

Q3 Inv. Recovery Veh., LLC v McEvoy
2023 NY Slip Op 30184(U)
January 10, 2023
Supreme Court, New York County
Docket Number: Index No. 657090/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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Q3 INVESTMENT RECOVERY VEHICLE, LLC,

INDEX NO. 657090/2020

Plaintiff,

MOTION DATE _____

- v -

DENIS MCEVOY, TAGLICH BROTHERS, INC., TAGLICH
PRIVATE EQUITY, LLC, and SIGNATURE BANK

MOTION SEQ. NO. 005 006 007

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 37, 38, 52, 53, 59, 60, 61

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 55, 62, 63, 64, 67, 68, 69, 70, 81, 82

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 50, 51, 56, 65, 66

were read on this motion to/for DISMISS

In motion sequence number 005, defendant Denis McEvoy moves, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint. In motion sequence number 006, defendant Signature Bank (Signature) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the amended complaint. In the alternative, Signature moves for an order staying all proceedings in this action, pending resolution of a parallel action in Florida. In motion sequence number 007, defendants Taglich Brothers, Inc. and Taglich Private Equity, LLC (together, Taglich) move, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint.

Facts

The following facts are taken from the amended complaint, and for the purposes of these motions are accepted as true.

Plaintiff Q3 Investment Recovery Vehicle, LLC is an entity formed to represent a group of cryptocurrency investors (Q3 Investors) who invested in nonparty Q3 I, L.P. (Q3I), a limited partnership formed to facilitate a cryptocurrency trading club. (NYSCEF Doc. No. [NYSCEF] 36, Amended Complaint ¶¶1-2, 8.)

In 2017, nonparties Dr. Quan Tran, James Seijas, and Michael Ackerman formed an informal cryptocurrency trading club. (*Id.* ¶15.) The club purported to use a proprietary algorithm developed by Ackerman to trade on the cryptocurrency exchanges. (*Id.*) Plaintiff alleges, however, that there was no successful algorithm, and Ackerman tricked the club by maintaining sole access to exchange accounts and reporting false returns. (*Id.*)

“In 2018, Q3I was created to formalize the club. Q3I would take deposits in real currency from limited partners, give them a proportional limited partnership interest in Q3I, and then sweep their deposits into cryptocurrency exchanges.” (*Id.* ¶¶18-19.) Q3I is managed by its general partner, nonparty Q3 Holdings, LLC (Q3 Holdings); Q3 Holdings is managed by its board of managers which includes Tran, Seijas, and Ackerman (collectively, the Q3 Managers). (*Id.* ¶8.)

Signature Allegations

Q3I needed a bank account whereby the Q3I Investors could make real currency deposits. (*Id.* ¶19.) According to plaintiff, many banks declined to take the risk involved with cryptocurrency trading funds, so “Q3I needed a bank willing to take the risk.” (*Id.*)

Thus, Q3I turned to Signature, one of the few banks to allow cryptocurrency trading funds to use its accounts. (*Id.* ¶22.)

Q3I worked with David D'Amico, Signature's Group Director for Digital Asset Banking, to open an account to facilitate the trading fund (Q3I Account). (*Id.* ¶26.) Before opening the account, D'Amico requested a variety of information from Q3I concerning its operations. (*Id.*) Q3I sent Signature its fund documents, including a Private Placement Memorandum (PPM), Limited Partnership Agreement, and a Subscription Agreement (collectively, the Investment Documents). (*Id.*)

Plaintiff asserts that Signature should have known that Ackerman was engaging in a scheme to defraud investors.¹ Plaintiff alleges that Signature "enabled Ackerman to conduct his fraud" by first allowing Ackerman to open the Q3I Account, and thereafter, ignoring indications of the fraud. (*Id.* ¶5.) According to plaintiff, Signature "had full knowledge of Q3I's stated purpose and strategy" that the monies paid by the Q3I Investors into the Q3I Account "would be swept at least every other day into a cryptocurrency exchange." (*Id.* ¶¶29, 43.) However, contrary to this investment strategy, once investor funds were deposited in the Q3I Account, Ackerman transferred a vast amount of those funds to Q3 Holdings' account² and then to the Q3 Managers' personal accounts, with very little money ever entering the cryptocurrency markets. (*Id.* ¶32.) Plaintiff further alleges that Signature had "visibility into the actual movement of

¹ Plaintiff alleges that Ackerman hid his scheme from Tran and Seijas by providing them with doctored statements from Q3I's cryptocurrency accounts showing false profits. (*Id.* ¶15.)

