York State Workers' Comp. Bd. v LaFiura, CPAs, P.C*, 146 AD3d 1110, 1114 [3d Dept 2017]). As noted above, Plaintiff alleges that in June 2016, the government brought criminal charges against Nordlicht and other members of Management in connection with a bribery scheme and securities laws violation and that, prior

to such time, the Katzes were unaware that Defendants were part of a scheme to defraud investors (Complaint, ¶¶ 51-52). This action was commenced in September 2018.

Huberfeld argues that, of the total $39 million investment by the Katzes, $26.5 million was invested prior to May 1, 2011 (allegedly induced by fraud and misrepresentation). Accordingly, claims related to the $26.5 million portion are time-barred as they accrued more than six years before commencement of this action (Huberfeld Brief at 19; referencing Complaint ¶ 17). Because the remaining investment was made between August 2014 and May 2015 (more than three years before commencement of this action and more than two years after the fraudulent scheme was discovered by the Katzes in June 2016), Huberfeld argues that "at least a portion, if not all, of Plaintiff's claims premised upon the Katzes' investment in PPVA are time-barred" (*id.*). He asserts that because the fraud and misrepresentation claims "unquestionably accrued on or before May 1, 2011" as to the $26.5 million, they expired long before this action was commenced in September 2018 (*id.* at 20; citing *Prichard v 164 Ludlow Corp.*, 49 AD3d 408, 409 [1st Dept 2008] [claims accrued when plaintiffs completed the act that the alleged fraudulent statements had induced them]). And as to the remaining investment, Huberfeld argues that because the Complaint fails to identify any fraud or misrepresentation attributable to him, "claims based on investments after May 2011 are likewise time-barred" (*id.*). Huberfeld further argues that, because the Katzes admitted that they discovered the alleged fraud in June 2016, the two-year limitation period expired in June 2018, months before this action was commenced (*id.*; citing cases). In sum, Huberfeld argues that the fraudulent inducement, aiding and abetting fraud, and the negligent misrepresentation claims against him are all time-barred (*id.* at 21 [noting that a negligent misrepresentation claim generally has a three-year statute of limitations, and that even if the court applies a six-year statute, it would still be time-barred for

the same reasons that the fraudulent inducement claim is time-barred]). Nordlicht makes similar arguments as to the fraud and misrepresentation claims against him (Nordlicht Brief at 24-25).

In opposition, Plaintiff contends that where a "continuing pattern and practice of actionable behavior [exists]," an aggrieved party "may invoke the continuing tort doctrine to provide an exemption from the statute of limitations," if the "last actionable act" of the alleged course of conduct falls within the statute of limitations (Omnibus Opp. at 19, n 8; quoting *Neufeld v Neufeld*, 910 F Supp 977, 983 [SD NY 1996] and citing various New York trial court decisions in the footnote). Plaintiff also contends that, because the "last actionable act" occurred in May 2016, when the Other Defendants met with the Katzes in Acapulco and misrepresented the liquidity of PPVA and its ability to pay redemption requests, these claims are "deemed filed within six years," and are thus timely (Omnibus Opp. at 19).

The *Neufeld* case cited by Plaintiff involved a claim of intentional infliction of emotional distress against family members, but the fraud and misrepresentation claims in this case are raised in a commercial transaction. While the facts are distinguishable, the legal theory and analysis behind the continuing wrong doctrine are the same, as explained below.[2] After *Neufeld*, while the federal court declined to find the continuing wrong/tort doctrine applicable in the case before it, the court noted that the Second Circuit and the New York Court of Appeals have applied the doctrine narrowly to situations where the equities required it (*see e.g., Carell v Shubert Org., Inc.*, 104 F Supp 2d 236, 261, n. 21 [SD NY 2000]; and *Jensen v General Elec. Co.*, 82 NY2d 77, 85 [1993] [reviewing continuing wrong doctrine and noting that it is a "narrow common-law exception" to the general accrual rule]). Subsequent to *Jensen*, the First

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[2] Huberfeld's attempt to distinguish the trial court cases cited by Plaintiff, arguing that those cases "concern radically different types of legal claims and actually underscores the inappropriate application of the continuing wrong doctrine" (Huberfeld Reply at 5; discussing claims and factual differences) is unavailing for the reasons discussed in the text.

