

**Aalii Fund, LP v Industrial & Commercial Bank of
China Fin. Servs. LLC**

2023 NY Slip Op 31233(U)

April 18, 2023

Supreme Court, New York County

Docket Number: Index No. 652446/2022

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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AALII FUND, LP and ALPHA CAPITAL PARTNERS,
LP,

Plaintiffs,

- v -

INDUSTRIAL AND COMMERCIAL BANK OF CHINA
FINANCIAL SERVICES LLC,
Defendant.

INDEX NO.	652446/2022
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

On April 17, 2023, the Court heard oral argument via Microsoft Teams on Motion Sequence 001 by defendant to dismiss plaintiffs' Complaint pursuant to CPLR §3211(a)(3) and (7). This action is closely related to another action before this Court captioned *SureFire Dividend Capture, LP v. Industrial and Commercial Bank of China Financial Services LLC* (index number 652507/2021) (the "SureFire Action") and reference to the decision denying a motion to dismiss in the SureFire action is relevant to the disposition of this motion. During the April 17, 2023 appearance, the Court reserved decision on the motion. For the reasons set forth herein, the motion is resolved as follows.

This action (and the SureFire Action) stem from an alleged underlying fraud that was perpetuated by non-party Brenda Smith, who is presently incarcerated in connection with that fraud. Smith, the owner of CV Brokerage, controlled two separate hedge funds—TA1 and Broad Reach Capital, LP ("Broad Reach")—that she allegedly used in connection with a Ponzi scheme to defraud people of their investments. Smith has pled guilty for this fraud. Defendant Industrial and Commercial Bank of China Financial Services LLC ("ICBCS") worked with Smith as the clearing broker for both hedge funds and was allegedly the only clearing broker that would

execute Smith’s unique options strategy of “dividend capture trades.” *Cmplt.* ¶¶25–26. Plaintiffs Aalii Fund, LP and Alpha Capital Partners, LP (collectively, “the A Funds”) allegedly invested over \$27 million in the Broad Reach fund between September 2016 and May 2018. In February of 2019, the A Funds transferred their interest in the Broad Reach fund to non-party SureFire Dividend Capture, LP (“SureFire”), via an “In-Kind Subscription Agreement” whereby the value of plaintiffs’ entire limited partnership interest in Broad Reach was transferred to SureFire, and plaintiffs became limited partners in SureFire. The transfer was allegedly recorded on Broad Reach’s books and records as a redemption by plaintiffs and a simultaneous investment by SureFire of approximately \$41,580,190.90 (an amount alleged to represent the value of plaintiffs’ investment at the time of the transfer). *Cmplt.* ¶¶126–28. Plaintiffs claimed on the Transcript of Proceedings of April 17, 2023 that they have not received any money as a result of the transfer, that the agreement between the parties was entered into prior to the fraud being uncovered, and that plaintiffs’ limited partnership interest in SureFire has essentially zero value as a result of the fraud.

On April 15, 2021, non-party SureFire commenced the related SureFire Action on the basis that ICBCS, as clearing broker for non-party Brenda Smith’s fraudulent hedge funds, aided and abetted Smith’s fraud and breach of fiduciary duties owed to SureFire as an investor. SureFire’s Amended Complaint contained allegations including misrepresentations made to the A Funds prior to SureFire’s involvement in the Broad Reach fund. ICBCS moved to dismiss SureFire’s claims. The Court dismissed SureFire’s claims in part based on lack of standing, reasoning that the In-Kind Subscription Agreement (which assigned the A Funds’ interest in the investment to SureFire) did not contain language evincing that the A Funds had any intent to

assign its *legal claims* to SureFire.¹ The Court further held that SureFire's potential damages were limited to the amount SureFire allegedly directly invested in the Broad Reach fund. Thereafter, the A Funds commenced this action, asserting the same claims asserted in the SureFire Action.