² In addition to the Q3I Account, Q3 Holdings also had an account at Signature (Q3 Holdings Account). Q3 Holdings was entitled to receive 50% of the profits earned from the cryptocurrency trades, as well as a license fee for the algorithm, and these profits were transferred from the Q3I Account to the Q3 Holdings Account. (*Id.* ¶¶29, 32.)

money,” and despite that this movement of funds was in Signature’s “plain view,” Signature “willfully turned a blind eye” to the fraud by shutting down a July 2019 inquiry regarding the transfers and accepting a dubious explanation for these transfers. (*Id.* ¶¶32-34; 40; 43-45.) After the July inquiry, Ackerman wrote two checks to himself for a combined total of \$800,000 from the Q3 Holdings Account, which Signature “dutifully and promptly paid” despite it already identifying suspicious behavior. (*Id.* ¶¶41-42.)

McEvoy/Taglich Allegations

In September 2018, Q3I retained McEvoy, a Chartered Financial Analyst who worked for Taglich, a mid-sized financial services firm providing advice to investors and administering investment funds, as the Fund Administrator. (*Id.* ¶¶46-47.) Ackerman announced McEvoy’s engagement in a Third Quarter 2018 newsletter to investors, stating “[W]e have hired a CFA or Administrator, per regulation, to ensure our compliance, consistent due diligence, reconciliation of all transactions and funding amounts.” (*Id.* ¶55.) Q3I retained McEvoy and Taglich to manage its compliance policies and procedures in order to protect the limited partners, and to oversee all aspects of the fund operations. (*Id.* ¶54.) Plaintiff alleges that Q3I “believed that McEvoy was fully backed by Taglich when he was hired,” and “reasonably relied on McEvoy’s advertised association with Taglich on Taglich’s web site and elsewhere, as well as McEvoy’s use of Taglich resources, when engaging him to serve as the Fund Administrator for Q3I.” (*Id.* ¶49.) “Q3I only hired McEvoy because it was retaining Taglich through McEvoy’s engagement.” (*Id.* ¶50.)

Following McEvoy’s retention, Q3I distributed the Investment Documents, of which McEvoy reviewed draft versions and provided feedback, including recommending

additional provisions to comply with regulations. (*Id.* ¶¶65-66.) In the PPM, Q3I represented that it was seeking no more than 100 investors and investor contributions of \$15 million. (*Id.* ¶68.) The PPM provides that generated trading profits would be split evenly between Q3 Holdings and the Q3 Investors. (*Id.* ¶71.) The PPM states that “[t]he Partnership’s administrative services will be provided by an administrator to be engaged by the GP in the near future. . . . Persons interested in subscribing for Interests will be furnished and will be required to complete and return to the GP and Administrator, subscription documents.” (*Id.* ¶72.)

By December 2019, more than 150 investors deposited more than \$33 million with Q3I. (*Id.* ¶73.) Plaintiff alleges that McEvoy “failed to protect the limited partners, to conduct any diligence, to ensure Ackerman’s compliance with the Investment documents, or reconcile Q3I’s transactions and funding amounts” despite having “visibility into the actual movement of money” which ultimately went “into the personal accounts of the members of the general partner.” (*Id.* ¶¶74–75.) Plaintiff further alleges that Taglich is liable for McEvoy’s conduct under the theories of respondeat superior or vicarious liability of a principal. (*Id.* ¶77.)

In the amended complaint, plaintiff asserts claims for breach of fiduciary duty against McEvoy and Taglich (first cause of action), negligence against all defendants (second cause of action), and gross negligence against all defendants (third cause of action).

Discussion

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court accepts the facts as alleged in the complaint as true, accords the

plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) “At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration. Dismissal of the complaint is warranted under CPLR 3211 (a) (7) if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks and citations omitted].) Dismissal is warranted under CPLR 3211(a) (1) “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-39 [1st Dept 2019], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

Construing the amended complaint in the generous matter to which it is entitled, this court nevertheless concludes that defendants’ motions to dismiss must be granted, as each claim is legally deficient on its face and/or is refuted by documentary evidence.

Signature’s Motion to Dismiss (Motion Seq. No. 006)

“To state a claim for negligence, a plaintiff must sufficiently allege (1) a duty; (2) a breach of that duty; (3) causation; and (4) actual injury.” (*Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 42-43 [1st Dept 2013] [citation omitted].) “Because a finding of negligence must be based on the breach of a duty, a threshold question in torts cases is whether the alleged tortfeasor owed a duty of care to the injured party.” (*Espinal v Melville Snow Contracts., Inc.*, 98 NY2d 136, 138 [2002]

[citations omitted].) Thus, a “court must first, however, determine whether any legal duty exists.” (Friedman v Anderson, 23 AD3d 163, 165 [1st Dept 2005].)

“The scope of any such duty of care varies with the foreseeability of the possible harm and takes into consideration the reasonable expectations of the parties and society in general. Although foreseeability has been called ‘a critical factor’ in defining an alleged tortfeasor’s duty, it will not create a duty which does not otherwise exist. In order to demonstrate this threshold element, the injured party must show not only that the defendant owed a general duty to society but a specific duty to the plaintiff; without a duty running directly to the injured person there is no liability in damages, however foreseeable the harm.”

(*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013] [citations omitted].)

Plaintiff alleges that “Signature Bank owed the [Q3 Investors] a duty of ordinary care and fair dealing to prevent Ackerman from using its bank accounts to misappropriate funds belonging to Q3I and the [Q3 Investors]” and that “Signature’s knowledge of the fiduciary relationship between Q3I and the [Q3 Investors] created a foreseeable zone of risk, and Signature Bank had a legal duty of ordinary care to assist the [Q3 Investors] in avoiding foreseeable harm from the creation of the Q3I accounts such as misappropriation of fiduciary funds.” (NYSCEF 36, Amended Complaint ¶84.)

Under New York law, “[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.” (*Lerner v Fleet Bank, N.A.*, 459 F3d 273, 286 [2d Cir 2006] [citation omitted]; *Matter of Agape*, 681 F Supp2d 352, 360 [ED NY 2010] [“Neither the Plaintiffs nor the Court have been able to locate a case which even suggests that New York law imposes upon banks a duty to protect non-customers from frauds involving depository accounts”].) Indeed “[w]ith billions of banking transactions occurring in New York alone, this would be the equivalent of making New York banks liable to the world’s banking public.” (*Lerner*, 459 F3d at 286.) This principal holds true

even where such third-party non-customers have invested in entities that are customers of the bank. (See *Hongying Zhao*, 2019 WL 1173010, at * 9, 2019 US Dist LEXIS 40673 at * 25 [holding bank owed no duty to investors in Ponzi scheme].) The amended complaint does not allege that the Q3 Investors ever held accounts with Signature or were customers of Signature. Therefore, Signature owed no duty to the Q3 Investors.

However, there is a narrow exception where banks do owe a duty to third-party, non-customers— where the third parties are beneficiaries of “trust accounts” or “fiduciary accounts.”

“Ordinarily, of course, a depository bank has no duty to monitor fiduciary accounts maintained at its branches to safeguard the funds in those accounts from fiduciary misappropriation. Indeed, “[i]n general, a bank may assume that a person acting as a fiduciary will apply entrusted funds to the proper purposes and will adhere to the conditions of the appointment. ... Notwithstanding the aforementioned rule, a depository bank may still be held answerable for the loss of funds misappropriated from a fiduciary account if the bank, with knowledge of the fiduciary's diversion of trust funds, accepts such funds in payment of a personal obligation owed by the fiduciary to the bank or the bank otherwise has actual knowledge or notice that a diversion is to occur or is ongoing. Facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated will trigger a duty of inquiry on the part of a depository bank, and a bank's failure to conduct a reasonable inquiry when the obligation to do so arises will result in the bank being charged with such knowledge as inquiry would have disclosed.”

(*Home Sav. of Am., FSB v Amoros*, 233 AD2d 35, 38-39 [1st Dept 1997] [citations omitted].) Again, this duty to inquire does not impose upon banks “a duty to protect non-customers from a fraud involving *depository* accounts.” (*Matter of Agape*, 681 F Supp2d at 360 [citation omitted] [finding that a duty is only triggered where trust accounts are concerned].) “The duty is therefore limited to special purpose fiduciary

accounts.” (*AXH Air-Coolers, LLC v Pioneer Bancorp, Inc.*, 2021 WL 5446947, * 4, 2021 US Dist LEXIS 224562 [ND NY 2021].)

Plaintiff alleges that the Q3I Account was a “trust account” or “fiduciary account” and that Signature was aware of this because the Investment Documents revealed a fiduciary relationship between Q3I and the Q3I Investors. (NYSCEF 36, Amended Complaint ¶¶28.) However, plaintiff’s allegations are conclusory. Simply labeling an account a trust account or fiduciary account does not necessarily make it so. (See *Zaz-Huff Inc. v Chase Manhattan Bank, N.A.*, 277 AD2d 59, 61 [1st Dept 2000].)

“As a general matter, a strong presumption exists under New York law that a deposit account is a general account and not a special purpose account.” (*Matter of Lehman Bros. Holdings Inc.*, 439 BR 811, 824 [Bankr SD NY 2010].) Whether an account is a “trust” or “fiduciary” account “depends on the rights and obligations intended” by the bank and the account opener. (*Matter of Schick*, 234 BR 337, 344 [Bankr SD NY 1999] [applying New York law]; see also *Wasserman v Broderick*, 140 Misc 174, 175-176 [Sup Ct, Kings County 1931] [holding that the character of a deposit, as general or special is determined by the express or implied contract between the bank and the depositor and “the presumption is that a deposit is general and not special”.].)

A “trust account” opened by a trustee requires “(1) a designated beneficiary, (2) a designated trustee, (3) a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee, and (4) actual delivery of the fund or property, with the intention of vesting legal title in the trustee.” (*Matter of Doman*, 68 AD3d 862, 863 [2d Dept 2009] [citation omitted]; *Matter of Schick*, 234 BR at 344.) Indeed, instructive to the court, the Federal Deposit Insurance Corporation (FDIC)

defines fiduciary accounts as “deposit accounts established by a person or entity for the benefit of one or more other parties [where] [t]he individual or entity opening the account does not have an ownership interest in the deposit.” (NYSCEF 49, FDIC's Financial Institution Employee's Guide to Deposit Insurance at 122.) The Employee Guide goes on to state that “[f]unds must be in fact owned by the principal and not by the third party who set up the account (i.e., the fiduciary or custodian who is placing the funds),” “account records must indicate the agency nature of the account (e.g., XYZ Company as Custodian, XYZ For the benefit of (FBO) . . .),” and the “records of the [bank], the fiduciary or a third party must indicate both the identities of the principals as well as the ownership interest in the deposit.” (*Id.* at 123.)

Importantly, “the fact that a deposit is made by one in a fiduciary capacity” – like an investment fund manager – does not change the character of a depository account into the type of “trust” or “fiduciary” account that creates this duty. (See e.g. 10 AM JUR 2d Banks and Financial Institutions § 656, Westlaw [Aug. 2021 update] [a “trust account cannot be implied” unless the bank understood from the accountholder that the deposited funds were intended to be deposited subject to the terms of a trust]; *Wasserman v Broderick*, 140 Misc at 175-176.)

In the absence of a bank account agreement specifying that the account is a trust account, plaintiff's allegations labeling the Q3I Account as a trust or fiduciary are insufficient to make it so. (*Deutsche Bank Tr. Co. Americas v Rado Ltd. Partnership*, 2019 WL 1863272, * 8, 2019 US Dist LEXIS 70046 [SD NY 2019]; *Zaz-Huff Inc.*, 277 AD2d at 61.) The Q3I Account application (Application), which is a “Business Profile and Account Application,” evidences that the Q3I Account is an ordinary depository

account and not a trust or fiduciary account. (See NYSCEF 42, Application.) Although there is a separate application to fill out for a fiduciary account, plaintiff does not allege that Q3I completed the “Fiduciary Client Profile and Account Application.” (See NYSCEF 41, Mims aff ¶¶5-6; NYSCEF 44, Fiduciary Client Profile Application.) Further, on the Application, the Q3 Managers did not describe themselves as trustees for the Q3 Investors or indicate the account was “in trust for” or that the account would hold property belonging to the Q3 Investors. (See NYSCEF 42, Q3I Account Application Packet at 2-6.) On the Application, the Q3 Managers checked off that the Account was a business checking account for the purposes of “operating.” (*Id.* at 5-6.) There are boxes for “other,” but they were left blank. (*Id.*) Also, the Limited Partnership Banking Agreement designates Signature as “depository.” (*Id.* at 40.) This documentary evidence contradicts plaintiff’s conclusory allegation that the Q3I Account is a trust or fiduciary account.

Plaintiff alleges that Signature knew that the Q3I Account was a trust or fiduciary account based on its review of the Investment Documents. (NYSCEF 36, Amended Complaint ¶¶27-28.) This too is conclusory. Nowhere in the Investment Documents is it indicated that the Q3 Investors’ funds would be held in trust or fiduciary accounts. In fact, Q3I’s Limited Partnership Agreement submitted to Signature with the Application actually establishes that the funds provided to Q3I were investments in exchange for limited partnership interests and not funds to be held “in trust” for the Q3 Investors. (NYSCEF 42, Q3I Account Application Packet at 10.)

In addition, plaintiff’s own allegations make clear that when the Q3 Investors’ funds were deposited in the Q3I Account, it was in exchange for a limited partnership

interest, and thus, the property of Q3I. (*Id.* ¶19 [“Q3I would take deposits in real currency from limited partners, [and] give them a proportional limited partnership interest in Q3I”], ¶27 [“Q3I Investors “purchased limited partnership interests in Q3I for the sole purpose of investing in cryptocurrency”], ¶68 [“According to the PPM, Victims could purchase limited partnership interests in Q3I, and Q3I would use investor funds to invest in cryptocurrencies... .”].)

Because plaintiff fails to allege facts to overcome the “strong presumption” that Q3I Account is a conventional, general depository account, and a not a special purpose account, this court finds that the “duty to make a reasonable inquiry” exception does not apply here. As this exception does not apply, Signature, as a bank, did not owe plaintiff, a third-party, non-customer, a duty, and therefore, plaintiff cannot establish its claim for negligence, and in turn, gross negligence. (*Home Sav. of Am., FSB*, 233 AD2d at 38; *E. Meadow Driving Sch., Inc. v Bell Atl. Yellow Pages Co.*, 273 AD2d 270, 271 [2d Dept 2000] [“existence of a duty is necessary to state a cause of action for gross negligence”].)

Accordingly, plaintiff’s claims for negligence and gross negligence against Signature are dismissed.

McEvoy’s and Taglich’s Motions to Dismiss (Motion Seq. Nos. 005 and 007)

Choice of Law

As a threshold matter, plaintiff contends that New Jersey law applies to its tort claims against these defendants because McEvoy, a New Jersey resident, “provided most of his services for Q3I on behalf of Taglich from the state of New Jersey to Q3I in Florida.” (NYSCEF 36, Amended Complaint ¶53.) Plaintiff asserts there is a difference

in law between the two states, as New Jersey law does not require a special or privity-like relationship for negligence claims arising out of a contractual relationship.

New York utilizes interest analysis as “the relevant analytical approach to choice of law in tort actions in New York.” (*Schultz v Boy Scouts of Am.*, 65 NY2d 189, 197 [1985].) “This analysis requires two separate inquiries: (1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss.” (*DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 553 [1st Dept 2011] [internal quotation marks and citation omitted].)

Plaintiff argues that because most of the services were performed in New Jersey and McEvoy is a resident of New Jersey, New Jersey has the greater interest in having its law applied as compared to New York. The court disagrees, as it is clear that, based on plaintiff’s own allegations, the jurisdiction having the greatest interest in the application of its standards of conduct is New York.

Plaintiff alleges that, “at all times,” McEvoy and/or his personal limited liability company were employed by defendants Taglich Brothers, Inc. and Taglich Privacy Equity, LLC, the first of which is a “New York corporation” and both of which have their principal places of business in New York. (NYSCEF 36, Amended Complaint ¶¶9-13, 48-51). In fact, plaintiff relies on these and similar allegations – including that “[s]ome of McEvoy’s acts that give rise to the cause[s] of action herein were performed in New York or on behalf of Taglich in New York,” that “the causes of action against McEvoy arise out of or are related to acts performed by McEvoy in the state of New York,” and that “a substantial part of events or omissions giving rise to this action occurred in New York” – in an effort to establish personal jurisdiction under CPLR 301 and 302 and

venue under CPLR 503. (*Id.* ¶¶12-14.) Plaintiff likewise relies on the allegation that “as a CFA, McEvoy is a professional who is subject to malpractice liability under New York law” in support of its negligence claims. (*Id.* ¶87.)

As plaintiff admits in its pleading, the majority of the alleged tortious conduct on the part of McEvoy – and all of the alleged tortious conduct on the part of Taglich, his employer – occurred in or emanated from New York. Thus, New York has the primary interest in this litigation, and New York law applies.

*Breach of Fiduciary Duty*³

“To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed [plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct.” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011] [citations omitted].)

“A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Generally, where parties have entered into a contract, courts look to that agreement to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency. If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them. However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.”

(*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19-20 [2005] [internal quotation marks and citations omitted].)

³ In opposition to dismiss this claim, plaintiff analyzes the claim under both New Jersey and New York law.

Here, plaintiff does not allege that McEvoy and Taglich provided any services beyond the administrative services agreed to that would transport any relationship between McEvoy, Taglich, and the Q3I investors to a higher realm. For example, in the amended complaint, plaintiff does not allege that McEvoy and Taglich made investment decisions, had a duty to independently value Q3I's assets, or made any independent calculations. (See *Plaintiffs' State & Sec. Law Settlement Class Counsel v Bank of NY Mellon*, 43 Misc 3d 887, 898-899 [Sup Ct, NY County 2014].) Rather, plaintiff alleges, in a conclusory fashion, that Q3I retained McEvoy and Taglich "to manage Q3I's compliance policies and procedures to protect the limited partners, and to oversee all aspects of the fund operations." (NYSCEF 36, Amended Complaint ¶¶54.) "Under these circumstances, courts have repeatedly held that an administrator of an investment fund does not owe it a fiduciary duty." *Plaintiffs' State & Sec. Law Settlement Class Counsel v Bank of NY Mellon*, 43 Misc 3d at 899 [citations omitted]; see also *The Jordan [Bermuda] Inv. Co. v Hunter Green Invs. LLC*, 2007 WL 2948115, *4, *24, 2007 US Dist LEXIS 75376, *9-11, *64 [SD NY, Oct. 3, 2007, No. 00 Civ. 9214 (RWS)] [holding, under New York law, that administrator had no fiduciary duty where administrator did not make investment decisions for the fund and was only responsible for calculating the NAV using information from fund's investment manager as opposed to making independent calculations].)

Plaintiff attempts to allege that McEvoy had a discretionary responsibility which could sustain this claim. (See *The Jordan [Bermuda] Inv. Co. v Hunter Green Invs. LLC*, 2007 WL 2948115.) Specifically, plaintiff alleges that, pursuant to the PPM, "new investors had to be approved by McEvoy [which] demonstrates the degree of discretion

accorded to him.” (NYSCEF 36, Amended Complaint, ¶ 72.) However, as quoted in the amended complaint, the PPM states that “[p]ersons interested in subscribing for Interests will be furnished and will be required to complete and return to the GP and Administrator, subscription documents” (*id.*); nowhere does this quote mention approval by the Administrator. Returning completed subscription documents to an Administrator does not place any discretionary responsibilities on that Administrator.

Plaintiff also alleges that McEvoy was responsible for Q3I’s compliance with Anti-Money Laundering and Know Your Customer rules and regulations, meaning that “McEvoy had to ensure that Q3I: (1) had an [Anti-Money Laundering] Compliance Officer; (2) conducted [Know Your Customer] due diligence on the fund’s investors and managers; (3) had a document retention policy; and (4) had ‘[o]ngoing monitoring designed to identify, detect, and report suspicious activity and/or suspicious behavior.’” (*id.* ¶56.) Again, there is no indication from this allegation that McEvoy actually conducted the monitoring himself and took an active and independent role in reviewing the Q3I Account and the investments.

Nevertheless, even if McEvoy had discretionary responsibilities, there are no allegations that a relationship existed between McEvoy and the Q3I Investors or that McEvoy or Taglich even communicated with the Q3I Investors. (*Jordan (Bermuda) Inv.*, 2007 WL 2948115, at * 23, 2007 US Dist LEXIS 75376, at * 61 [finding no fiduciary relationship where administrators “had no contact, much less a relationship” with plaintiff]; *W.S. Corp. v Cullen & Dykman LLP*, 2014 NY Slip Op 30353[U], *8 [Sup Ct, NY County 2014] [finding that plaintiffs’ breach of fiduciary duty claim was not maintainable as they had no direct relationship with defendant]; *Thermal Imaging, Inc. v*

Sandgrain Sec., Inc., 158 F Supp 2d 335, 343 [SDNY 2001] [dismissing fiduciary duty claim where court found that the parties did not share a direct business relationship, let alone a fiduciary relationship]; see also *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009] [holding that “corporation's attorney represents the corporate entity, not its shareholders or employees and defendant's “representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners.”].)

Plaintiff alternatively alleges that McEvoy and Taglich “owed fiduciary duties to the [Q3I Investors] because of the trust placed in [them] by the [Q3I Investors] with the consent and knowledge of McEvoy.” (NYSCEF 36, Amended Complaint ¶80.) Plaintiff, however, fails to allege facts to support this conclusory statement. There are no allegations that McEvoy and Taglich consented or otherwise accepted the purported trust placed in them by the Q3I Investors. “[A] fiduciary duty cannot be imposed unilaterally.” (*EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 216 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Mueller v Michael Janssen Gallery Pte. Ltd.*, 225 F Supp3d 201, 206 [SD NY 2016] [“Reposing trust or confidence in a party . . . is not sufficient to establish a fiduciary relationship—under New York law, there is no fiduciary duty unless the trust or confidence has been accepted as well.”] [citation omitted; emphasis in original].)

Accordingly, plaintiff's claim for breach of fiduciary duty must be dismissed.

Negligence and Gross Negligence

As previously stated, “[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in torts cases is whether the alleged tortfeasor owed a duty of care to the injured party.” (*Espinal v Melville Snow Contracts., Inc.*, 98

NY2d at 138.) “The existence of a duty is a legal issue to be determined by the courts. Foreseeability of injury does not equate with duty. Privity or a relationship akin to privity between parties is required.” (*Megally v Laporta*, 253 AD2d 35, 40-41 [2d Dept 1998] [citation omitted].)

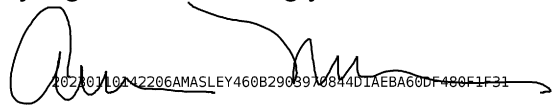
As previously discussed, plaintiff asserts that New Jersey law applies to the claims against these defendants. According to plaintiff, New Jersey law does not require privity; rather, a duty is determined by the foreseeability of the harm and an assessment of fairness and policy. As New York law applies, privity is at issue here, and plaintiff fails to address it. The negligence and gross negligence claims are dismissed.

It is unnecessary to reach defendants’ remaining arguments in support of dismissal or a stay.

Accordingly, it is

ORDERED that defendants’ motions to dismiss the amended complaint (motion sequence nos. 005, 006 and 007) are granted, and the amended complaint is dismissed, with costs and disbursements to defendants; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.



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1/10/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE