SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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INDEX NO. 652720/2023

MOTION DATE N/A

MOTION SEQ. NO. 010

A PARTICIPATIONS LTD., AMITELL MASTER FUND, AQUIS CAPITAL AG, AUGESCO HOLDINGS, CARL FRIEDRICH MARINO GUMPERT, CRESCENDO CAPITAL SA, DAIWA HOUSE INDUSTRY PENSION FUND, FRANCOIS DEKKER, GIOVE S.R.L., JAMES T. SHERWIN, JAPAN MEDICAL SUPPORT CO., LTD, KATSUSHI NAKAYAMA, KIYOKAZU KANNO, KEIKO KANNO, LIGHTVC, LTD., MAXYM ENTIN, MONTSOL ANSTALT, MUFG ALTERNATIVE FUND SERVICES (CAYMAN) LIMITED REF EQUATOR INVESTMENTS LIMITED, OPUS CHARTERED ISSUANCE S.A. COMPARTMENT 127, REINBERGER FOUNDATION, SHADOWBOLTS LIMITED, STEINFREUND57 S.A., SICAV-RAIF - GLOBAL HEDGEFUNDS, TEXAS TECH UNIVERSITY SYSTEM, TOTUS HOLDINGS, 2010 REVOCABLE GST GARY L. PILGRIM, ABRAHAM JOSHUA HESCHEL SCHOOL, AEJ CAPITAL, LLC,ANDREW SCHWERIN, BONNIE SCHWERIN, ATLAS GLOBAL FUND, BELMONTI FAMILY REVOCABLE TRUST & MARGARET M. BELMONTI REVOCABLE TRUST HELD AS TENANTS IN COMMON, BRIAN N. KAUFMAN REVOCABLE TRUST U/T/A 02/13/13, BRITTON FUND, BYRON S. KRANTZ REVOCABLE TRUST, CAROL A. BUEKER REVOCABLE TRUST U/A 12/12/95, MELDRUM FAMILY, LLC,COBALT ABSOLUTE, LLC,DAVID A. COHEN DECLARATION OF TRUST, DAVID A. HORN TR UW FBO CAROLYN, DAVID A. HORN TR UW FBO HELEN, DAVID N. SCAIFE 2020 REVOCABLE TRUST, DRAKE LEONARD II LLC,DJI 2006 FUND, EARL H. DEVANNY, III REVOCABLE TRUST U/A DTD 4/2/2001, ELLIOT SIGAL, RUTH SIGAL, FFI 2011 FUND, FLINT HILLS DIVERSIFIED STRATEGIES, LP, FRANK C. SULLIVAN II DECLARATION OF TRUST, FRANK H. PORTER JR. DECLARATION OF TRUST, GARY L. PILGRIM 2010 IRREVOCABLE TRUST, GARY L. PILGRIM 2013 DELAWARE TRUST, GARY L. PILGRIM GST TR U/D 6/4/98, GO4G BEST IDEAS, LLC,GOHEELS, LLC,GP10, LP, GREENLEAF TRUST, HARVEY L. KAPLAN TRUST, HUMMEL PARTNERS LP, IRENE B. NEWMAN REVOCABLE TRUST, IRIS ABSOLUTE, LLC,JASON M. KUHN REVOCABLE TRUST, JEFFREY BELMONTI REVOCABLE TRUST, JOHN D. STARR REVOCABLE TRUST U/A DTD 11/10/93, JOHN R. GRISSINGER LIVING TRUST U/A 4/7/11, KAPLAN 2020 FUND, KENDOR II LLC,KEVIN M. ANDERSON 2017 UPN IRREVOCABLE TRUST U/A DTD 3/21/2017, LAUREN N. RAINEN, LIBERTY SPECIAL STRATEGIES FUND LLC,MARIE GENSHAFT, MARGARET J. ANDERSON REVOCABLE

DECISION + ORDER ON MOTION

TRUST U/A DTD 7/22/1999, MARK DAVID 1994 PERSONAL IRREVOCABLE TRUST, MARK H SONNENBERG, SUSAN L SONNENBERG, MATTHEW N. KRISER REVOCABLE TRUST, MCSR MASTER FUND, L.P., MICHAEL J. HAGAN, MICHAEL J. RAINEN REVOCABLE TRUST U/A/ DTD 5/4/1990, MICHAEL J. SELVERIAN, NEIL GENSHAFT REVOCABLE TRUST, PAUL L. GOLDBERG DECLARATION OF TRUST, PFLP INVESTMENTS, LLC,RICHARD B. KLEIN REVOCABLE TRUST U/A/DTD 6/8/1993, REVOCABLE TRUSTY AGREEMENT OF JULIETTE B. FREEMAN, REGE E. EISAMAN, ROBERT A. BERNSTEIN REVOCABLE TRUST U/A DTD 7/8/1997, AS AMENDED, RUTH E. PILGRIM REV. GST TR 9/22/10, SECOND AMENDED AND RESTATED AGREEMENT OF TRUST FOR LAWRENCE S. CONNOR DATED MAY 2, 2016, SECULAR GROWTH INVESTORS, LP, SIGAL FAMILY INVESTMENTS, LLC,SIMBA INVESTMENTS, LLC,SNYDER RESOURCE MANAGEMENT L.P., STATE TEACHERS RETIREMENT SYSTEM OF OHIO, STEVEN B. SHAFFER TRUST U/A 8/25/2003, THE 2009 JOHN N. MCCONNELL III GIFT TRUST, THE 2020 MARK FISHMAN TRUST PREVIOUSLY THE 2009 MARK FISHMAN TRUST, THE LEONARD G. HERRING FAMILY FOUNDATION, INC.,THOMAS E. LAUERMAN REVOCABLE TRUST U/A DTD 10/30/2000, AS AMENDED, TUTERA GROUP, INC.,VIOLET A. CARSON RESTATED 2004 REVOCABLE TRUST, VERGER CAPITAL FUND, LLC,WA ABSOLUTE RETURN HEDGE FUND LLC,WALLIS ANNENBERG LIVING TRUST, WEINERG FAMILY LP, LUNA S.R.L.,