Defendant ICBCS now moves to dismiss plaintiffs' Complaint for lack of capacity to sue and failure to state a cause of action. Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, "the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

Defendant ICBCS first moves to dismiss plaintiffs' claims for lack of standing. Under CPLR § 3211(a)(3), a plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *See Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). Plaintiffs allegedly received a limited partnership interest in SureFire equal to the then-current value of plaintiffs' investment in Broad Reach, which was allegedly represented to be valued at over \$41 million dollars at the time of the transfer. Defendant claims that plaintiffs, having already received more than the full balance of plaintiffs' investment upon the sale/transfer to SureFire, have not suffered any damages and thus lack standing to assert its claims against defendant. Plaintiffs, on the other hand, argue that no equivalent value was received for the transfer, that the value of the limited partnership interest in SureFire was grossly inflated by reason of the fraud, and that plaintiffs suffered out-of-pocket damages totaling over

¹ In the related action, SureFire appealed the Court's ruling that the A Funds did not assign their legal claims to SureFire. As of the date of this Decision and Order, no decision on the appeal has been rendered.

\$27 million (representing the amount plaintiffs invested in the Broad Reach fund pursuant to the alleged Ponzi scheme).

While there may be merit to defendant's claim that plaintiffs were compensated for the transfer, the motion to dismiss for lack of standing must be denied. Liberally construing plaintiffs' Complaint as true, the Court cannot, at the pre-answer motion to dismiss stage, make any determination as a matter of law regarding the issue of damages. Whether plaintiffs suffered any damages, and the amount of any such damages, is a question of fact to be determined on a fuller record at a later stage in this litigation.

Defendant next moves to dismiss the first cause of action for aiding and abetting fraud for failure to state a claim. That motion is denied. To state a claim for aiding and abetting fraud, plaintiffs must sufficiently plead (1) the existence of an underlying fraud, (2) knowledge of this fraud on the part of the aider and abettor, and (3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd. v. Metro Life Ins. Co.*, 64 A.D.3d 472, 476. The existence of the underlying fraud perpetuated by non-party Brenda Smith is undisputed. Plaintiffs have sufficiently alleged the remaining elements.² There are questions of fact as to whether defendant, a clearing firm, moved beyond performing mere ministerial and routine clearing functions such that defendant became actively and directly involved in the fraud perpetuated by non-party Brenda Smith. *See, e.g., McDaniel v. Bear Stearns & Co., Inc.*, F. Supp.2d 343, 352–53 (S.D.N.Y. 2002).

Finally, defendant moves to dismiss the second cause of action for aiding and abetting breach of fiduciary duties. That motion is also denied. To state a claim for aiding and abetting

² Defendant ICBCS presented essentially the same arguments in its motion for dismissal of the aiding and abetting fraud claim in the related SureFire Action that this court previously rejected. *See* 652507/2021 NYSCEF Doc. No. 106.

breach of fiduciary duty, plaintiffs must sufficiently plead (1) a breach by a fiduciary of obligations to another, (2) that defendant knowingly induced or participated in the breach, and (3) that plaintiffs suffered damages as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). It is undisputed that non-party Brenda Smith owed plaintiffs fiduciary duties prior to the May 2018 transfer of interests to SureFire. Defendant argues that plaintiffs cannot recover for funds lost after the transfer to SureFire because there was no fiduciary duty owed by Smith at that point. However, the Complaint adequately alleges that the losses appear to have occurred *during* plaintiffs’ relationship with Smith. *Cmplt.* ¶93. Just as there exists a question of fact as to whether plaintiffs suffered any damages in this case, there exists a question as to when any such damages were sustained and whether Smith owed a fiduciary duty to plaintiffs at the time of the loss.

Defendant is directed to submit an Answer to the Complaint within twenty days of this Order. A Preliminary Conference is scheduled for July 11, 2023 at 12:00 p.m. via Microsoft Teams. To that end, the parties are directed to meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline no later than 22 months from the date of this Order, and e-file it with a request to so Order by June 30, 2023.

Dated: April 18, 2023



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE