

<b>A Participations Ltd. v Infinity Q Capital Mgmt. LLC</b>
2024 NY Slip Op 31788(U)
May 16, 2024
Supreme Court, New York County
Docket Number: Index No. 652720/2023
Judge: Melissa A. Crane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MELISSA A. CRANE**

**PART**

**60M**

*Justice*

-----X

**INDEX NO.** 652720/2023

**MOTION DATE** N/A

**MOTION SEQ. NO.** 011

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, MUFU 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.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 011) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 191, 203, 204, 205, 206, 231, 239

were read on this motion to/for

DISMISS

Defendant EisnerAmper LLP (“EisnerAmper”) has moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (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 EisnerAmper's motion to dismiss.

### **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 uncovered 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). Defendant US Bancorp was the Hedge Fund's administrator, "responsible for calculating the [net asset value ("NAV")] of the assets in each client's account and the value of the participating shares in the Hedge Fund" (*id.*, ¶ 142).

Infinity Q Mgmt. first launched a mutual fund ("Mutual Fund") in 2014 and subsequently launched the Hedge Fund in 2017 (*id.*, ¶¶ 155-156).<sup>1</sup> Both the Mutual Fund and Hedge Fund

---

<sup>1</sup> 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).

invested in volatility-based securities which did not have readily available market prices (*id.*, ¶¶ 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 NAV of the funds (*id.*, ¶ 253). EisnerAmper audited the financial statements for the Hedge Fund (*id.*, ¶ 12). The heart of this case is that, notwithstanding representations that the IQM Parties<sup>2</sup> made to Plaintiffs, they were able to “artificially inflate prospective gains or deflate prospective losses by modifying input parameters, strategies and even code within BVAL,” and in doing so they “fraudulently increas[ed] the purported value of the positions and the Hedge Fund’s NAV” (*id.*, ¶¶ 7, 181). The amended complaint generally alleges as to Defendants other than the IQM Parties that they failed to catch this fraudulent scheme and thereby allowed it to continue (*id.*, ¶¶ 253, 285, 287)

In particular, the amended complaint alleges that EisnerAmper audited the Hedge Fund’s financial statements and “proclaimed that the Hedge Funds’ financial statements for 2017, 2018 and 2019 were ‘accurate and complete,’ ‘free from material misstatement,’ and that ‘present[ed] fairly, in all material respects, the financial position of the Hedge Fund” [sic] (*id.*, ¶ 12). Plaintiffs further allege that in its capacity as the auditor, EisnerAmper “met with individual investors, including Plaintiffs, who were contemplating investing in the Hedge Fund,” that “[i]n such discussions, EisnerAmper touted its resources, expertise in complex derivatives, and experience acting as the auditor for a variety of hedge and private equity funds,” and that “[d]uring such meetings, EisnerAmper advised investors that the key controls used by the IQM Parties in valuing the complex derivatives were proper and standard in the industry” (*id.*, ¶ 268). According to

---

<sup>2</sup> The amended complaint defines Infinity Q Mgmt., Velissaris, Lindell, Potter, IQME, BFLP and Wildcat collectively as the “IQM Parties” (Amended Complaint, p. 6).

Plaintiffs, EisnerAmper's assurances were "designed to give confidence to potential investors, such as Plaintiffs, to invest in the Hedge Fund," and EisnerAmper "knew that its audits would be used by potential investors in deciding whether to invest and by investors in considering whether to maintain, increase, or withdraw their investment in the Hedge Fund" (*id.*). The amended complaint notes that EisnerAmper "was selected as a replacement auditor for the Funds because of its resources and expertise in analyzing the complex derivative positions" (*id.*, ¶ 266).

The amended complaint alleges that, notwithstanding its role as the auditor and its knowledge that investors would rely on its audits, EisnerAmper failed to identify that the financial statements it audited "severely misstated the Hedge Fund's NAV" (*id.*, ¶ 13). According to Plaintiffs, "EisnerAmper had access to all the information and data necessary to fully uncover the systemic fraud and prevent the massive damage incurred by Plaintiffs, but EisnerAmper fostered the fraud by willfully ignoring a litany of red flags that the fraud was pervasive, ongoing, and intentional" (*id.*, ¶ 271). In particular, EisnerAmper allegedly "failed to implement proper audit controls when auditing the complex OTC Positions," and "inappropriately relied on the fraudulent BVAL models and inputs created by the IQM Parties without confirming, corroborating, replicating, or independently verifying the valuations that the IQM Parties were reporting for the OTC Positions" (*id.*, ¶¶ 286-287). Plaintiffs allege that EisnerAmper even "told the IQM Parties which positions it intended to independently value, giving the IQM Parties the opportunity to manipulate the results" (*id.*, ¶ 14). Further, the amended complaint alleges that the audits allegedly containing false statements "purported to provide a third-party, objective assessment of the financial health of the Hedge Fund" and that the Plaintiffs "would not have invested in the Hedge Fund without receiving the Annual Audits" (*id.*, ¶¶ 279-280).

Plaintiffs allege a number of red flags that EisnerAmper either knew of or willfully ignored, including disparities between counterparty valuations and the valuations of the IQM parties (*id.*, ¶¶ 290, 305), disparities in valuations of identical positions in the Mutual Fund and Hedge Fund (*id.*, ¶ 291), and “mathematically impossible valuations” which “should have been discovered by EisnerAmper if it had implemented basic audit standards” (*id.*, ¶¶ 295-296). Additionally, EisnerAmper allegedly lacked access to corridor values for corridor swaps in order to replicate Infinity Q Mgmt.’s valuations of Hedge Fund assets (*id.*, ¶ 289), used a “glaringly small” sample size during one of its audits (*id.*, ¶ 293), and knew that the Valuation Committee for the Mutual Fund was not even meeting (*id.*, ¶ 303). Plaintiffs allege that EisnerAmper’s failure to independently verify valuations rendered its “purported audits” as “amount[ing] to no audits at all” and that EisnerAmper’s failure prevented it from discovering the fraud (*id.*, ¶¶ 287, 304-305).

The Master Fund (which, together with the Feeder Fund, comprise the Hedge Fund) retained EisnerAmper’s services pursuant to engagement letters dated February 25, 2018 (February 2018 Engagement Letter, NYSCEF Doc. No. 134), June 26, 2018 (June 2018 Engagement Letter, NYSCEF Doc. No. 135), and September 9, 2019 (September 2019 Engagement Letter, NYSCEF Doc. No. 136). The engagement letters identify “Infinity Q Volatility Alpha Fund, L.P.” (*i.e.*, the Master Fund) as the “Client” (February 2018 Engagement Letter, p. 1; June 2018 Engagement Letter, p. 1; September 2019 Engagement Letter, p. 1). Garth Puchert of EisnerAmper signed each of the engagement letters and Velissaris and/or Lindell signed on behalf of Infinity Q Mgmt., which in turn signed “on behalf of Infinity Q Volatility Alpha Fund, LP” (February 2018 Engagement Letter, p. 6; June 2018 Engagement Letter, p. 6; September 2019 Engagement Letter, p. 6). Further, each engagement letter appends Standard Terms and Conditions containing a “No Third-Party Beneficiary” clause stating, “[t]he engagement is being undertaken

solely for the client's benefit and the parties do not intend to provide contractual rights to any other person" (February 2018 Engagement Letter, p. 8; June 2018 Engagement Letter, p. 8; September 2019 Engagement Letter, p. 8). The Standard Terms and Conditions also state that the engagement letter and terms and conditions "contain the full and complete understanding of EisnerAmper and the client with respect to the subject matter and services described in the engagement letter and supersedes all prior representations, agreements, contracts, and understandings concerning such subject matter and services, whether they be oral or written" (February 2018 Engagement Letter, p. 9; June 2018 Engagement Letter, p. 9; September 2019 Engagement Letter, p. 9).

Ultimately, both the Mutual Fund and the Hedge Fund suspended operations in February 2021 as the SEC moved towards formal charges in connection with the fraud (*id.*, ¶¶ 155, 221). In the aftermath of the 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 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 EisnerAmper, then moved to dismiss again.

