SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

BANKERS CONSECO LIFE INSURANCE COMPANY and WASHINGTON NATIONAL INSURANCE COMPANY,

Plaintiffs,

-against-

KPMG LLP,

Defendant.

- X

DECISION AND ORDER
Index No.: 653765/2019

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

Under motion sequence 002, defendant KPMG LLP ("KPMG") moves to dismiss plaintiffs' complaint for failure to state a claim and on statute of limitations grounds. For the following reasons, the motion shall be granted.

I. BACKGROUND

Plaintiffs Bankers Conseco Life Insurance Company ("Bankers") and Washington National Insurance Company ("Washington") are insurance companies domiciled in New York and Indiana respectively, and both indirect subsidiaries of CNO Financial Group, Inc. ("CNO") (Complaint ¶¶13, 14 [Doc. No. 1]). Defendant KPMG is a limited liability partnership located in New York (*id.* ¶16).

From 2003 to 2015, Platinum Partners, LP ("Platinum") reported average annual returns of 17% while promising its investors liquidity on sixty to ninety days notice (*id.* ¶21). Beginning in 2012, Platinum used new investor money and borrowings to pay existing investors asking for return of their money. By 2014, Platinum was relying almost exclusively on such accounts becoming, in essence, a Ponzi scheme (*id.* ¶22). To keep the scheme afloat, Platinum sought outside funding from investors such as insurers but the backgrounds of the three Platinum co-founders—Murray Huberfeld, David Bodner, and Mark Nordlicht—scared away institutional investors (*id.* ¶¶23–32). To create a new investment vehicle to feed the scheme, the co-founders acquired 70% of Beechwood Re, Ltd.'s ("Beechwood") common shares through family trusts and Beechwood Re Investments, LLC ("Beechwood Investments") so as to conceal their identities (*id.* ¶¶33–35). In July 2015, Bodner admitted he and his colleagues were not "exactly honest" with plaintiffs about the original investment or Beechwood and Platinum's integration (*id.* ¶38).

In 2013, Bankers and Washington turned to the reinsurance marketplace to explore ceding long-term care liabilities to a qualified reinsurer (*id.* ¶39). At that time, Beechwood was a new reinsurance company with no existing business. Plaintiffs would not have dealt with Beechwood without a belief that it would make conservative and prudent investments (*id.* ¶40). To attract institutional investors, Platinum and Beechwood portrayed Beechwood as an entity backed by clean, substantial capital run by front men with no apparent ties to Platinum: Mark Feuer and Scott Taylor (*id.* ¶¶41–42). Feuer and Taylor along with Beechwood Capital, represented to plaintiffs that Beechwood was owned by Feuer, Taylor, and David Levy (Huberfeld's nephew), and that Beechwood would have a capitalization of $50 million which was increased to $100 million (*id.* ¶¶34, 42, 43). On May 20, 2013, plaintiffs received written materials from Beechwood Capital which indicated that Beechwood wanted to participate in the request for proposals process and misrepresented that Beechwood's initial capitalization would be $50 million with capital commitments to expend operations over the next two years (*id.* ¶44). In a slide deck prepared by Beechwood Capital and provided to plaintiffs in July 2013, the front men knowingly misrepresented that Beechwood had access to over $100 million in capital with access to fund up to $500 million in coming years (*id.* ¶45).

Beechwood employed KPMG to raise its credibility in the reinsurance market (*id.* ¶46). Platinum and KPMG knew that plaintiffs would not want to do business with "hedge fund guys" and an internal email from KPMG in August 2013 makes clear that KPMG knew its task was to prove that Beechwood is a substantive reinsurance company by using assets belonging to Platinum's owners while making sure plaintiffs would not know the source of the assets on which the valuation was based (*id.* ¶47). In July 2013, Herschel Wein, a KPMG tax principal, emailed to the front men that KPMG had developed an approach to show the desired capitalization by having the investors issue a demand note collateralized by the assets (the "Demand Note Strategy") (*id.* ¶49). Beechwood received a $100 million Demand Note dated August 30, 2013 from Beechwood Investments, which was controlled by Nordlicht and owned by family trusts he established along with Huberfeld and Bodner (*id.* ¶50). The Demand Note was collateralized entirely by "limited partnership interests" in two Platinum funds which were basically worthless, a fact known to KPMG. (*id.*). Under the terms of the Demand Note, Beechwood could seek funds from Beechwood Investments which could then fund Beechwood's demand and Beechwood Holdings would issue preferred stock in the demanded amount, providing a 4% return (*id.* ¶51). Beechwood's capital

was effectively a $100 million line of credit backed only by the co-founders (*id.*). In August 2013, Beechwood commissioned KPMG to provide a valuation to convince plaintiffs that Beechwood Capital and the front men possessed significant capital to shoulder the burden and risk of a reinsurance relationship (*id.* ¶53). The front men informed KPMG principal Michael Athanason that they needed a valuation to prove to plaintiffs that Beechwood was a "substantive reinsurance company" without plaintiffs knowing the assets on which the valuation was based because Feuer and Levy understood that "insurance companies don't want to do deals with hedge fund guys" (*id.* ¶54). KPMG did so but noted that it was practically impossible for it to provide a "fair value" valuation and that its valuation had to be based on Beechwood's representations (*id.* ¶¶55–56). Platinum pressured KPMG to issue the valuations "ASAP so we can print and bury it in the diligence package" to give to plaintiffs (*id.* ¶57). Despite KPMG's recitation that the letter and its conclusions should only be used by management for "internal planning purposes", KPMG understood this document would be used to induce plaintiffs to enter the Reinsurance Agreements (*id.* ¶59). Using the Demand Note and the valuation letter, Platinum contrived capitalization which was used in marketing materials sent to plaintiffs (*id.* ¶61). The valuation letter purported to corroborate statements made by Beechwood to plaintiffs (*id.* ¶63)., Having received the KPMG letter about Beechwood's claimed capitalization, Bankers and Washington each entered into Reinsurance Agreements with Beechwood in February 2014 (*id.* ¶69). In 2015, Wein and Athanason's colleagues at KPMG Bermuda concluded in a 2015 memo stating that "the undrawn down portion of [a] Demand Note should not be recognized as an asset and equity on the balance sheet" and described the prior recognition of the undrawn portion of a demand note as a balance sheet asset, a departure from US Generally Accepted Accounting Principles (*id.* ¶67).

Plaintiffs assert three claims against KPMG: (i) aiding and abetting fraud, (ii) constructive fraud, and (iii) negligent misrepresentation.

II. LEGAL STANDARD

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its

allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS

A. Defendant's Arguments

KPMG asserts that plaintiffs do not allege facts sufficient to sustain an aiding and abetting fraud claim (Def. Br. at 9 [Doc. No. 91]). KPMG argues plaintiffs do not allege facts showing that KPMG had actual knowledge of the Platinum scheme to use Beechwood Re to siphon money from insurance companies (*id.*), but instead support the opposite as the complaint states Platinum did not begin siphoning money from Beechwood until 2015, two years after KPMG last performed work for Beechwood Re (*id.*). Because plaintiffs' complaint fails to meet the actual knowledge element of aiding and abetting fraud, the claim should be dismissed (*id.*; *see Eurycleai Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Nat'l Westminster Bank USA v Weksel*, 124 AD2d 144, 147–148 [1st Dept 1987]). KPMG further argues that Beechwood Re's alleged request that KPMG remove the names of the assets from its valuation letter did not indicate to KPMG that a fraudulent scheme was taking place as not providing confidential, proprietary, or sensitive business information is common when parties are in early negotiation as plaintiffs and Beechwood Re were when KPMG issued the letter ([Def. Br. at 10]; *see Sodhi v Gentium S.P.A.*, No. 14-CV-287 [JPO], 2015 US Dist LEXIS 7344 at *16 [SDNY 2015]; *Coventry Capital US LLC v EEA Life Settlements, Inc.*, 2017 US Dist LEXIS 182474 at *7 [SDNY 2017]). KPMG owed no fiduciary duty to plaintiffs, having never interacted with them, and, consequently, there was no obligation to disclose its client's information to plaintiffs (*Eurycleia Partners, LP*, 12 NY3d at 560).

The complaint's references to KPMG agent Michael Athanason's internal email only reflects Athanason's description of an "unidentified third party's speculation" that an "unidentified insurance company" may not want to "deal with hedge fund guys" (Def. Br. at 10; Complaint ¶8; Exhibit C). The complaint fails to allege that plaintiffs did not want to enter a reinsurance deal with individuals who have worked with hedge funds (Def. Br. at 10–11). KPMG further argues that Athanason's email only notes that investors were "putting in 150 Million 'hard assets'" and "interests in company that are tied to a public company" (Def. Br. at 11).

The aiding and abetting fraud claim fails because, although the complaint alleges that Beachwood Re used KPMG's reputation through a one-page interim valuation letter, plaintiffs fail to allege that the letter amounted to substantial assistance (*id.*; Complaint ¶46). KPMG argues that although its letter did not provide the names of assets, the nondisclosure of the asset names was not hidden from plaintiffs who failed to conduct their own due diligence (*see Grumman Allied Indus., Inc.*, 748 F2d 729, 737 [2d Cir 1984]; *KNK Enters., Inc. v Harriman Enters., Inc.*, 824 NYS2d 307 [1st Dept 2006]). Substantial assistance does not include good faith professional advice or services in support of transactions, even where those transactions are later found to be objectionable (*see Weksel*, 124 AD2d at 147). Consequently, this claim must be dismissed.

Defendant further argues that plaintiffs' constructive fraud claim fails because plaintiffs do not allege facts necessary to demonstrate a fiduciary relationship which is a necessary element (Def. Br. at 12; *see Brown v Lockwood*, 76 AD2d 721, 731 [1st Dept 1980]). Plaintiffs and KPMG had no relationship and plaintiffs do not even allege that they had contact with KPMG (*see Ernest Lawrence Grp. v Mktg. the Ams., Inc.*, 2005 US Dist LEXIS 25307 at *27–30 [SDNY 2005]).

KPMG next argues that plaintiffs' negligent misrepresentation claim should be dismissed because: (i) the claim is time-barred, (ii) plaintiffs failed to allege any misrepresentation made by KPMG, and (iii) plaintiffs have not alleged a significant and direct relationship with KPMG (Def. Br. at 13). Negligence-based claims against accounting firms are generally treated as accounting malpractice claims when determining the applicable limitations period; such claims have a three-year statute of limitations which accrue upon receipt of work product and do not toll because an injured party fails to discover flaws in the accountant's work (*see A. Morrison Trucking, Inc. v Bonfiglio*, 824 NYS2d 752 [Sup Ct 2006]; *Ackerman v Waterhouse*, 644 NE2d 1009, 1013 [Ct App 1994]; *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7–8 [Ct App 2007]; CPLR 214(6)). KPMG performed the work plaintiffs challenge in September 2013 and the statute of limitations tolled in September 2016. Consequently, the negligence claim expired years ago and should be dismissed.

A claim for negligent misrepresentation requires that plaintiffs plead an incorrect statement of fact and reasonable reliance on such information (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). KPMG did not provide any opinion or report regarding the demand note structure that was provided to plaintiffs (Def. Br. at 14). Plaintiffs do not allege facts identifying any misrepresentations in the September 10, 2013 summary valuation letter and, further, opinions

or appraisals of value like those found in KPMG's letter cannot form the basis of a claim for fraudulent or negligent misrepresentation (*id.*; *see Mandarin Training Ltd. v Wildensten*, 65 AD3d 448, 450 [1st Dept 2009]; *S'holder Representative Servs. LLC v Sandoz Inc.*, 9 NYS3d 595 [Sup Ct 2015]). KPMG had no duty to disclose to plaintiffs the names of assets being valued in its one-page letter (*see SNS Bank, N.V. v Citibank, N.A.*, 777 NYS2d 62, 66 [NY App Div 2004]). Plaintiffs have further failed to allege facts demonstrating justified reliance on KPMG's letter because it only contained a hypothetical valuation of assets anticipated to be contributed to Beechwood and because plaintiffs failed to conduct due diligence by researching te contents of the letter (Def. Br. at 15; *see KNK Enterprises*, 33 AD3d at 872; *Serino v Lipper*, 846 NYS2d 138, 145 [NY App Div 2007]).

Finally, KPMG argues that plaintiffs who are non-clients, cannot succeed on a negligence theoty because they failed to allege conduct linking them to KPMG (*see Credit All. Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Company*, 5 NY3d 582, 842 NE2d 471, 478–79 [2005]). No such direct link exists as a relationship between the accountant's client and non-client alone cannot create a sufficient relationship to attach liability (*see Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 94 [1st Dept 2003]).

B. Plaintiffs' Memorandum of Law in Opposition

In opposition, plaintiffs argue that they have adequately alleged KPMG's actual knowledge of the fraud as KPMG cannot dispute having knowledge that "disreputable 'hedge fund guys'" were secretly behind Beechwood and the $100 million purported capitalization was not capitalization but debt based on illiquid Platinum assets (Pl. Br. at 10 [Doc. No. 99]; Complaint ¶¶47–52; Buckley Exs. 1, 2, 10). Plaintiffs further argue the KPMG cannot dispute that it took an active role in creating the Demand Note Scheme and provided the valuation letter that covered up Platinum's connections (Complaint ¶¶47–66; Buckley Exs. 2, 4–6). Plaintiffs were fraudulently induced into signing the Reinsurance Agreements and KPMG, in furtherance of that goal: (i) created the Demand Note Scheme to make Beechwood's $100 million capitalization look legitimate, (ii) agreed to remove names of underlying assets in the valuation letter so as to hide assets tainted by self-dealing, (iii) purported to provide "fair value" estimates for the unnamed assets despite knowing the valuation was worthless, and (iv) stated the assets were anticipated to be contributed to Beechwood's capital (Pl. Br. at 11; Complaint ¶¶47–52; 54, 56–59; 67–68; 105–

108). Plaintiffs argue that KPMG is not "clueless" as Athanason knew that the purpose was to provide a valuation where the holding assets were "illiquid Hedge Fund Interests" (Buckley Ex. 1). Plaintiffs argue that defendant's reliance on *National Westminster Bank USA* is factually distinguishable as, there, the complaint only had two paragraphs of allegations against the defendant and failed to allege that the defendant had actual knowledge, whereas here, the complaint alleges facts showing that KPMG had actual knowledge of Beechwood's effort to deceive plaintiffs (*see National Westminster*, 124 AD2d 144–147 [1st Dept 1987]; Pl. Br. at 12). The same applies for defendant's reliance on *Eurycleia Partners, LP v Seward & Kissel, LLP* (12 NY3d 553, 560 [2009]).