Plaintiff,

- V -

INFINITY Q CAPITAL MANAGEMENT LLC,JAMES VELISSARIS, SCOTT LINDELL, LEONARD POTTER, INFINITY Q MANAGEMENT EQUITY, LLC,BONDERMAN FAMILY LIMITED PARTNERSHIP, LP, WILDCAT CAPITAL MANAGEMENT, LLC,EISNERAMPER LLP, U.S. BANCORP FUND SERVICES LLC,EISNERAMPER US (CAYMAN) LTD., U.S. BANCORP FUND SERVICES, LTD.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 190, 200, 201, 202, 230, 238

were read on this motion to/for DISMISS.

Defendants US Bancorp Fund Services, LLC and US Bancorp Fund Services, Ltd., (collectively, "US Bancorp") have filed a motion to dismiss Plaintiffs' amended complaint

(Amended Complaint, NYSCEF Doc. No. 97) pursuant to CPLR 3211(a)(1), (a)(3), (a)(7) and CPLR 3013. The court dismissed the cause of action for unjust enrichment against all defendants during oral argument on February 7, 2024 (Oral Argument Transcript, p. 177). For the following reasons, the court grants the remainder of US Bancorp's motion in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

This action relates to the 2021 collapse of Infinity Q Volatility Alpha Fund, L.P. ("Master Fund") and Infinity Q Volatility Alpha Offshore Fund, Ltd. ("Feeder Fund") (collectively, "Hedge Fund") after the SEC and the public became aware of a multi-year scheme to improperly value the Hedge Fund's assets to inflate the value of the Hedge Fund. Plaintiffs allegedly invested approximately $381,000,000 in the Hedge Fund at various points during the several years prior to the Hedge Fund's collapse (Amended Complaint, ¶¶ 30-133). Defendant Infinity Q Capital Management LLC ("Infinity Q Mgmt.") allegedly was the Hedge Fund's investment advisor and was "responsible for the day-to-day management of the Hedge Fund" (*id.*, ¶ 134). Defendants Infinity Q Management Equity ("IQME") and Bonderman Family Limited Partnership ("BFLP") together own Infinity Q Mgmt. (*id.*). Defendant James Velissaris ("Velissaris") was Infinity Q Mgmt.'s Chief Investment Officer (*id.*, ¶ 138). Defendants Leonard Potter ("Potter") and Scott Lindell ("Lindell") also had roles with Infinity Q Mgmt., with Potter acting as Chief Executive Officer and Lindell acting as Chief Risk Officer, Chief Compliance Officer, and Head of Portfolio Services (*id.*, ¶¶ 139-140).

Infinity Q Mgmt. first launched a mutual fund ("Mutual Fund") in 2014 and subsequently launched the Hedge Fund in 2017 (*id.*, ¶¶ 155-156).[1] Both the Mutual Fund and Hedge Fund invested in volatility-based securities which did not have readily available market prices (*id.*, ¶¶

[1] The court notes that, despite numerous references to the Mutual Fund throughout the amended complaint, the causes of action pled against defendants in this case focus on the Hedge Fund (*see* Amended Complaint, ¶¶ 307-404).

163-166). Therefore, both the Mutual Fund and the Hedge Fund had to generate valuations of the over-the-counter derivative positions ("OTC Positions") themselves (*id.*, ¶¶ 4, 167). They did so using Bloomberg's valuation software, BVAL (*id.*, ¶ 7). US Bancorp would then allegedly use the OTC Positions calculated by other defendants to calculate the net asset value of the funds (*id.*, ¶ 253). The heart of this case is that, notwithstanding representations that Defendants made to Plaintiffs in various offering and marketing materials, Defendants were able to exercise discretion to edit elements of BVAL, and they did so in order to "fraudulently increas[e] the purported value of the positions and the Hedge Fund's NAV" (*id.*).

The amended complaint alleges that US Bancorp administered both the Hedge Fund and the Mutual Fund, that US Bancorp employees served as officers of the valuation committee of the Mutual Fund, and that in its capacity as fund administrator, US Bancorp ignored red flags in the valuation of the assets despite its "specialized knowledge of the OTC Positions and valuation process and protocols," and thus "allowed the fraud to expand" (*id.*, ¶¶ 10-11). US Bancorp allegedly was "responsible for calculating the NAV of the assets in each client's account and the value of the participating shares in the Hedge Fund" and providing Plaintiffs with NAV calculations (*id.*, ¶¶ 142, 180, 229). The amended complaint alleges that a Due Diligence Questionnaire given to Plaintiffs specifically identified US Bancorp "as the party responsible for calculating the Net Asset Value of the assets in client accounts and in the private funds for fee calculation and other purposes" (*id.*, ¶ 180 [internal quotation marks omitted]). US Bancorp also allegedly provided data to the funds to assist with monitoring compliance with governing documents, obtained prices from a manager-approved pricing source and then applied those prices to portfolio positions, identified interest and dividend accrual balances, reconciled cash balances of the fund with the custodian and derivative counterparties with official monthly reconciliations

in the records, and prepared statistical data on the funds and prepared financial reports if requested (*id.*, ¶ 228).

Plaintiffs allege that US Bancorp "knew and expected that its role with the Hedge Fund would be marketed to potential investors, like Plaintiffs," and that Plaintiffs "relied on US Bancorp's role—to compute and calculate the NAV of the Fund, to provide Plaintiffs with accurate monthly statements identifying the value of their investment, and to be part of the valuation process—when deciding to maintain their investments in the Hedge Fund and when to increase such investments" (*id.*, ¶¶ 236-237). Despite this and despite having access to information related to the funds, US Bancorp allegedly "ignored crucial data in calculating NAVs for each Fund and for Plaintiffs while it rubber-stamped valuations proffered by the IQM Parties"[2] (*id.*, ¶ 250). In particular, US Bancorp allegedly ignored divergent valuations of identical positions in each fund and failed to ensure that the Mutual Fund's valuation committee even met at all (*id.*, ¶¶ 251-252). US Bancorp allegedly was "aware that the IQM Parties had the ability to change inputs and calibrate the models that valued various OTC Positions within BVAL" and nevertheless "accepted the IQM Parties' valuations of the OTC Positions when calculating or computing the NAV" (*id.*, ¶ 253). Plaintiffs allege that as a result of US Bancorp ignoring multiple red flags and failing to uphold its obligations to investors, the NAV of the Hedge Fund "was overstated by approximately $567,000,000 as of February 2021" (*id.*, ¶¶ 260-264).

Ultimately, both the Mutual Fund and the Hedge Fund suspended operations in February 2021 after the public uncovered the alleged improper valuation scheme (*id.*, ¶ 155). In the aftermath of this collapse, Velissaris pled guilty to securities fraud, and the court sentenced him to fifteen years in prison (*id.*, ¶¶ 192-195). Subsequently, investors in both the Mutual Fund and

[2] The amended complaint defines "IQM Parties" as referring collectively to Infinity Q Mgmt., Velissaris, Lindell, Potter, IQME, BFLP, and Wildcat Capital Management, LLC (Amended Complaint, p. 6).

Hedge Fund filed a class action lawsuit related to the collapse of the Infinity Q entities, and the parties reached a settlement that the court preliminarily approved on October 17, 2022 (*In re Infinity Q Diversified Alpha Fund Securities Litig.*, Index No. 651295/2021, NYSCEF Doc. No. 181). The court then held a final approval hearing on June 14, 2023 and approved the settlement on January 2, 2024 (*In re Infinity Q Diversified Alpha Fund Securities Litig.*, Index No. 651295/2021, NYSCEF Doc. No. 439). However, Plaintiffs to this action determined to opt out of the class action settlement, and instead pursue their claims in this action. The Plaintiffs initiated this action by filing their complaint on June 2, 2023. Various defendants then moved to dismiss. The parties then stipulated that the Plaintiffs would file an amended complaint in lieu of opposing the motions to dismiss (So-Ordered Final Stipulation Setting Briefing Schedule, NYSCEF Doc. No. 82). Plaintiffs then filed the amended complaint on September 1, 2023. Defendants, including US Bancorp, then moved to dismiss again.

The amended complaint alleges causes of action against US Bancorp for breach of fiduciary duty (Count IX), fraud (Count X), gross negligence (Count XI), aiding and abetting fraud (Count XII), aiding and abetting breach of fiduciary duty (Count XIII), and unjust enrichment (Count XIV). At the oral argument on February 7, 2024, the court dismissed the unjust enrichment cause of action (Oral Argument Transcript, p. 177) and requested supplementary briefing as to whether or not the claims against various defendants should be dismissed for lack of standing because of Plaintiffs' decision to bring the claims directly rather than derivatively. Having reviewed the supplementary briefing, the court grants the remainder of US Bancorp's motion to dismiss in its entirety.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). Further, a court may grant a motion to dismiss under CPLR 3211(a)(1) where documentary evidence "utterly refute[s] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 157 [1st Dept 2022] [citations and internal quotation marks omitted]; *Offshore Exploration and Production, LLC v De Jong Capital, LLC*, 225 AD3d 427 [1st Dept 2024]). A court may grant a motion to dismiss pursuant to CPLR 3211(a)(3) where the defendant establishes that the plaintiff lacks standing to sue (*Lehr Associates Consulting Engineers, LLP v Daikin AC (Americas) Inc.*, 133 AD3d 533, 533 [1st Dept 2015]; *Delaney v HC2, Inc.*, 221 AD3d 563 [1st Dept 2023]).

1. Standing – Derivative v. Direct

As a threshold matter, US Bancorp and other defendants assert that the court should dismiss the amended complaint pursuant to CPLR 3211(a)(3) because the Plaintiffs lack the standing to assert the claims directly rather than derivatively. The court agrees with US Bancorp and dismisses the claims against US Bancorp on that basis. Neither party disputes that because the fund at issue is a Delaware limited partnership, Delaware law determines whether the claims must be brought directly or derivatively (*see Terry v Charitable Donor Advised Fund, LP*, 2024 WL 382113, *15 [SDNY Feb 1, 2024] ["New York law . . . requires that courts look to the law of the state of incorporation in adjudicating a corporation's internal affairs . . . including questions as to whether a claim is direct or derivative"] [citations and internal quotation marks omitted]; *see also Ezrasons,*

Inc. v Rudd, 217 AD3d 406, 406 [1st Dept 2023] [stating that, under the internal affairs doctrine, "claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation"] [citations and internal quotation marks omitted]).

Under *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031 [Del. 2004]), the Delaware Supreme Court clarified when a cause of action should be brought directly or derivatively, stating that the "analysis must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" (*id.* at 1035; *see also Hemingway Group LLC v i80 Group LLC*, 222 AD3d 422, 425 [1st Dept 2023] [applying *Tooley* test in LLC context]). When evaluating whether a claim is direct or derivative, the court will "independently examine the nature of the wrong alleged and any potential relief to make its own determination of the suit's classification" without being bound by "plaintiffs' designation of the suit" (*Stone & Paper Investors, LLC v Blanch*, 2019 WL 2374005, *3 [Del. Ct. Ch. May 31, 2019]). In order to prove that a claim is direct, a plaintiff generally must demonstrate that "the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation" (*El Paso Pipeline GP Company, LLC v Brinckerhoff*, 152 A3d 1248, 1260 [Del. 2016] [citation and internal quotation marks omitted]).

Courts have applied the test the *Tooley* court set in a number of different contexts, providing guidance as to what types of claims are likely direct versus derivative. For instance, a claim related to an alleged breach of a commercial contract to which the plaintiff was party is likely a direct claim (*see NAF Holdings, LLC v Li & Fung (Trading) Limited*, 118 A3d 175, 180-182 [Del. 2015]; *but see El Paso GP Company, LLC v Brinckerhoff*, 152 A3d 1248, 1259 [Del.

2016] [rejecting proposition that "any claim sounding in contract is direct by default, irrespective of *Tooley*," and finding that because a claim "sound[ed] in breach of a contractual duty owed to the **Partnership**, [the court would] employ the two-pronged *Tooley* analysis"] [emphasis added]). A claim such as one for "corporate overpayment," on the other hand, where the plaintiffs allegedly felt economic harm in proportion with their stock ownership solely by virtue of their status as shareholders is a "classically derivative injury" (*El Paso Pipeline GP Company, LLC*, 152 A3d at 1261). Such claims are typically viewed as derivative because "[a]ny harm to stockholders from an overpayment is indirect in the form of dilution to the value of their stock" (*In re MultiPlan Corp. Stockholders Litig.*, 268 A3d 784, 802 [Del. Ct. Ch. 2022]; *Reith v Lichtenstein*, 2019 WL 2714065, *10 [Del. Ct. Ch. 2019] ["Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature."] [internal citation and quotation marks omitted]). Claims based on "diminution in value of the stock held by plaintiffs are generally derivative in nature" (*Thermopylae Capital Partners, LP v Simbol, Inc.*, 2016 WL 368170, *10 [Del. Ct. Ch. 2016]). A claim related to the impairment of a shareholder's redemption rights or voting rights is likely a direct claim because such a claim would allege a "personal injury to the stockholders, not the corporate entity" (*In re MultiPlan Corp. Stockholders Litig.*, 268 A3d at 802).

Delaware authority suggests that claims for fraudulent inducement can be treated as direct or derivative depending on the nature of the injury. In *Sehoy Energy LP v Haven Real Estate Group, LLC* (2017 WL 1380619 [Del. Ct. Ch. 2017]) the court found that a claim that defendants made false and misleading statements regarding a partnership's financial performance and thus "frustrated the Plaintiffs' exercise of their withdrawal rights" was personal to the plaintiffs and did not amount to derivative claims (*id.* at *11). The court in *Sehoy* noted that under *Tooley*, the harm

of the fraudulent misrepresentation ran to the plaintiffs rather than the partnership and that the recovery would also run to the plaintiffs (*id.*). On the other hand, in *Big Lots Stores, Inc. v Bain Capital Fund VII, LLC* (2006 WL 4762843 [Del. Ct. Ch. Mar 28, 2006]), the court cited bankruptcy caselaw holding that "fraudulent inducement claims where the only alleged injury is inextricably linked to a corporate injury are derivative claims" (*id.* at *5).

Additionally, at this court's request, the parties submitted supplemental briefing evaluating the impact that the Delaware Supreme Court's decision in *Citigroup Inc. v AHW Investment Partnership* (140 A3d 1125 [Del. 2016]) has on this court's *Tooley* analysis here. Plaintiffs have asserted that *Citigroup* limited the *Tooley* test to breach of fiduciary duty claims while US Bancorp and other defendants have asserted no substantive impact on *Tooley*. Ultimately, while *Citigroup* may have added an additional preliminary step to the *Tooley* analysis, it does not appear to have exclusively limited the application of the *Tooley* test to only breach of fiduciary duty claims. In *Citigroup*, the Southern District of New York had certified to the Delaware Supreme Court the question of whether "claims of a plaintiff against a corporate defendant alleging damages based on the plaintiff's continuing to hold the corporation's stock in reliance on the defendant's misstatements . . . [are] direct or derivative" (*id.* at 1126). The Delaware court found that the claim was direct but that it was not necessary to evaluate the claim under *Tooley* because *Tooley* dealt with the "narrow issue of whether a claim for breach of fiduciary duty **or otherwise to enforce the corporation's own rights** must be asserted derivatively or directly" (*id.* at 1126-1127 [emphasis added]). Rather, before even engaging in *Tooley* analysis, the court found that it was necessary to determine if the plaintiff "seek[s] to bring a claim belonging to her personally or one belonging to the corporation itself" (*id.* at 1127). Because the plaintiffs in *Citigroup* were holders of stock bringing claims against Citigroup related to their holding of Citigroup stock—claims

which Citigroup could not logically bring against itself—those claims belonged to the plaintiffs regardless of any *Tooley* analysis (*id.* at 1139-1140). Thus, the court agrees with Defendants that *Citigroup* did not limit the application of *Tooley* to breach of fiduciary duty claims. The *Citigroup* decision contemplates the *Tooley* test's continued application to any claims to "otherwise enforce the corporation's own rights."

Here, ultimately, the claims in the amended complaint against US Bancorp belong to the Hedge Fund rather than the Plaintiffs. Unlike in *Citigroup*, where plaintiffs were holders of Citigroup stock who sued **Citigroup** for misrepresentations that **Citigroup** made in its filings and financial statements (*Citigroup*, 140 A3d at 1128), here, Plaintiffs are holders of shares in a **Hedge Fund** for which **US Bancorp** provided services and allegedly made misrepresentations. The amended complaint alleges that US Bancorp was the administrator of the Hedge Fund (Amended Complaint, ¶ 369), and in that capacity, US Bancorp carried out such tasks as "[p]roviding data to the **Funds** to assist with monitoring compliance with policies and investment limitations," "[d]etermining, for each valuation date, the net asset value of the **Fund**," and "[p]reparing various **Fund** statistical data on a periodic basis" (Amended Complaint, ¶ 228 [internal quotation marks omitted] [emphasis added]). While the amended complaint contains conclusory allegations that US Bancorp owed fiduciary duties to Plaintiffs (*see e.g.*, Amended Complaint, ¶¶ 362-364), the administration agreement between the Hedge Fund and US Bancorp makes it clear that the Hedge Fund was the party that retained US Bancorp and the work that US Bancorp allegedly did was for the Hedge Fund (*see* Administration Agreement, NYSCEF Doc. No. 115).

While the amended complaint does contain limited allegations of representations that US Bancorp made to Plaintiffs (*see e.g.*, Amended Complaint, ¶ 230 ["US Bancorp also advised potential investors, including Plaintiffs, that it was obligated to ensure that the valuation policy of

the Funds was executed properly"]), the facts in this case are distinguishable from *Citigroup*, where the court found that claims against **Citigroup** based on **Citigroup**'s misrepresentations could survive. In *Citigroup*, it would have been illogical to expect Citigroup to sue itself for its own misrepresentations. Here, on the contrary, the Hedge Fund theoretically could have sued US Bancorp for the misrepresentations alleged in the amended complaint.

Further, this case is distinguishable from *NAF Holdings, LLC v Li & Fung (Trading) Limited* (118 A3d 175 [Del. 2015]), on which the *Citigroup* court relied. In *NAF*, the plaintiff company had previously entered into a commercial contract with the defendant to act as its sourcing agent in its effort to acquire a fashion apparel company (*id.* at 177). In order to do so, the plaintiff created subsidiaries which entered into the merger agreement, but then defendant allegedly repudiated the contract with plaintiff by refusing to serve as the sourcing agent, causing damage through diminution of the subsidiaries' stock (*id.*). The *NAF* court found that the plaintiff did not need to bring its claims derivatively where it was suing on its "own commercial contract[]" (*id.* at 180-181). Thus, the *NAF* case involved a claim that clearly belonged to the plaintiff LLC. Here, unlike *NAF*, the Plaintiffs did not have any contractual relationship with US Bancorp. Their contractual relationship was with the Hedge Fund, and the Hedge Fund was the party with the relationship with US Bancorp.

In any event, applying the *Tooley* analysis to this case, it is clear that both the damages and the recovery related to all of the causes of action against US Bancorp necessarily flow through the Hedge Fund. The amended complaint alleges that US Bancorp worked as the administrator for the Hedge Fund and calculated NAV for the Hedge Fund assets in this capacity (Amended Complaint, ¶¶ 142, 228). The alleged failure of US Bancorp and other defendants to ensure accurate NAV, in contravention of their prior representations about their procedures, is the core cause of Plaintiffs'

purported damages (*see e.g.* Amended Complaint, ¶¶ 1, 234-238). That is, because parties like US Bancorp allegedly allowed inaccurate NAV calculations to persist, the Hedge Fund was overvalued, leading to a precipitous collapse once the SEC discovered the fraud (*see id.*, ¶¶ 1-2, 261, 264). Plaintiffs allege that, as a result of Defendants' alleged "complicit[y] in the fraudulent scheme" and failure to "protect against fraud," they lost over $200,000,000 (*id.*, ¶ 15). However, the Hedge Fund sustained these purported damages first, and any prospective recovery must flow back through the Hedge Fund before reaching the Plaintiffs. Plaintiffs' conclusory allegations that Defendants induced them to invest initially, and subsequently induced them to "maintain their investments," are insufficient to make these derivative claims direct (*id.*, ¶ 1).

For all of the amended complaint's discussion about the confidence that Plaintiffs had in US Bancorp, and even US Bancorp's alleged knowledge that Plaintiffs would rely on its role with the Hedge Fund (*see id.*, ¶¶ 236-237), the relationship between US Bancorp's alleged actions and the Plaintiffs' losses was not a direct one. US Bancorp's actions allegedly allowed the fraudulent overvaluation of the Hedge Fund, which damaged Plaintiffs **among other investors** (*see id.*, ¶ 197 ["This systemic, multi-year fraud was perpetrated against investors in the Hedge Fund, including Plaintiffs."]). Plaintiffs have identified in detail the different levels of investment of each individual plaintiff (*id.*, ¶¶ 33-133) and have not alleged anything suggesting that damages would be based on anything other than their pro rata shares of the Hedge Fund. This is inherently a derivative claim (*see Hemingway Group LLC v i80 Group LLC*, 222 AD3d 422, 425 [1st Dept 2023] [holding that in the LLC context, a claim is derivative "where the nature of the alleged injury is such that it falls directly on the LLC as a whole and only secondarily on an individual member as a function of and in proportion to [their] pro rata investment in the LLC"] [citation and internal quotation marks omitted]). Any recovery would similarly need to flow through the Hedge Fund,

remedying Defendants' alleged wrongdoing on a pro rata basis (*see El Paso Pipeline GP Company, LLC v Brinckerhoff*, 152 A3d 1248, 1251 [Del. 2016] [finding that a limited partner's claim was derivative where the plaintiff "sought only monetary relief for the limited partnership"]. Therefore, even applying the *Tooley* analysis, Plaintiffs lack standing to pursue their claims directly.

2. Failure to State a Claim

Even if Plaintiffs did have standing to sue US Bancorp, nearly all of their claims should be dismissed for failure to state a cause of action.

a. Breach of Fiduciary Duty

Even assuming that Plaintiffs have standing, the cause of action against US Bancorp for breach of fiduciary duty must be dismissed because, quite simply, Plaintiffs have failed to allege that US Bancorp was their fiduciary. To state a cause of action for breach of fiduciary duty, a plaintiff must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Besen v Farhadian*, 195 AD3d 548, 549-550 [1st Dept 2021] [citation and internal quotation marks omitted]; *New York Marine & General Insurance Company v Wesco Insurance Company*, 213 AD3d 461, 462 [1st Dept 2023]). 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" (*AG Capital Funding Partners, LP v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008] [citations and internal quotation marks omitted]).

Under the special facts doctrine, a duty to disclose information may arise even absent a fiduciary relationship where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Jana L. v West 129th Street Realty Corp.*, 22

AD3d 274, 277 [1st Dept 2005] [citations and internal quotation marks omitted]; *New York City Waterfront Development Fund II, LLC v Pier A Battery Park Assocs., LLC*, 206 AD3d 565, 567 [1st Dept 2022]). In order to establish liability under the special facts doctrine, the plaintiff must show that the "material fact was information peculiarly within [the] knowledge of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the exercise of ordinary intelligence" (*Plaintiffs' State and Securities Law Settlement Class Counsel v Bank of NY Mellon*, 43 Misc3d 887, 900 [Sup Ct, NY County 2014] [citation and internal quotation marks omitted]).

Plaintiffs argue that US Bancorp had a duty to disclose material facts related to the Hedge Fund pursuant to the special facts doctrine. However, US Bancorp correctly argues that Plaintiffs' allegations essentially sound in **constructive** knowledge, rather than **actual** knowledge. The amended complaint contains a number of allegations that perhaps suggest that US Bancorp **should have known** of the ongoing fraudulent scheme, including that US Bancorp was "responsible for calculating the NAV" but "ignored crucial data . . . while it rubber-stamped valuations proffered by the IQM Parties" (*id.*, ¶¶ 142, 250), that US Bancorp employees were officers for the **Mutual Fund** (Amended Complaint, ¶ 240), that US Bancorp "knew there were no meetings by the Funds' Valuation Committee" (*id.*, ¶ 11), and that "even a basic review of Identical Positions" with "conflicting valuations across the Hedge Fund and the Mutual Fund" would have "raised a massive red flag for [US Bancorp as] administrator" (*id.*, ¶ 244). However, the amended complaint makes clear that the source of the core fraud was the IQM Parties' alleged changing of inputs and calibration of models on BVAL, which created the OTC Positions valuations on which US Bancorp relied for the NAV calculations (*see id.*, ¶ 253). Even though the amended complaint alleges that "US Bancorp was aware that the IQM Parties had the ability to change inputs and

calibrate the models . . . within BVAL" (*id.*), the amended complaint is devoid of anything more than conclusory allegations that US Bancorp had actual knowledge of the manipulation such that it would have a duty to disclose material facts pursuant to the special facts doctrine.

In this respect, US Bancorp's citation to *Plaintiffs' State and Securities Law Settlement Class Counsel v Bank of NY Mellon* (43 Misc3d 887, 900 [Sup Ct, NY County 2014]) is apt. There, the court rejected the application of the special facts doctrine where the plaintiffs alleged that BNY Mellon had "superior knowledge" of facts related to Bernie Madoff's fraudulent investment activity (*id.* at 900-901). The court found that the plaintiffs were required to allege actual knowledge and that, to the extent plaintiffs alleged actual knowledge, the allegations were "wholly conclusory" (*id.*). Plaintiffs assert in response that *Bank of NY Mellon* is distinguishable because here, the allegations of actual knowledge are not conclusory. However, the *Bank of NY Mellon* allegations seem of the same type as the allegations here. In *Bank of NY Mellon*, the court found conclusory allegations that BNY Mellon "knew or should have known about the evidence that Madoff was misusing client funds," that because of BNY Mellon's maintenance of business records, they "would have actual and/or constructive knowledge that Madoff had not actually purchased the number of shares he claimed," and that because of Madoff's account with BNY Mellon, BNY Mellon "was or should have been suspicious of Madoff's money laundering operations" and "ignored evidence that something was wrong" (*id.* at 901 [internal quotation marks omitted). Here, the allegations that US Bancorp should have been aware of the fraud because of its role as administrator and purported red flags of which it could have made itself aware are of the same type of allegations the court in *Bank of NY Mellon* found to be insufficient. Just as such allegations were insufficient to plead the special facts doctrine there, so are they insufficient here.

b. Fraud

Even if Plaintiffs have standing, the cause of action against US Bancorp for fraud must also be dismissed. In order to state a cause of action for fraud, a plaintiff must allege "a material representation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance . . . and damages" (*Rapaport v Strategic Financial Solutions, LLC*, 190 AD3d 657 [1st Dept 2021]). Further, a plaintiff must plead a cause of action for fraud with particularity (*Vincent D'Arata v NYC Dep't of Health and Mental Hygiene*, 2024 WL 1723712 [1st Dept Apr. 23, 2024]; CPLR 3016[b]).

Here, Plaintiffs have failed to plead their cause of action for fraud. Plaintiffs assert in the amended complaint that US Bancorp is liable for fraud because US Bancorp made "false representations regarding the NAV of Plaintiffs' accounts in the Hedge Fund," that US Bancorp knew that Plaintiffs would rely on those representations in making their investment decisions, and that US Bancorp's false statements regarding the NAV caused damages by "preventing Plaintiffs from redeeming or withdrawing their investments in the Hedge Fund" (Amended Complaint, ¶¶ 373-376). However, this cause of action fails because Plaintiffs fail to allege elements of fraud with particularity. While Plaintiffs allege false representations regarding the NAV, they fail to point to any particular communications between any US Bancorp employees and any particular Plaintiffs (*see CMB Export Infrastructure Investment Group 48, LP v Motcomb Estates, Ltd.*, 223 AD3d 513, 514 [1st Dept 2024] [dismissing fraudulent inducement claim where the plaintiff failed to "allege any specific facts with respect to the time, place, or manner of this purported misrepresentation"]). Nor do Plaintiffs allege that any particular Plaintiffs justifiably relied on any US Bancorp misrepresentations. Further, the allegations related to scienter are defective for a similar reason that Plaintiffs' breach of fiduciary duty cause of action fails. Namely, Plaintiffs have failed to allege in non-conclusory terms that US Bancorp knew that the NAVs were false. Rather,

as explained above, Plaintiffs have alleged that US Bancorp, by virtue of its position as administrator, should have been aware of red flags which could have led it to discover the fraud. That is not sufficient to allege fraud (*see MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 292 [1st Dept 2016] [finding that to allege scienter, plaintiff is required to allege facts "from which it is possible to infer defendant[s'] knowledge of the falsity of [their] statements when they were made"] [citation and internal quotation marks omitted]; *Mateo v Senterfitt*, 82 AD3d 515, 518 [1st Dept 2011] [finding allegations of scienter inadequate where the complaint alleged that defendant "was reckless and grossly negligent in failing to conduct any reasonable investigation"]). Therefore, the court dismisses the cause of action for fraud.

c. Aiding and Abetting Breach of Fiduciary Duty and Fraud

Likewise, the causes of action for aiding and abetting breach of fiduciary duty and aiding and abetting fraud must be dismissed for failure to state a claim. In order to allege aiding and abetting fraud, a plaintiff must allege "the existence of the underlying fraud, actual knowledge, and substantial assistance" (*1650 Broadway Associates, Inc. v Sturm*, 2024 WL 1447407, *2 [1st Dept Apr 4, 2024]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). A plaintiff alleging a cause of action for aiding and abetting breach of fiduciary duty must allege "(1) breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 11 [1st Dept 2019] [internal citation and quotation marks omitted]; *Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015] [finding that the complaint's "conclusory allegations [were] insufficient to sustain the aiding and abetting [breach of fiduciary duty] cause of action" where the complaint failed to sufficiently allege that the defendants "knew that [co-defendant] was a

fiduciary" or that he had "breached a fiduciary obligation"]). As with a cause of action for aiding and abetting fraud, a plaintiff must allege actual knowledge for a claim of aiding and abetting breach of fiduciary duty (*see ALP, Inc. v Moskowitz*, 204 AD3d 454, 460 [1st Dept 2022]).

Both aiding and abetting claims fail because Plaintiffs fail to sufficiently allege that US Bancorp had actual knowledge of the alleged fraud or breach of fiduciary duty. The allegations that US Bancorp was "responsible for the calculation" of NAVs and that US Bancorp "ignored a litany of red flags" in its role (Amended Complaint, ¶ 10) fail to establish more than constructive knowledge, which is insufficient for aiding and abetting fraud or breach of fiduciary duty (*see Lumen at White Plains, LLC v Stern*, 135 AD3d 600, 600-601 [1st Dept 2016] [finding lower court properly dismissed aiding and abetting fraud claim where the complaint "[did] not allege that defendants knew about the fraudulent transactions, but only that they and other defendant lawyers 'knew of each other's involvement' and failed to, among other things, 'advise the Plaintiffs once the fraud was discovered,'" allegations which the court found amounted to, "at best, constructive knowledge"]; *ALP Inc. v Moskowitz*, 204 AD3d 454, 460 [1st Dept 2022] [dismissing aiding and abetting breach of fiduciary duty cause of action where the complaint failed to allege that co-defendant "had actual knowledge of these defendants' breaches of fiduciary duty"]). The court does not credit Plaintiffs' conclusory allegations of knowledge (*see* Amended Complaint, ¶¶ 391, 395; *McBride v KPMG Intern.*, 135 AD3d 576, 578 [1st Dept 2016] [dismissing aiding and abetting fraud cause of action where the plaintiff made "only conclusory allegations that the aiders and abettors knew about and substantially assisted" with the particular defendant's fraud]).

d. Gross Negligence

On the other hand, if Plaintiffs did not lack standing, the gross negligence claim may have survived this motion to dismiss. In order to state a cause of action for gross negligence, a plaintiff

must allege conduct that "evidences a reckless disregard for the rights of others" or "smack[s] of intentional wrongdoing" (*Platinum Partners Value Arbitrage Fund LP v Kroll Associates, Inc.*, 102 AD3d 483, 483 [1st Dept 2013]; *Tillage Commodities Fund, LP v SS&C Technologies, Inc.*, 151 AD3d 607, 608 [1st Dept 2017]; *Morgan Stanley Mortg. Loan Trust 2006-13ARX v Morgan Stanley Mortg. Capital Holdings, LLC*, 143 AD3d 1, 8 [1st Dept. 2016]). Whether Plaintiffs' allegations that US Bancorp ignored red flags in its calculation of NAV for the Hedge Fund amount to mere carelessness (*see Platinum Partners Value Arbitrage Fund LP*, 102 AD3d at 483), as opposed to gross negligence, is typically an issue of fact that cannot be resolved at the pleading stage (*see e.g. Morgan Stanley Mortg. Loan Trust 2006-13ARX*, 143 AD3d at 8 [finding allegations that Morgan Stanley, among other things, failed to "verify basic and critical information" and "disregarded [] known or obvious risks" related to loans were "sufficient to withstand dismissal at the pleading stage"]; *AEA Middle Market Debt Funding LLC v Marblegate Asset Management, LLC*, 214 AD3d 111, 132 [1st Dept 2023] ["The issue of gross negligence ordinarily presents an issue of fact."]).

However, as discussed above, the court dismisses the cause of action for gross negligence because Plaintiffs lack standing to bring the cause of action derivatively (*see infra* Section I).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that US Bancorp's motion to dismiss the amended complaint is granted in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and General Clerk's Office within 5 days of the date of this order. Upon proper service, the Clerk and General Clerk is directed to update their records to reflect the change in the caption. Service upon the Clerk and General Clerk must be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh).

05/10/2024
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

652720/2023 A PARTICIPATIONS LTD. ET AL vs. INFINITY Q CAPITAL MANAGEMENT LLC ET AL
Motion No. 010