The amended complaint alleges causes of action against EisnerAmper for fraud (Count V), negligence (Count VI), aiding and abetting fraud (Count VII), aiding and abetting breach of fiduciary duty (Count VIII), 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 EisnerAmper's motion to dismiss.

### 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, 428 [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, EisnerAmper 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. 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]).

The court refers to its decision on US Bancorp’s motion to dismiss (NYSCEF Doc. No. 253, pp. 8-11) for a full recitation of Delaware law as it relates to the determination of whether an action is properly brought directly or derivatively. Ultimately, under *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031 [Del. 2004]), the analysis is focused on the questions of “[w]ho 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). However, under *Citigroup Inc. v AHW Investment Partnership* (140 A3d 1125 [Del. 2016]), the court must first determine if the

plaintiff “seek[s] to bring a claim belonging to her personally or one belonging to the corporation itself” (*id.* at 1127).

Here, for similar reasoning as that in the decision and order on US Bancorp’s motion to dismiss, all of the claims that Plaintiffs allege directly against EisnerAmper are properly brought derivatively. Therefore, the court dismisses the claims against EisnerAmper for lack of standing pursuant to CPLR 3211(a)(3). Plaintiffs’ claims against EisnerAmper essentially rest on the theory that EisnerAmper, in its capacity as an auditor, ignored red flags and failed to uncover the fraudulent manipulation of Hedge Fund asset valuations (*see* Amended Complaint, ¶¶ 270-271, 284-301). After the SEC uncovered the massive fraud, the value of the Hedge Fund collapsed, allegedly causing damage to Plaintiffs through the loss of “more than \$200,000,000 from their collective \$381,000,000 investments in the Hedge Fund” (*see* Amended Complaint, ¶¶ 1-2, 221-222, 264). Fundamentally, these claims belong to the Hedge Fund (*see Stone & Paper Investors, LLC v Blanch*, 2019 WL 2374005, \*4 [Del. Ct. Ch. May 31, 2019] [finding that claim related to violation of provision of operating agreement requiring the company to “disclose terms and conditions of any interested transaction to its members” was a direct claim based on a “personal right belonging to the members” but that a claim based on failure to reimburse reasonable expenses was a right held by the company, requiring application of the *Tooley* test] [emphasis added]). The engagement letters clearly reflect that the right to accurate audits belonged to EisnerAmper’s client, Infinity Q Volatility Alpha Fund, LP (*i.e.*, the Master Fund, which, together with the Feeder Fund comprise the Hedge Fund) (*see e.g.*, February 2018 Engagement Letter, pp. 6, 8 [“The engagement is being undertaken solely for the client’s benefit.”]). While the amended complaint does not assert claims based on breaches of the engagement letters, the claims ultimately arise out

of the EisnerAmper's alleged actions in contravention to this right of the Master Fund to accurate audits.

Further, under *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031 [Del. 2004]), the claims against EisnerAmper are derivative because the Hedge Fund suffered the alleged harm and would receive the benefit of any recovery (*id.* at 1035). While Plaintiffs style their claims as arising largely out of EisnerAmper allegedly fraudulently inducing their investment decisions—which Plaintiffs assert are direct claims—the alleged damages are inextricably linked with damage to the Hedge Fund through the fraudulent mismarking of the NAV (*see Big Lots Stores, Inc. v Bain Capital Fund VII, LLC*, 2006 WL 4762843 [Del. Ct. Ch. Mar 28, 2006] [holding that “fraudulent inducement claims where the only alleged injury is inextricably linked to a corporate injury are derivative claims”] (*id.* at \*5; *In re Garces Restaurant Group, Inc.*, 2019 WL 3002932, \*8 [Bankr. DNJ July 9, 2019] [applying Delaware law and holding that “[a]lthough fraudulent inducement appears to be a direct claim, if the claims are masked claims for a diminution in value of their limited partner units as a result of corporate mismanagement, the claims are actually derivative”]; *Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014] [holding that “even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand”])). Ultimately, the alleged fraudulent inducement to purchase shares in the Hedge Fund was not the central cause of Plaintiffs' alleged damages. Plaintiffs' damages arose from the collapse of the Hedge Fund resulting from the persistent fraudulent overvaluation of the Hedge Fund which EisnerAmper allegedly failed to catch. This injury would have affected all shareholders on a pro rata basis, and any recovery would flow through the Hedge Fund. Therefore, Plaintiffs assert derivative claims (*see El Paso Pipeline GP Company, LLC v Brinckeroff*, 152 A3d 1248, 1261

[Del. 2016]). The court dismisses the causes of action against EisnerAmper for lack of standing pursuant to CPLR 3211(a)(3).

2. Failure to State a Cause of Action

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

a. *Fraud*

The court finds that Plaintiffs failed to state a cause of action for fraud against EisnerAmper. 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, 657 [1st Dept 2021] [citation and internal quotation marks omitted]). 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]; *Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014] [finding that plaintiffs did not plead fraud and fraudulent inducement claims with requisite particularity “because the words used by defendants and the date of the alleged false representations [were] not set forth”]; CPLR 3016[b]). Although fraudulent intent is “divined from the surrounding circumstances, this does not mean constructive knowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances” (*CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011] [citation and internal quotation marks omitted]).

In order to state a cause of action for fraud against an auditor, a plaintiff must allege “that the auditor's practices were so deficient as to amount to no audit at all, that there was a refusal to see the obvious, a failure to investigate the doubtful” (*CRT Investments, Ltd. v Merkin*, 29 Misc3d 1218(A), \*13 [Sup Ct, NY County May 5, 2010] [citation and internal quotation marks omitted]);

*see also Israel Discount Bank of New York v EisnerAmper LLP*, 45 Misc3d 1218(A), \*6 n.3 [Sup Ct, NY County 2014]). Ultimately, to support a claim for fraud based on an auditor's failure to adhere to generally accepted auditing standards, the auditor "must actually know about the red flags and unjustifiably ignore them" (*Israel Discount Bank of New York*, 45 Misc3d 1218(A), at \*8).

Here, Plaintiffs have failed to plead the elements of their fraud claim against EisnerAmper with sufficient particularity. Plaintiffs' core allegation that EisnerAmper "made false representations in the Annual Audits when it certified that the Hedge Fund's financial statements were accurate, free from material misstatement, and fairly presented the financial position of the Hedge Fund" (Amended Complaint, ¶ 335) fails to identify with specificity to whom EisnerAmper made the misrepresentations or which Plaintiffs received the audits and justifiably relied on them. Additionally, while Plaintiffs allege that EisnerAmper "met with investors—including certain Plaintiffs" and "provided assurances regarding the valuation systems and financial statements" (*id.*, ¶ 141), Plaintiffs provide no specific details regarding these meetings, such as which Plaintiffs EisnerAmper met with or when they met with them. This failure to allege the elements of fraud with particularity is fatal to the claim (*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"]).

Further, the amended complaint fails to allege in non-conclusory terms that EisnerAmper had actual knowledge that its representations in the annual audits were false. If anything, the amended complaint's allegations suggest constructive knowledge. Plaintiffs allege that EisnerAmper "**had access** to all the information and data necessary to fully uncover the systemic

fraud and prevent the massive damage incurred by Plaintiffs, but EisnerAmper fostered the fraud by willfully ignoring a litany of red flags” (*id.*, ¶ 271). The amended complaint also alleges that EisnerAmper “inappropriately relied on the fraudulent BVAL models and inputs created by the IQM Parties without confirming, corroborating, replicating, or independently verifying the valuations” (*id.*, ¶ 287), “intentionally disregarded the significant disparities between the counterparty valuations of OTC Positions that it audited against the values provided by the IQM Parties” (*id.*, ¶ 290), and that EisnerAmper “**should have [] discovered**” the “mathematically impossible valuations” caused by the IQM Parties’ alleged mismarking of OTC Positions (*id.*, ¶ 295). Additionally, Plaintiffs allege that EisnerAmper “failed to identify that the Identical Positions in each the Mutual Fund and Hedge Fund were being valued at drastically different figures at the same point in time,” and that EisnerAmper “willfully ignored substantial available data during its audit reviews that would have identified these clear red flags” (*i.e.*, EisnerAmper did **not** have actual knowledge of those red flags but **could have**) (*id.*, ¶¶ 291-292). Because Plaintiffs have failed to allege actual knowledge in non-conclusory terms, the amended complaint fails to state a cause of action for fraud.