Department has held that "where a plaintiff asserts a single breach – with damages increasing as the breach continued – the continuing wrong theory does not apply" (*Henry v Bank of America*, 147 AD3d 599, 601 [1st Dept 2017]). In *Henry*, the First Department, explained that the continuing wrong/tort doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*id.* at 601 [internal quotation marks and citations omitted]).

Here, the Complaint alleges in detail, that subsequent to May 2011 (after the Katzes made their $26.5 million investment), the Other Defendants continued to defraud the Katzes by, among other things, misrepresenting the asset values of PPVA, concealing or failing to disclose its liquidity problems, and misleadingly representing that PPVA had sufficient assets to honor their redemption requests (Complaint, ¶¶ 21-50). Although the continuing wrong doctrine must be narrowly applied, the Complaint adequately alleges that the Other Defendants continued to defraud the Katzes and made misrepresentations to them, which caused them to maintain their investment in PPVA, invest more money, and sustain additional losses. Because these claims are premised upon "continuing unlawful acts and not on the continuing effects of earlier unlawful conduct," the continuing wrong doctrine is applicable to claims that accrued earlier in May 2011, so long as the Complaint also adequately alleges that the "last actionable act" of the Other Defendants occurred in May 2016, as Plaintiff contends.

Further, as to those investments made by the Katzes after May 2011 (between August 2014 and May 2015), the six year statute had not run. Also, even though the Katzes admittedly discovered the alleged fraud in June 2016, more than two years before this action was commenced, that allegation has no adverse effect because the limitations period is *the greater of* six years from when the claim accrued *or* two years from when the fraud was discovered.

Accordingly, the fraudulent inducement, negligent misrepresentation, and aiding and abetting fraud claims are not time-barred.

With respect to the breach of fiduciary duty claim, Huberfeld argues that the statute of limitations is three years and it accrues on the date of the breach (Huberfeld Brief at 20; citing *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [IDT]). However, Huberfeld also notes that the applicable limitations period may be three or six years, depending on the relief sought. Since Plaintiff seeks monetary damages (not equitable relief), the breach of fiduciary claim (as well as the aiding and abetting breach claim) has a three-year limitations period (*id.* at 21; citing *IDT*, 12 NY3d at 139). Huberfeld further argues that this claim accrued on May 1, 2015, when the Katzes last invested in PPVA, and is barred by the three years (*id*). Nordlicht makes similar arguments (Nordlicht Brief at 23-24).

Plaintiff contends that the limitations period for this claim does not begin to run "until the fiduciary has openly repudiated the fiduciary relationship or it has been otherwise terminated" (Omnibus Opp. at 18; citing cases). It also contends that once the fiduciary relationship ended, the limitations period is six years "if an allegation of fraud is essential" to the breach of fiduciary duty claim (*id.*, citing *Kaufman*, 307 AD2d at 119). Plaintiff further asserts that the fiduciary relationship ended in June 2016, when the Katzes first became aware of the alleged fraud due to the government's charges against Defendants in connection with the bribery scheme and securities fraud (as discussed above), and that even if the shorter three-year period applies, the breach of fiduciary duty and aiding and abetting breach claims are timely because this action was commenced in September 2018 (*id*).

In reply, Huberfeld asserts that, because the Complaint "confirms that Plaintiff's claim accrued no later than May 1, 2015, the last date that the Katzes invested in PPVA and the date

that the Katzes suffered the full extent of damages based on Huberfeld's purported wrongful action," the claim is time barred because this action was not commenced until September 2018, more than three years later (Huberfeld Reply at 6).

The argument is unavailing. In *IDT*, the case relied on by Huberfeld, the Court of Appeals repeated its ruling in *Kaufman* and stated that "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8)" (*IDT*, 12 NY3d at 139). Here, as reflected in the Complaint and Plaintiff's papers, the fraud claim is essential to the breach of fiduciary duty claim, and thus a six-year limitations period is applicable, which, in effect, renders the breach of fiduciary duty claim (and aiding and abetting breach of fiduciary duty claim) timely, even in the context of a May 1, 2015 claim accrual date, as asserted by Huberfeld. In such regard, further analysis are needed to determine whether the breach of fiduciary duty claim may be dismissed alternatively, pursuant to CPLR 3211 (a) (7), as against Huberfeld and Nordlicht.

4. Breach of Fiduciary Duty Claim Against Other Defendants

Making arguments similar to those made by Fuchs (as discussed in section III.A.1), each Other Defendant asserts that the breach of fiduciary claim may be dismissed alternatively, under CPLR 3211 (a) (7). Specifically, they argue that the Complaint fails to allege sufficient facts to show each of them was a fiduciary to the Katzes; that even though Management was a registered investment advisor, there are no allegations that each of them was an advisor to the Katzes; that a fiduciary relationship does not exist if a pleading only alleges an arms-length business relation involving sophisticated business people; that a fiduciary duty cannot be imposed unilaterally; that the losses sustained by the Katzes were due to the underperformance of their investments, which is inadequate to sustain a breach of fiduciary duty claim; and that a breach of fiduciary

duty claim must meet the specificity requirement of CPLR 3016 (b) (Huberfeld Brief at 13-14; Nordlicht Brief at 18-20; Bodner Brief at 11-13).

Plaintiff contends that the Complaint sufficiently alleges that each Other Defendant breached his fiduciary duty owed to the Katzes by misrepresenting the value of PPVA's asset and its liquidity problems as well as the Katzes' ability to redeem their investment, because the Complaint sets forth specific instances of such breaches by each Other Defendant (Omnibus Opp. at 8-10; enumerating separate paragraphs of the Complaint that allege specific instances of breach by each Other Defendant). Plaintiff also sets forth applicable caselaw in support of its assertion that each Other Defendant owed the Katzes a fiduciary duty; that each of them breached the duty and that the Katzes suffered damages as a result; and therefore the Complaint adequately alleges each element of this breach of fiduciary duty claim (*id.* at 6-8).

In reply Huberfeld essentially repeats arguments made in the Huberfeld Brief which will not be described again.

Echoing Huberfeld's assertion that the Katzes were sophisticated investors, and thus can neither support a breach of fiduciary duty claim in an arms-length transaction nor a justifiable reliance by them upon the alleged misrepresentations because they had an affirmative duty to investigate the details of their transactions, Nordlicht argues for a dismissal of all claims against him (Nordlicht Reply at 11-15). These arguments fail for the reasons discussed above. Accordingly, the breach of fiduciary duty claim survives Nordlicht's motion to dismiss.

In the Bodner Reply, which attempts to collectively address the "fraud, fiduciary breach and negligent misrepresentation claims," He does not deal specifically with the breach of fiduciary duty claim. Instead, he asserts, in a two-pronged approach, that to the extent the three claims rely on "alleged misrepresentations by Bodner before May 2015, they fail because the

[Complaint] does not meet [the] pleading requirements under CPLR 3016 (b)," and to the extent that these claims rely on "three interactions between the Katzes and Bodner from July 2015 to May 2016, the claims fail because the [Complaint] establishes that the Katzes made a full redemption request in August 2015 and never waivered from their decision" (Dual Argument; Bodner Reply at 2-3). The Dual Argument fails to discuss the elements of a breach of fiduciary duty claim and the absence of specific argument for the breach of fiduciary duty claim undermines Bodner's motion to dismiss. Applying the legal standards that govern a motion to dismiss pursuant to CPLR 3211 (a) (7) Bodner's motion seeking to dismiss the breach of fiduciary claim must be denied. [3]

5. Fraudulent Inducement and Negligent Misrepresentation Claims

The elements of fraudulent inducement claim and a negligent misrepresentation claim are stated in sections III.A.2 and III.A.3, respectively, and need not be repeated herein. However, as a threshold issue, the Other Defendants argue that these claims should be dismissed because they are actually breach of contract claims. For example, in the Bodner Brief, he argues that the gravamen of the claims is that "Bodner knowingly misled the Katzes regarding PPVA's ability to pay their August 2015 redemption," but these claims "seek to impermissibly take PPVA's alleged contractual failure to redeem the Katzes' [redemption] requests and turn that into a fraud claim" (Bodner Brief at 1). In support of the argument, Bodner cites *Cronos Group Ltd. v XCompIP, LLC*, 156 AD3d 54, 67-68 (1st Dept 2017) (*Cronos*), for the proposition that "an insincere promise to perform a contractual obligation is not actionable as fraud – absent which contract claims would be routinely pleaded in the alternative as fraud – guards against the

[3] The Dual Argument, however, will be considered in the context of the fraud and misrepresentation claims against Bodner, as discussed below.

erosion of the distinction between the two causes of action" (Bodner Brief at 10). Thus, Bodner asserts that Plaintiff cannot "transform PPVA's failure to meet contractual obligations into a fraud claim" by alleging he and Other Defendants made misrepresentations . . . about PPVA's ability or intent to honor its contract obligation (*id.* at 10-11; see also Huberfeld Reply at 12-13 [citing *Cronos* and arguing that these claims "seek nothing more than the benefit of the Katzes' bargain with PPVA;" Nordlicht Brief at 12 [breach of contract claim cannot be converted into fraud claim by alleging that promisor did not meet its contractual duties]).

Plaintiff contends that these claims against the Other Defendants, "who were not parties to any enforcement contract with the Katzes," do not seek contractual damages because they are not recoverable under a breach of contract theory, and thus their argument fails (Omnibus Opp. at 17-18). In reply, Bodner argues that the damages sought in this action, $39 million, are "exactly the same" as would be available in a breach of contract action against PPVA, had PPVA paid and honored the Katzes' redemption requests in full, and therefore the purported fraud claims are essentially breach of contract claims (Bodner Reply at 3, n 4).

The argument is unavailing. In *Cronos*, the plaintiff asserted, among other things, breach of contract and fraud against the defendants, including the corporate defendant and its managing officer (156 AD3d at 56-59). The First Department noted that, where a fraud claim alleges that the defendants misrepresented their intention in which they would perform their contractual duties, the fraud claim would be dismissed as "duplicative" of the contract claim, because the fraud claim was "based on the same facts" that underlay the contract claim and was "not collateral to the contract" (*id.* at 63; citations omitted). Here, PPVA, the entity in liquidation proceedings in the Cayman Islands, is not a defendant in this action and no breach of contract claim is asserted against PPVA or the Other Defendants. Therefore, the fraud and

misrepresentation claims are not "duplicative" of the non-asserted breach of contract claim, and the holding and rationale in *Cronos* is inapplicable. Also, Bodner does not discuss whether the fraud claim is "not collateral to the contract," an allegation he is required to make. (see Transcript of oral argument at 12-17; addressing the "collateral to contract" issue that Bodner tried to belatedly raise).

In addition, principals and officers of a corporation or other business entity may be held personally liable for their own fraudulent misconduct or other tortious acts (*see Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005] [corporate officer who participated in the commission of a tort may be held individually liable regardless of whether he acted on behalf of the corporation and regardless of whether the corporate veil is pierced]; *American Express Travel Related Servs. Co. v North Atl. Resources, Inc.*, 261 AD2d 310, 311 [1st Dept 1999] [same]).[4]

Further, the Dual Argument raised by Bodner also fails. Despite Bodner's argument that the Complaint fails to meet the requirement of CPLR 3016 (b), the courts have held that "group pleading" is permissible in some circumstances, and that CPLR 3016 (b) only requires that a complaint alleges the "basic facts," which is met when the alleged facts are "sufficient to permit a reasonable inference of the alleged [fraudulent] conduct" (see discussions in sections III.A.1, III.A.2 and III.A.3, citing, among other cases, *Pludeman*). Also, the Dual Argument asserting that the Complaint shows that the Katzes did not change their position based on anything that Bodner said or did between July 2015 and May 2016 -- thus purportedly undermining the "reliance" element of the fraud and misrepresentation claims -- because the Katzes never

[4] Similarly, as noted above, although a written agreement did not impose fiduciary duty on the defendants, officers of an investment advisory firm who allegedly provided investment advice to the plaintiff, who purportedly relied on the defendants' expertise in the field of investment consulting services, were found by the court to be sufficient to raise a factual issue regarding the existence of fiduciary duties owed by the defendants in their individual capacity to the plaintiff (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 110 [1st Dept 2005]).

withdrew their redemption requests is equally unpersuasive. Bodner cites no caselaw in support of his novel theory that an aggrieved party must withdraw or waive his rights to recovery before he can assert a fraud or misrepresentation claim. Moreover, as discussed above, what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss (see sections III.A.1 to III.A.3, citing cases).

Other arguments raised by the Other Defendants – such as there is no special relationship between the Katzes and Other Defendants, the Katzes should have exercised a heightened degree of diligence to protect themselves from potential fraud and misrepresentation because they are sophisticated business people, and the unilateral reliance by the Katzes on a purported fraud was unjustified – have been addressed and rejected in connection with Fuchs' motion. They will not be repeated here (see sections III.A.2 and III.A.3 above). The fraudulent inducement and negligent misrepresentation claims shall survive.

6. Aiding and Abetting Breach of Fiduciary Duty And Aiding and Abetting Fraud

The elements for these two claims are discussed in section III.A.4 above. As also noted there, these two claims are not asserted against Nordlicht, as he was purportedly the party who was aided and abetted by Huberfeld, Bodner and others.

Substantially similar to the arguments made by Fuchs, Huberfeld and Bodner argue that the Complaint contains mere conclusory allegations that they had knowledge of, and substantially assisted in, the breach of fiduciary duty and fraud by Nordlicht or other members of Management and PPVA (Huberfeld Brief at 16-18; Bodner Brief at 13-14). They also assert that these claims must be dismissed because the Complaint fails to allege facts with particularity and that, as alleged aiders and abetters, they proximately caused the harm on which the primary liability is predicated (*id*). For the same reasons stated in section III.A.4, the aiding and abetting

breach of fiduciary duty and aiding and abetting fraud claims survive the motions to dismiss by Huberfeld and Bodner.

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED that the motions to dismiss by defendants Bernard Fuchs (motion sequence number 002), David Bodner (motion sequence number 007), Murray Huberfeld (motion sequence number 008) and Mark Nordlicht (motion sequence number 009) are denied in their entirety; and it is further

ORDERED that each of the above defendants is directed to serve an answer to plaintiff's first amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the above parties shall appear for a status conference before this court on April 21, 2020 at 10:30 a.m.; and it is further

ORDERED that the motion to dismiss by defendant Gilad Kalter (motion sequence number 006) is deemed moot and academic, because plaintiff has discontinued the instant action against said defendant and his estate, pursuant to the Notice of Discontinuance filed with this court dated October 28, 2019 (NYSCEF Doc. No. 108).

Dated: March 10, 2020

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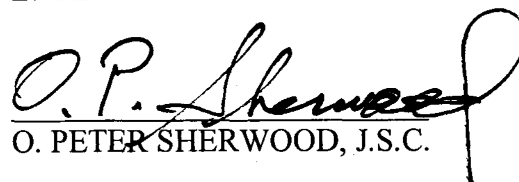

O. PETER SHERWOOD, J.S.C.