Regarding KPMG's argument, that the complaint does not allege that KPMG had actual knowledge of the broader "Ponzi" scheme that is a misdirection as the issue here is whether KPMG aided and abetted a fraud to induce plaintiffs to enter the Reinsurance Agreements (Complaint ¶¶68, 105–108). KPMG's "I didn't know everything" argument was rejected by the Court of Appeals in *CPC Int'l Inc. v McKesson Corp.* where the court held that defendants, as parties to the underlying fraud conspiracy, could be liable for McKesson's independent actions done in furtherance of the fraud (70 NY2d 268 [1987]). Plaintiffs argue that they need only allege KPMG had actual knowledge that it was committing and participating in a fraud (Pl. Br. at 13; *see Kings Cnty v IKB Deutsche Industriebank AG*, 751 FSupp2d 652, 665 [SDNY 2010]; *AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]; *Balance Return Fund Ltd. v Royal Bank of Can.*, 83 AD3d 429, 431 [1st Dept 2011]). The request to remove asset names from the valuation letter was a clue to KPMG that a fraud was occurring and the complaint alleges that KPMG already knew of the fraud when it designed the Demand Note structure to suit Beechwood's fraudulent purposes (Pl. Br. at 13); Complaint ¶¶48–52). KPMG's reliance on *Sodhi v Gentium S.P.A.* is beside the point. The dispute over interpretation of facts is not a proper basis for dismissal under CPLR 3211.

The complaint adequately alleges that KPMG substantially assisted in the fraud by devising the Demand Note Scheme and misrepresenting that the assets were anticipated to be contributed to Beechwood's capital in the valuation letter (Pl. Br. at 14; Complaint ¶¶46–68; Buckley Ex. 6). A fraud claim can be based on omission and the valuation letter omitted material facts to plaintiffs' detriment (*see JP Morgan Chase Bank v Winnick*, 406 F Supp 2d 247, 256 [SDNY 2005]; *Silverboys, LLC v Skordas*, 2019 NY Misc LEXIS 546, at *10 [Sup Ct NY Cnty 2019]). Plaintiffs

had no duty to request the true names of the assets as KPMG argues (*see IKB Int'l S.A. v Morgan Stanley*, 142 AD3d 447, 450 [1st Dept 2016]). A misrepresentation does not have to be repeated in multiple documents to be sufficient and KPMG's role in drafting the valuation letter is enough for plaintiffs to survive a motion to dismiss (*see William Doyle*, 167 AD3d at 503; *Nathel v Siegal*, 592 F Supp 2d 452, 470 [SDNY 2008]; *Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010]). Plaintiffs argue that, as a matter of law, they were not required to assume that KPMG's valuation was fraudulent and verify it because there were no "hints" of KPMG's falsity (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]; *Orchard Hotel LLV v D.A.B. Grp. LLC*, 172 AD3d 530, 532 [1st Dept 2019]). KPMG's reliance on *KNK Enters., Inc. v Harriman Enters., Inc.* and *Grumman Allied Indus. v Rohr Indus.* is misplaced as both cases occurred after discovery was completed (*KNK Enters.*, 33 AD3d 872 [2d Dept 2006]; *Grumman*, 748 F2d 729 [2d Cir 1984]). KPMG's argument relies on the court only considering what KPMG says are facts and, consequently, must be denied for this reason (Pl. Br. at 16; *see Schachat v Bell Atl. Corp.*, 282 AD2d 330 [1st Dept 2001; *Kurt Waynes, Inc. v Lead Underwriters a Lloyds London*, 14 Misc3d 614, 620 [Sup Ct NY Cnty 2006]).

KPMG's argument for dismissing the constructive fraud claim fails because KPMG only argues that no fiduciary relationship exited between the parties but fails to argue that no confidential relationship exists. Confidential relationships are established by justifiable trust which, in turn, is established when the defendant has superior access to information (*see LBBW Luxemburg S.A. c Wells Fargo Sec. LLC*, 10 F Supp 3d 501, 524 [SDNY 2014]; *Kimmell v Schaefer*, 89 NY2d 257, 264 [1996]). A confidential relationship between parties existed here because the complaint alleged that KPMG had superior knowledge and that plaintiffs trusted KPMH to provide an independent valuation (Pl. Br. at 17).

The negligent misrepresentation claim is not time-barred as it is subject to a six-year statute of limitations under First Department precedent (*see 14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.* 78 AD3d 431, 432 [1st Dept 2010]). KPMG's argument, that the negligent misrepresentation claim is a claim for accountant malpractice, is incorrect as it is contrary to the four corners of the complaint which alleges that KPMG engaged in a fraudulent scheme (Pl. Br. at 18). Defendant's reliance on *A. Morrison Trucking, Inc. v Bonfiglio* is improper as that involved an accountant who failed to exercise proper care whereas here plaintiffs allege that KPMH created a fraudulent scheme (*see A. Morrison*, 13 Misc3d 1211(A) [Sup Ct Kings Cnty 2006]).

Plaintiffs adequately alleged KPMG's misrepresentations as the complaint alleges the valuation letter misrepresented that the assets underling the Demand Note were to be contributed to Beechwood's capital and KPMG misstated the valuation of the subject assets (Pl. Br. at 19). An opinion may be actionable if the speaker does not genuinely believe it or it is without basis in fact (*see Abu Dhabi Commer. Bank v Morgan Stanley & Co.*, 651 F Supp 2d 155, 176 [SDNY 2009]). Here, the complaint alleges KPMG knew that the $100 million valuation letter contained misstatements or was not objectively supported. Plaintiffs distinguish *Shareholder Representative Services* and *Mandarin Trading.* As, to the former, the valuation letter is a far cry from the "mere puffing" that failed to support a claim and, to the latter, where a claim was dismissed because the complaint contained no facts alleged to have been misrepresented (*see Shareholder*, 46 Misc3d 1228(A) [Sup Ct NY Cnty 2015]; *Mandarin Trading*, 65 AD3d 448, 450 [1st Dept 2009]).

Plaintiffs next argue that they have adequately alleged justifiable reliance because, as a matter of law, the issue of reliance is not subject to summary disposition (*see ACA*, 25 NY3d at 1045; *Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 467-68 [1st Dept 2014]; *Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]; *UBS Sec. LLC v Highland Capital Mgmt.*, 2017 NY Misc LEXIS 977 [Sup Ct NY Cnty. 2017]). Boilerplate disclaimers, such as the language KPMG points to in its valuation letter, are effective to preclude justifiable reliance only if the disclaimers "track" the particular type of fact misrepresented and if they do not concern facts within the speaker's knowledge (*see Loreley Fin. (Jersey) No. 3, Ltd. v Citigroup Global Mkts Inc.*, 119 AD3d 136, 143–146 [1st Dept 2014]). The language in the valuation letter does not track sufficiently the misrepresentations that plaintiffs have alleged (Pl. Br. at 20–21). Plaintiffs argue that KPMG's reliance on *J.A.O. Acquisition Corp v Stavitsky* is inapposite as, there, the court found that plaintiff could not establish its claim because the CFO testified that the misrepresentation had no effect on plaintiff's decision to enter into the transaction, whereas here, plaintiffs have alleged such reliance (Pl. Br. at 21; Complaint ¶¶68–69l 124).

Finally, plaintiffs argue that they have adequately alleged a special relationship because the complaint alleges that KPMG knew the valuation letter was being prepared solely to provide to plaintiffs as part of due diligence (Complaint ¶¶47, 54, 59, 122). When professionals render their reports with the object of shaping plaintiff's conduct, they owe a duty of diligence established in law to both the clients and to the relying plaintiff (*see Ossining Union Free School Dist. v*

Andersen LaRocca Anderson, 73 NY2d 417, 426 [1989]). Plaintiffs argue their allegations satisfy their standard.

C. Defendant's Reply Memorandum

In its reply memorandum KPMG notes that plaintiffs fail to allege facts suggesting KPMG's actual knowledge of any alleged fraud scheme (Def. Reply at 2 [Doc. No. 79]) and failed to inform the court that, in the related criminal case, the court (i) granted Platinum's motions for acquittal as to allegations that it overvalued certain investments, including the one at issue here, and (ii) only convicted Platinum on a claim related to bond transactions that are irrelevant here (*see U.S. v Nordlicht et al.*, 16-cr-00640, Order [ECF No. 752] at 4–5). Plaintiffs' arguments, (i) that KPMG knew it designed the Demand Note to make Beechwood's $100 million in capital appear legitimate despite knowing it was not and (ii) that KPMG knowingly made misrepresentations and omissions in its valuation letter, should fail as both lack the support of alleged facts and fall apart upon examination (Def. Reply at 3–4). To the first argument, KPMG argues that it was foolish for plaintiffs to rely on a memorandum (Buckley Aff., Ex. 3, the "Bermuda Memo") that: (i) was prepared more than a year after KPMG's work here, (ii) which plaintiffs do not allege KPMG saw, (iii) was authored by non-party KPMG Bermuda, and (iv) concerns a different demand note which was issued to Beechwood Bermuda Limited (Def. Reply. at 4). As to the second argument, KPMG argues that (i) it did not simply rely on Beechwood's representations when drafting the valuation letter but also reviewed and relied on audited financials as of December 31, 2012 regarding these assets, and (ii) plaintiffs fail to point to allegations suggesting that Beechwood or Platinum funds being valued were "affiliates" (Def. Reply at 5). Further, plaintiffs fail to explain why, if KPMG was knowingly misrepresenting that the assets in questions were anticipated to be contributed to Beechwood's capital KPMG asked Beechwood on September 9, 2013 to provide the Asset Contribution Agreement (*id.*at 5–6).

Defendant next argues that plaintiffs do not allege KPMG provided substantial assistance to any fraud because: (i) plaintiffs' argument that KPMG's substantial assistance took the form of making the misrepresentation in the valuation letter fails as noted above, (ii) fraud by omission requires that the bad actor have some duty to disclose to the injured party which plaintiffs do not identify, and (iii) the law requires sophisticated business entities to make enquiries when on notice that they do not have all the information which plaintiffs failed to do (Def. Reply at 6–8; Buckley Aff. Ex. 6; *see IKB International S.A. v Morgan Stanley* 142 AD3d 447,, 448 [1st Dept 2016].

Plaintiffs' constructive fraud claim fails because they do not allege a relationship between the parties (*id.* at 8). Defendant argues that plaintiffs' argument regarding a confidential relationship fails because plaintiffs fail to allege that any relationship existed between the parties, a necessary element of the claim's (*see* B*rown v Lockwood*, 76 AD2d 721, 731 [NY App Div 1980]; *Ernest Lawrence Grp. v Mktg. the Ams. Inc.*, 2005 US Dist LEXIS 25307, at *27–30 [SDNY 2005]).

The negligent misrepresentation claim, similarly to plaintiffs' fraud claims, is fatally flawed and lacking in factual support (Def. Reply at 8–9). Plaintiffs' negligence-based claims must be dismissed because they are time-barred (*id.* at 9). Plaintiffs wrongly contend that they need not allege linking conduct with KPMG to sustain their negligent misrepresentation claim because they misread the holding of *Ossining* to "do away" with the linking conduct standard articulated in *Credit Alliance Corp. v Arthur* (*Id.*). The court in *Ossining* did not modify the holding in *Credit Alliance* but, instead, upheld the "long-standing rule" that privity of contract between parties, or a similar relationship, is necessary (*see Ossining*, 73 NY2d at 424; *Credit Alliance*, 65 NY2d at 536). Plaintiffs allege no facts suggesting linking conduct between the parties or any relationship with KPMG whatsoever (Def. Reply at 9).

IV. DISCUSSION

A. Aiding and Abetting Fraud

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) actual knowledge of the fraud on the part of the aiding and abetting party; and (3) substantial assistance to advance the fraud's commission (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]; *Wright v BankAmerica Corp*., 902 F 2d 169, 172 [2d Cir] 1990). The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*Mandarin Trading* , 16 NY3d at 178; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Plaintiffs have failed to state with particularity, as they must, a claim for aiding and abetting fraud. While the complaint alleges that Platinum and Beechwood engaged in fraudulent conduct

to enter into a business transaction with plaintiffs, there is nothing in the complaint to suggest that KPMG was aware that Platinum or Beechwood's conduct was fraudulent or that it took any action to perpetuate a fraud against plaintiffs.

According to the complaint, Beechwood and Platinum repeatedly represented to KPMG that they did not want plaintiffs knowing that they were engaging in business with "hedge fund guys" however, there is no indication that KPMG was aware of the fraud, that these "hedge fund guys" were also disreputable parties with reputations suggesting fraudulent activity and were planning to perpetuate a fraud on plaintiffs..

Further, the valuation letter does not amount to substantial assistance as it lacks information sufficient for reliance by plaintiff. The notion that a sophisticated insurer contemplating investing more than $500 million in conservative investments would be influenced in any way by the contents of a one page "valuation letter" prepared by a consultant with which plaintiffs had no relationship, where the letter states its intended having nothing to do with plaintiffs ("internal management purposes"), discloses that the valuation is yet to be conducted on "certain [unspecified] Subject Interests" which would provide an "estimated Base Value" on the basis of a "preliminary high level estimate" that the author of the letter cautioned would be "subject to change based on completion of [an] analysis" intended to estimate a Fair Value of the unidentified Subject Interests defies reason (*see* valuation letter, Doc. No. 62). The letter also anticipates delivery of a completed draft analysis to Beechwood within one week of the date of the letter *(see id.)*. The complaint does not allege that the promised analyses was provided. Plaintiffs do not allege that KPMG actively participated in the fraud. Instead plaintiffs suggest KPMG failed to disclose "the names of the subject assets"(Opp. Br. at 14) but fail to allege facts showing that KPMG any duty to plaintiffs do so. The facts alleged here do not show that KPMG's conduct provided any assistance in achieving thew fraud, much less assistance that could reasonably be described as making a substantial contribution to perpetuation of the fraud.

Consequently, plaintiffs' claim for aiding and abetting fraud must be dismissed.

B. Constructive Fraud

The elements of constructive fraud are: "(1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in

a fiduciary or confidential relationship" (*Del Vecchio By Del Vecchio v Nassau County*, 118 AD2d 615, 617-18 [2d Dept 1986] citing *Brown v Lockwood*, 76 AD2d 721, 730 [2nd Dept 1980]). Distinguishing this claim from fraud itself, a claim for constructive fraud does not require proof of "actual knowledge of the falsity of the representation by the defendant" (*see Del Vecchio By Del Vecchio*, 118 AD2d at 617-18; *Brown*, 76 AD2d at 731; *Pitcher v Sutton*, 238 AD 291 [4th Dept 1933] amended, 240 AD 754 [4th Dept 1933] and amended, 240 AD 759 [4th Dept 1933] and affd, 264 NY 638 [1934]).

Defendant correctly argues that plaintiffs have failed to establish that the parties are in a fiduciary or confidential relationship with one another. The establishment of a fiduciary or confidential relationship requires showing of a direct relationship between the parties. Here, the complaint does not allege any facts suggesting any relationship between the parties other than each parties' individual relationship with Beechwood and Platinum which is insufficient to satisfy this element. Plaintiffs' claim for constructive fraud must be dismissed.

C. Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are: "(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 *Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]).

Plaintiffs have failed to allege a special or privity-like relationship between the parties that would impose a duty on KPMG to impart correct information to the plaintiff. In fact, the complaint fails to allege the existence of any relationship between plaintiffs and defendant at any point. Plaintiffs' claim for negligent misrepresentation must be dismissed.

V. CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendants KPMG is GRANTED in its entirety; and it is further

ORDERED that the complaint is hereby DISMISSED and the Clerk of the court is directed to enter judgment against plaintiffs, Bankers Conseco Life Insurance Company and Washington National Insurance Company and in favor of the defendants KPMG LLP and to assess costs in an amount to be determined by the clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: April 1, 2020

E N T E R,

Hon. O. Peter Sherwood
O. PETER SHERWOOD J.S.C.