*b. Aiding and Abetting Fraud and Breach of Fiduciary Duty*

The court also holds that the amended complaint fails to state causes of action for aiding and abetting fraud and aiding and abetting breach of fiduciary duty. In order to state a claim for aiding and abetting fraud, a plaintiff must allege “(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 Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]; *Lumen at White Plains, LLC v Stern*, 135 AD3d 600, 600 [1st Dept 2016]). A plaintiff is required to plead “actual knowledge of

the fraud” (*see Lumen at White Plains, LLC*, 135 AD3d at 600). 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 are insufficient to sustain the aiding and abetting [breach of fiduciary duty] cause of action” where the complaint failed to allege sufficiently that the defendants “actually 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 claims fail for much the same reason that the fraud claim failed. Plaintiffs have failed to allege that EisnerAmper had actual knowledge of the fraud or breach of fiduciary duty. Rather, the amended complaint alleges that EisnerAmper “ignor[ed] a litany of red flags” (Amended Complaint, ¶¶ 271, 284) and that, had EisnerAmper conducted its audits properly, it would have discovered the fraud (*see e.g.*, Amended Complaint, ¶ 288). Plaintiffs’ conclusory allegation that EisnerAmper “knew about the fraud” (*id.*, ¶ 354) is insufficient (*see 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]). Accordingly, Plaintiffs failed to state a cause of action for both aiding and abetting causes of action against EisnerAmper as well.

*c. Negligence*

However, if Plaintiffs did not lack standing, the negligence claim may have survived this motion to dismiss. The parties agree that the Court of Appeals' decision in *Credit Alliance Corp. v Arthur Andersen & Co.* (65 NY2d 536 [1985]) and its progeny govern negligence claims against accountants. Under *Credit Alliance*, before an accountant "may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports" the plaintiff must satisfy the following prerequisites: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance"; *Parrott v Coopers & Lybrand, LLP*, 263 AD2d 316, 320 [1st Dept 2000]). Generally, whether or not a relationship is of a "nature and caliber" such that a party's reliance on an alleged negligent misrepresentation is justified "raises an issue of fact" (*Caprer v Nussbaum*, 36 AD3d 176, 196 [2d Dept 2006] [internal citation and quotation marks omitted]).

Here, Plaintiffs have alleged that EisnerAmper "was selected as a replacement auditor for the Funds because of its resources and expertise in analyzing the complex derivative positions" and that EisnerAmper "knew that this expertise was the reason it was retained as the Fund's auditor" (Amended Complaint, ¶ 266). EisnerAmper allegedly conducted audits of the Hedge Fund across multiple years (*id.*, ¶¶ 272-276). Contrary to EisnerAmper's argument that Plaintiffs have failed to allege linking conduct, the amended complaint alleges that EisnerAmper "met with individual investors, including Plaintiffs, who were contemplating investing in the Hedge Fund," that "[d]uring such meetings, EisnerAmper advised investors that the key controls used by the IQM Parties in valuing the complex derivatives were proper and standard in the industry," and that

“[a]s a result of such meetings, EisnerAmper knew that its audits would be used by potential investors in deciding whether to invest and by investors in considering whether to maintain, increase, or withdraw their investment in the Hedge Fund” (*id.*, ¶¶ 268, 279 [“EisnerAmper knew that investors, like Plaintiffs, would rely on the accuracy and integrity of the Annual Audits in making investment decisions”]). Whether or not these allegations would ultimately be borne out at summary judgment or at trial, they may have satisfied the factors in *Credit Alliance* at the pleading stage. In any event, this cause of action is dismissed for lack of standing for the reasons set forth above (*see infra* § I).

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

Accordingly, it is

**ORDERED** that EisnerAmper’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](http://www.nycourts.gov/supctmanh)).

05/16/2024

DATE



MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE