SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

----------X

BENCHMARK PLUS INSTITUTIONAL PARTNERS, L.L.C., BENCHMARK PLUS PARTNERS, L.L.C.,

Plaintiffs,

- v -

DARIO SACCHETTI, JONATHAN HOWARD, TAAVI DAVIES, ARTHUR DZAGHGOUNI, ANAVIO EQUITY CAPITAL MARKETS FUND GP LIMITED, ANAVIO CAPITAL PARTNERS LLP, ANAVIO EQUITY CAPITAL MARKETS FUND LP

Defendants.

----------X

INDEX NO. 655662/2024

MOTION DATE 02/12/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69–77, 114–118, 121–123 were read on this motion to/for DISMISS.

The present matter arises from Defendants and Nominal Defendant's alleged breach of terms agreed to in the side letter agreement made between Nominal Defendant (Anavio Equity Capital Markets Fund LP), Anavio Capital Partners LLP ("Anavio" or "Investment Manager"), Anavio Equity Capital Markets Fund GP Limited ("Fund GP") and Benchmark Plus Management, LLC ("Benchmark Plus") on May 29, 2020. NYSCEF Doc. Nos. 2 ("Compl."), 29 ("Am. Compl.")[1], 76 ("Side Letter"). Plaintiff Benchmark Plus Institutional Partners, L.L.C. is a limited liability company registered in Delaware with its principal place of business in Washington. NYSCEF Doc. No. 2 at ¶ 13. Plaintiff Benchmark Plus Partners, L.L.C. (together with Benchmark Plus Institutional Partners, "Benchmark") is a limited liability company registered in Delaware with its principal place of business in Washington. *Id.* at ¶ 14. Benchmark Plus Partners is managed by non-party Benchmark Plus Management. *Id.*

For a description of the corporate structures, the Court refers to Plaintiffs' corporate diagram mapping the relationships between and among the parties. *Id.* at ¶ 75.[2]

[1] Plaintiffs filed the Complaint unsealed and unredacted, and the Amended Complaint in redacted form. Accordingly, any citation to the Complaint mirrors the Amended Complaint.

[2] Defendant Anavio is: (1) the parent entity to Defendant Fund GP; (2) the Investment Manager to both (a) Defendant Anavio Equity Capital Markets Fund ("Delaware Fund") and (b) Anavio Capital Markets Master Fund Limited

Defendant Dario Sacchetti ("Saccheti") is the Investment Manager's Chief Investment Officer and founder. *Id.* at ¶ 20. Sacchetti owns and controls the Investment Manager through the Fund GP. *Id.* Sacchetti is a resident of the United Kingdom. *Id.* Defendant Jonathan Howard ("Howard") is the Investment Manager's Chief Risk Officer, Chief Operating Officer, and Chief Financial Officer, and is a resident of the United Kingdom. *Id.* at ¶ 21. Defendant Taavi Davies ("Davies") was director of the Fund GP and the Master Fund until at least November 7, 2023, and is a resident of Luxembourg. *Id.* at ¶ 17. Defendant Arthur Dzaghghouni ("Dzaghghouni") was a director of the Fund GP and the Master Fund until at least December 31, 2023, and is a resident of the Cayman Islands. *Id.* at ¶ 18. The Delaware Fund is a limited partnership registered in Delaware with its registered office address in Delaware. *Id.* at ¶ 15. The Fund GP is organized under the laws of the Cayman Islands with its registered office address in the Cayman Islands. *Id.* at ¶ 16. The Investment Manager is a limited liability partnership organized under the laws of England and Wales with its registered office in the United Kingdom. *Id.* at ¶ 19.

Relevant Factual[3] and Procedural History

I. Benchmark's Investment Based on Anavio's Representations Regarding Investment Strategy, Including Strict Position Limits and Liquidity Requirements

Benchmark first invested in an unrelated Anavio-managed hedge fund in April 2017. *Id.* at ¶ 37. Benchmark states that, of the three strategies that that hedge fund pursued, the capital markets book had "the best expected return/risk characteristics." *Id.* The capital markets were diluted as Anavio's assets under management increased, prompting Benchmark to redeem its investment in September 2018. *Id.* In early 2020, Anavio contacted Benchmark stating that it was starting new funds focused only on capital markets, specifically "highly liquid, short-term investments in equity and debt offerings." *Id.* at ¶ 38. Anavio "admitted that in its first fund," the extended length of time it held positions was problematic, and declared that "it needed tight risk limits in capital market trades and claimed it did not want to hold too large of a position in any offering." *Id.*

In February 2020, Defendant Sacchetti, Non-Party Andrew Williams, and Non-Party Michael Robinson—all Anavio officers and/or employees—pitched Benchmark on the Funds, underlining their "tighter risk limits, short holding periods, and the importance of high liquidity in a capital markets-focused trading strategy." *Id.* at ¶ 39. At the time, Anavio had not secured any other material investors in the Funds. *Id.* at ¶ 40. Anavio recognized that to gain Benchmark's investment, Anavio needed to convince Benchmark that its risk policies and adherence to them would be sufficiently strict. *Id.* at ¶ 41. On May 20, 2020, the parties commenced their business relationship by entering into a Limited Partnership Agreement ("LPA"), wherein Plaintiffs would act as limited partners and Defendants would act as General Partners, operating the funds. NYSCEF Doc. No. 75. On May 29, 2020, the parties signed a letter agreement ("Side Letter"). NYSCEF Doc. No. 76.

("Master Fund"). NYSCEF Doc. No. 2 at ¶ 75. The Fund GP: (1) is the General Partner to the Delaware Fund; and (2) has common directors with the Master Fund. *Id.* The Delaware Fund is a feeder fund to The Master Fund. *Id.*

[3] The facts are taken from the Complaint and the exhibits thereto and are accepted as true for purposes of this Motion.

Defendants Sacchetti, Howard, and Anavio provided Benchmark with repeated disclosures about Anavio's investment strategy, including risk policies. *Id.* at ¶ 42. One of these disclosures was Anavio's responses to Benchmark's Due Diligence Questionnaire ("DDQ") on April 1, 2020, in which Howard verified the information. *Id.* at ¶ 43. In the DDQ responses, Anavio stated that the maximum position size of convertible bonds would be "10% of its net asset value ["NAV"] based on cost," and that "these were 'clear limits' used to 'manage its risk profile' and would be 'monitored daily.'" *Id.* In an April 18, 2020 e-mail, Anavio stated that it had implemented a "'Tighter Stop Loss Policy'" compared to the earlier Anavio funds. *Id.* at ¶ 46. As part of this policy, Anavio implemented "'[h]ard stops at position and portfolio level.'" *Id.* The Risk Management Policy described "the limit on…exposure to any one company, regardless of the different types or tranches of securities Anavio bought" as 10%. *Id.* at ¶ 47.

In January 2020, Anavio presented Benchmark with information on Anavio, the Funds, and the investment strategy, highlighting the Funds' focus on "'[c]apital preservation'" and "'implement[ation of] a robust risk management framework.'" *Id.* at ¶ 48. The January 2020 presentation stated that Anavio's Risk Management Framework was to set a maximum position size of 10% of NAV for convertible bonds. *Id.* at ¶ 49. In the DDQ responses, Anavio stated that a "core element" of its investment strategy was "high liquidity…made possible by making only short-term investments in liquid securities, and under its 10% cap." *Id.* at ¶ 50. Anavio presented that liquidity would be ensured by a combination of the "10% single name exposure limit and 'close monitoring.'" *Id.* at ¶ 51. Anavio's strategy necessitated that 90% of all investments could be liquidated within two (2) days under normal conditions and that 50% of all investments could be liquidated in two days under atypical conditions. *Id.* Anavio declared that "'[n]o individual position may take more than 5 days to liquidate.'" *Id.* Anavio stated that if excessive resources were allocated, Anavio's investment managers would be able to "'manage positions back within limits, without impacting stock prices, within 2 days.'" *Id.*

In an April 18, 2020 e-mail, Anavio reinforced that it was imposing "'a liquidity limit'" and would avoid exposure to low liquidity investments. *Id.* at ¶ 52. In its April 2020 DDQ responses, Anavio notified Benchmark that it would monitor risk "'on a real-time basis,'" and "at least daily." *Id.* at ¶ 53. Anavio was responsible for risk management and compliance with its Funds' risk policies. *Id.* at ¶ 54. If any risk threshold was crossed, Defendant Howard would be notified. *Id.* at ¶ 55.

Anavio provided Benchmark with the Delaware Fund's May 2020 Confidential Private Placement Memorandum ("PPM") and Partnership Agreement. *Id.* at ¶ 56. The PPM emphasized Anavio's commitments to its capital markets investment strategy and monitoring of all types of risk. *Id.* at ¶ 57. The risk policies that Anavio already articulated "were the 'pre-determined risk metrics' with which the Investment Manager agreed to monitor compliance." *Id.*

The Delaware Fund did not reject Anavio's risk policies, and, to Plaintiffs' knowledge, they were never revised or modified. *Id.* at ¶ 58. Defendants Davies and Dzaghghouni "had express responsibility for approving Anavio's risk policies, monitoring Anavio's adherence to its policies and guidelines and appropriate standards of risk management, ensuring that risk policies continued to be appropriate, and rectifying breaches of the risk policy." *Id.* at ¶ 59. Davies and Dzaghghouni, directors of the Master Fund, knew of and were responsible for ensuring that Anavio adhered to its risk management policies." *Id.* at ¶¶ 60–61.

Due to Benchmark's unique value as a seed investor that could attract further investment, Anavio devised "unique rights" for Benchmark, which the parties agreed to in the Side Letter. *Id.* at ¶ 62. The Side Letter was signed by the Delaware Fund, Anavio, and the Fund GP, on one side, and Benchmark Plus Management "on behalf of all Benchmark managed funds, including the Plaintiffs," on the other side. *Id.* at ¶ 63. The Side Letter required that Anavio give Benchmark written notice before affecting "any material changes to the Master Fund's investment objectives." *Id.* at ¶ 64. Anavio agreed that Benchmark would be able to withdraw its investment before Anavio made any changes. *Id.*; *see also* Part 4.1 of the DDQ. .

Pursuant to the Side Letter, Benchmark's *pro rata* share of the Master Fund's expenses was capped at 1.50% per year. *Id.* at ¶ 65. Anavio would pay any of Benchmark's *pro rata* share of Master Fund expenses that exceeded 1.50% year. *Id.* Benchmark was permitted to redeem its investment with 30 days' notice, instead of the 90-day notice period required by the Partnership Agreement. *Id.* at ¶ 66.

Between approximately June 1, 2020, and May 1, 2021, Benchmark invested $51.7 million in the Delaware Fund and the Master Fund, "based on Anavio's statements and representations regarding its investment strategy, including its risk policies." *Id.* at ¶ 67. By investing in the Delaware Fund, Benchmark became a limited partner of that Fund and a party to the Partnership Agreement. *Id.* at ¶ 68. Benchmark has been a limited partner in the Delaware Fund since its investment in 2020. *Id.* at ¶ 69. The Delaware Fund invested all of Benchmark's investment in the Master Fund pursuant to Anavio's direction. *Id.* at ¶ 70. As of December 31, 2023, "the Delaware Fund held over 98% of the Master Fund." *Id.* at ¶ 71. Virtually all the Master Fund's funds were and continue to be Benchmark's funds invested *via* the Delaware Fund. *Id.* Because Anavio serves as the investment manager of the Delaware Fund and the Master Fund, Anavio controlled the money invested in the Delaware Fund and the money the Delaware Fund invested in the Master Fund, and was responsible for aligning these investments with Anavio's investment strategy and objectives, "including its risk policies." *Id.* at ¶¶ 72–73.

Anavio profited from acting as investment manager, being paid (1) "a percentage of net asset value per month" and (2) "incentive compensation equal to 17.5% of the net realized and even unrealized appreciation in the net asset value of the Master Fund, as compared to the previous high net asset value." *Id.* at ¶ 74 (emphasis removed).

II. Anavio's Significant Investments in COPL

Anavio began investing in Canadian Overseas Petroleum Limited ("COPL"), "a small, speculative oil exploration company headquartered and incorporated in Canada," in 2022. *Id.* at ¶ 76. In early 2024, "under pressure from Benchmark," Anavio admitted to having invested $48 million of the Master Fund's NAV of $51.7 million (as of Feb. 29, 2024), in COPL. *Id.* at ¶ 78. "Anavio had invested over 92% of the Master Fund's NAV in COPL, an insolvent company." *Id.* The Master Fund had become a majority owner of COPL, holding more than 90% of all its issued and outstanding common shares, due to Anavio's continued investments. *Id.* at ¶¶ 79–80.

That over 92% of the Master Fund was invested and "concentrated in a 90% ownership stake in a single company," with this investment having been held for over a year and a half, violated Anavio's and its Funds' investment strategy and objectives, including its risk management

policies, and stands in clear conflict with Anavio's continued representations to Benchmark regarding Anavio's investments in numerous ways. *Id.* at ¶¶ 79, 80–81. Plaintiffs allege that Defendants breached their stated investment strategies and objectives because:

1. Most of the COPL securities Anavio's Funds bought were convertible bonds which violated its risk policy because the amount of convertible bonds purchased was greater than the "Fund's 10% cap on convertible bonds in any one company.'" *Id.* at ¶ 82.

2. Anavio's investment in COPL surpassed Anavio's maximum position size of 10% of NAV. *Id.* at ¶ 83.

3. Anavio's COPL investments surpassed Anavio's 10% single name exposure limit. *Id.* at ¶ 84.

4. When Anavio's COPL position exceeded the 10% limits described above, Anavio failed to modify its positions and pare them back to the limits within two days, instead maintaining the COPL positions for "over eighteen months." *Id.* at ¶ 85.

5. Because of the significant percentage of COPL's outstanding securities that Anavio owned, Anavio would have been unable to liquidate its COPL positions within 5 days, theoretically. *Id.* at ¶ 86.

6. Anavio's policy stated that "90% of all assets under management could be unwound in only 2 days." *Id.* at ¶ 87. Given that Anavio's COPL investment was 90% of Anavio's Assets Under Management, Anavio would not have been able to liquidate its COPL position within 2 days, even if applying the policy for unwinding positions under stressed conditions. *Id.*

7. COPL was a micro-cap stock, not a large cap stock, and did not match Anavio's requirement "that 'trading liquidity allows entry/exit of positions within' 5 days." *Id.* at ¶ 88. This also constituted a violation of COPL's risk policy. *Id.*

8. Despite Anavio's promise to Benchmark that it would 'avoid[] exposure to low liquidity names,'" Anavio increased the Funds' exposure to a low liquidity name (COPL), "causing the Funds to become the majority owner of an illiquid, distressed, micro-cap company." *Id.* at ¶ 89.

III. Anavio's Statements to Benchmark & Omissions of Material Information

In March 2022, following "lackluster returns, changing market conditions, and the duration of Anavio's trades," Benchmark questioned Anavio's investment strategy and submitted redemptions to Anavio for $26 million, approximately half the value of the Master Fund. *Id.* at ¶ 92. Anavio sought to dissuade Benchmark from making the redemption. *Id.* at ¶¶ 92–93. Anavio provided information about its trade hold periods, stating that Anavio exited 98.2% of its trades within 60 days and 93.1% within 30 days, having an average mean holding period of 9 days. *Id.* at ¶ 94. In April 2022, armed with these "assurances," Benchmark redeemed $6.6 million, instead of $26 million. *Id.* at ¶ 95. On August 24, 2022, Anavio notified Benchmark that it "had

caused the Master Fund to take a position in a company that was a 10% weight in the portfolio," but would scale this position back. *Id.* at ¶ 97.

Anavio created risk reports specifically for Benchmark. *Id.* at ¶ 98. The September 2022 report stated that the Master Fund's largest position stood at $4.6 million out of a total of $47 million in AUM, which meant that Anavio's "largest position size was just under the 10% cap." *Id.* In the December 2022 report, Anavio represented that the Master Fund's most significant position was $7.7 million out of a total of $63 million in AUM, indicating that the largest position size was 12%. *Id.* at ¶ 99. "Benchmark relied heavily on the financial reporting and information provided by Anavio management." *Id.* at ¶ 100.

In a January 18, 2023 call, Anavio and Sacchetti informed Benchmark that it had taken a 10% position in COPL, but that it would pull out of the investment by June 2023. *Id.* at ¶ 105. In a February 8, 2023 call, Sacchetti told Benchmark that Anavio's original COPL investment was 11% of the Master Fund's NAV, not the 10% cap represented to Benchmark in August 2022. *Id.* at ¶ 106. Sacchetti told Benchmark that he "had intended to be fully out of the [COPL] position by year end 2022," but COPL inadvertently gave him non-public information thus preventing him from offloading the COPL securities. *Id.* In contrast to Sacchetti's promise to Benchmark "that he would soon *reduce* the Funds' oversized position in COPL, Sacchetti and Anavio instead allowed the COPL position to *increase* dramatically." *Id.* at ¶ 104.

Benchmark learned that the September and December 2022 reports and Anavio's August 24, 2022 description of the Master Fund's initial COPL position size "were utterly false and misleading." *Id.* at ¶ 101. Anavio's position in COPL was not 10%, but rather 30% in August 2022. *Id.* at ¶ 102. Benchmark learned that the content of the January 18 and February 8 calls was inaccurate, and that Anavio's original COPL position was not 11% of the Master Fund's NAV, but over 30%. *Id.* at ¶ 107.

On December 30, 2022, Anavio bought more COPL bonds worth $4 million. *Id.* The December purchase evidences that Sacchetti's claim that he was unable to sell COPL securities due to his having non-public information was false. *Id.* at ¶ 108. Anavio's March 2023 report to Benchmark stated that the Master Fund's largest position was $7.2 million of the Funds' total $63.2 million. *Id.* at ¶ 110. However, this information was false: in March 2023, "Anavio admitted to Benchmark that it had taken a position in COPL equal to nearly 80% of the Master Funds' [*sic*] $63.2 million in net asset value," equaling approximately $50.5 million. *Id.* at ¶¶ 111–12. On March 24, 2023, Anavio purchased additional $8 million of COPL bonds. *Id.* at ¶ 112.

Benchmark was "[a]larmed" at the acquisition of further COPL securities and sought to withdraw its investment: in late March 2023, Benchmark asked for a withdrawal of $14.8 million." *Id.* at ¶ 113. On March 28, Sacchetti asked Benchmark to reduce the redemption to $12.5 million and to make its withdrawal over a three-month period. *Id.* Sacchetti "stress[ed] that there was little downside in the COPL position" and that Benchmark "stood to make significant profits in any M&A transaction involving COPL." *Id.* Based on Anavio's statements, "Benchmark reluctantly agreed to decrease and spread out its redemption." *Id.* at ¶ 114.

On May 9, 2023, Sacchetti, Robinson, and Williams stated that Anavio's COPL position had been reduced to 66% of the Funds' NAV "and that it would sell a large portion of that position

within 10 days." *Id.* at ¶ 116. On June 29, Sacchetti claimed that Anavio's COPL position had been lowered to 50% of the Funds' NAV and that he would reduce the position to under 25% in July. *Id.* at ¶ 117. In a 2022 Alternative Investment Fund Managers Directives ("AIFMD") regulatory filing for the Master Fund, Anavio stated that would reduce the concentration of its investment to the limit target of 10% by late 2023, and "that as of June 23, 2023, it had already reduced the COPL investment to 53.3% of the net assets of the Master Fund." *Id.* at ¶ 118.

Benchmark learned that the AIFMD filing "contained multiple false or misleading statements," including that COPL trades comprised approximately 53.3% of the Master Fund's NAV, a calculation that omitted "the value of warrants Anavio had acquired for COPL stock, and also omits 'makewhole' payments that COPL then owed Anavio but had not paid (and never paid) as of June 30, 2023, relating to a prior conversion of some bonds." *Id.* at ¶ 120. Had these numbers been incorporated, the Master Fund's aggregate COPL position on this date "would have materially exceeded 53.3%." *Id.* Plaintiffs allege that Anavio and the General Partner were aware of their misrepresentation of the Master Fund's COPL position. *Id.*

In a July 13, 2023 e-mail, Anavio informed Benchmark that Anavio had sold 30% of the Master Fund's total COPL position from inception. *Id.* at ¶ 122. Anavio stated that COPL's stock price had decreased due to reasons unrelated to any "underlying weakness with the investment" and reiterated Sacchetti's claim that downside of the COPL investment was low while upside was high. *Id.* at ¶ 123. Benchmark received its final July 2023 risk report from Anavio in August 2023. *Id.* at ¶ 124. The July report indicated that that the largest position size was $3.1 million out of the $52 million the Funds had in total net assets, which Anavio claimed meant that "COPL constituted at most only 6% of the Master Fund" at that time. *Id.*

Plaintiffs allege that both the July 13, 2023 e-mail, and July 2023 risk report were false: COPL constituted more than 6% of the Master Fund in July 2023 and Anavio had increased, not decreased, its COPL positions further than the 53.3% it had reported in its 2022 AIFMD filing. *Id.* at ¶ 125. By the end of July 2023, Benchmark had a redemption request for $6 million pending. *Id.* at ¶ 126. In August 2023, Anavio, through Williams, asked Benchmark to withdraw this $6 million redemption request, claiming that redemption "would negatively impact Benchmark's return" and that Anavio was "continuing to de-risk the [COPL] position, which was already small." *Id.* at ¶ 127. Relying on these representations, Benchmark withdrew its partial request. *Id.*

Over the course of 2023 and 2024, Anavio sent Benchmark "Factsheets" with updates on the performance of the Master Fund. *Id.* at ¶ 128. Benchmark received at least ten such Factsheets, each of which included a "Monthly Review" section. *Id.* at ¶¶ 128–129. These Monthly Reviews did not state the size of the COPL position, or COPL's precarious financial state, or that any of its positions were out of compliance with Anavio's risk policies. *Id.* at ¶¶ 129–130. Anavio also gave Benchmark quarterly Operational DDQ responses, in which Anavio denied breaching investment restrictions. *Id.* at ¶ 131.

Benchmark learned that Anavio's representations about its COPL position, the reasons COPL's price decreased, and the data in Anavio's risk reports, the Factsheets, and DDQ responses were false. *Id.* at ¶ 132. In a January 4, 2024 call, Sacchetti told Benchmark that Anavio had sold 33% of its COPL position since February 2023, but later, on February 6, 2024, Anavio said that "'around 76.3'" of the Master Fund was invested in COPL. *Id.* at ¶ 133. This statement is at odds

with Anavio's reports to Benchmark that showed the Funds' exposure to COPL was $47.3 million of the Master Funds' total $52.5 million. *Id.* at ¶ 134. Almost "90% of the Funds' total assets were invested in COPL," an amount that increased to 92.4% at the end of the month. *Id.*

By February 2024, Anavio "admitted to Benchmark that Anavio had…falsified its financial reporting to Benchmark to hide its true COPL position." *Id.* at ¶¶ 135–36. On March 11, COPL filed for bankruptcy, stating in a press release "that there was 'little prospect for a return to shareholders or bond holders.'" *Id.* at ¶ 137. Anavio told the limited partners in the Delaware Fund, including Benchmark, that Anavio's COPL investment of over 90% of the Funds' NAV was worthless. *Id.* Throughout the time Anavio invested in COPL, COPL told its investors "that it did not have sufficient working capital and cash flows to cover its operations and capital expenditures, and that there was significant doubt that it would even continue as a going concern." *Id.* at ¶ 138.

On March 22, 2024, Benchmark made a "total redemption request." *Id.* at ¶ 142. Benchmark has not received its redemption and Anavio's Funds are in liquidation. *Id.*

IV. Anavio Diverted Fees Based on Falsified Valuations and Profits

Plaintiffs allege that throughout the relevant time period, Anavio paid itself millions in fees which were based largely based on the COPL trades. *Id.* at ¶ 143. Anavio's management and incentive fee earning structure is "based on the Master Fund's [NAV] rather than any realized profits," meaning that Defendants' own valuation of the securities held by the Master Fund are of utmost importance. *Id.* at ¶ 144. Anavio and the General Partner are in complete control of valuation. *Id.* at ¶ 145. Anavio created a Valuation Committee "responsible for overseeing adherence to valuation policy and for resolving any valuation issues." *Id.* at ¶ 146. From mid-2022 to March 2024, COPL's securities made up the majority of the Master Fund's NAV. *Id.* at ¶ 147. Despite COPL's financial distress, and its poorly performing stock price, the Valuation Committee valued the COPL securities "far in excess of their cost." *Id.* at ¶ 148. At the end of 2022, Defendants claimed that the Master Fund "had $25.6 million in unrealized gains…largely relating to the COPL securities." *Id.* Anavio thus valued COPL securities at more than 267% of their cost. *Id.* After COPL filed for bankruptcy, Anavio was obliged to write down the Master Fund's NAV by $47 million, "much of which was supposed unrealized 'gains' on COPL." *Id.* at ¶ 149. Prior to COPL's bankruptcy, Anavio had paid itself $2.3 million in incentive fees based on unrealized profits from COPL trades in 2022 and $875,000 in management fees in 2022 and 2023 based on the same unrealized COPL profits. *Id.* at ¶ 150. No material profits linked to Anavio's COPL trades were ever realized. *Id.* at ¶ 151.

On October 25, 2024, Plaintiff commenced the present action by filing the Summons and Complaint. NYSCEF Doc. Nos. 1–2. The Complaint alleges four causes of action: (1) breach of contract against Anavio and the Fund GP; (2) fraud and intentional misrepresentation against all defendants; (3) breach of fiduciary duty against all defendants; and (4) aiding and abetting breaches of fiduciary duty against all defendants. *Id.* at ¶¶ 182–249.

On February 12, 2025, Defendants Sacchetti, Howard, the Fund GP, the Manager, and Nominal Defendant the Delaware Fund (collectively, "Moving Defendants") moved to dismiss the Amended Complaint in its entirety with prejudice. NYSCEF Doc. No. 69 (Not. of Mot. to Dismiss) (Mot. Seq. No. 004). On March 12, 2024, Benchmark filed its opposition to Defendants

and Nominal defendant's motion. NYSCEF Doc. No. 114 (Mem. of Law in Opp.). Defendants and Nominal Defendant filed their reply on March 26, 2024. NYSCEF Doc. No. 114 (Anavio Defs.' Rep. Mem. of Law).[4]

On February 14, 2025, Moving Defendants filed another motion seeking to stay discovery pending this Court's Decision on Mot. Seq. No. 4. NYSCEF Doc. No. 78 (Mot. Seq. No. 005). The Court granted the Stay. NYSCEF Doc. No. 110.

Legal Analysis

The Moving Defendants seek to dismiss the Complaint for: (1) lack of personal jurisdiction; and (2) failure to state a claim. NYSCEF Doc. No. 70. The relevant documents designate Delaware law as applicable to the underlying agreement. NYSCEF Doc. Nos. 75–76. "Choice of law provisions apply to substantive issues, and matters of procedure are governed by the law of the forum state." *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 496 (1st Dept. 2017) Accordingly, the Court analyzes Moving Defendants' arguments relating to personal jurisdiction pursuant to New York law; while Moving Defendants' arguments regarding failure to state a claim are analyzed pursuant to Delaware law.

I. Personal Jurisdiction

CPLR § 3211(a)(8) states, in relevant part, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that… (8) the court has not jurisdiction of the person of the defendant …." "[W]e have explained that the 'constitutional predicates of personal jurisdiction' contain two components. The first 'component involves service of process, which implicates due process requirements of notice and opportunity to be heard. The other component of personal jurisdiction involves the power, or reach, of a court over a party, so as to enforce judicial decrees.'" *Aybar v. Aybar*, 177 N.E.3d 1257, 1264 (N.Y. 2021) (quoting *Keane v. Kamin*, 723 N.E.2d 553 (N.Y. 1999)). "To satisfy the jurisdictional basis there must be a constitutionally adequate connection between the defendant, the State and the action." *Keane*, 723 N.E.2d at 555.

A. Signing Parties

"[T]here are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.' For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 n. 14 (1985) (internal citations omitted). Courts will enforce valid forum selection clauses and choice of law provisions. *Boss v. Am. Exp. Fin. Advisors, Inc.*, 791 N.Y.S.2d 12 (1st Dept. 2005), *aff'd sub nom. Boss v. Am. Express Fin. Advisors, Inc.*, 844 N.E.2d 1142 (N.Y. 2006). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) (citations omitted). '[W]here the language is clear, unequivocal, and unambiguous, the contract is

[4] Defendants Davies and Dzaghgouni filed their Motion to Dismiss on March 28, 2025. NYSCEF Doc. No. 124.

to be interpreted by its own language.'" *R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29, 33 (2002); *see W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

The LPA contains a forum selection clause which designates New York as the forum for "any Proceeding arising out of the terms and conditions of this Agreement." NYSCEF Doc. No. 75 at § 11.09. The LPA's forum selection clause is clear and unambiguous that the parties have agreed to litigate any proceedings related to the LPA in New York courts. Consequently, this Court must interpret the clause accordingly and assert its jurisdiction over the signatories.

The Side Letter states that the "letter agreement… is made between Anavio Equity Capital Markets Fund LP… Anavio Capital Partners LLP… Anavio Equity Capital Markets Fund GP Limited… and Benchmark Plus Management, LLC… and sets forth certain agreements relating to one or more investments by Investor in the Fund." NYSCEF Doc. No. 76 at 1 (Side Letter). The Side Letter goes on to state:

> The terms of the letter supersede the provisions of the Fund's Limited Partnership Agreement, dated as of May 20, 2020 (the "LP Agreement") with respect to the investment made in the Fund by Benchmark, to the extent there are any inconsistencies. To the extent there are any conflicts between the terms and conditions of the "Fund Documents" and the terms and conditions of the Letter Agreement, the terms and conditions of the Letter Agreement shall take precedence.

Id. This language manifests that the Side Letter was intended to act as an amendment or modification of the terms of the LPA as the Side Letter only supersedes LPA provisions which are inconsistent. Accordingly, the Side Letter does not eclipse the LPA but added and/or amended the terms. The Side Letter contains a choice of law provision,[5] but no forum selection provision. *See* NYSCEF Doc. No. 76. Accordingly, the Court determines that Plaintiffs have sufficient plead that the instant proceeding, which arises out of the terms of the Side Letter, is subject to the LPA's forum selection clause.

The LPA was signed by Defendant Davies as the director of the Fund GP. NYSCEF Doc. No. 75 at 17, 45. The Side Letter states that it is between Anavio Equity Capital Markets Fund LP, Anavio Capital Partners LLP, Anavio Equity Capital Markets Fund GP, and Plaintiff. NYSCEF Doc. No. 76 at 2. It was signed by Defendant Howard as the Chief Operating Officer of the Investment Manager, Anavio Capital Partners LLP, and Defendant Dzaghgouni as the Director of Anavio Capital Markets Fund GP. *Id.* at 9–10. Accordingly, the Court determines that each of the Anavio corporate entities are subject to the forum selection clause of the LPA and, therefore, the Side Letter.

Considering the Side Letter was intended to amend the LPA, Moving Defendants' argument that a breach of the Side Letter does not "aris[e] out of" the LPA is unconvincing.

[5] The choice of law provision in the Side Letter is consistent with the LPA in that both documents designate Delaware law as applicable. NYSCEF Doc. No. 75 at § 11.07; NYSCEF Doc. No. 76 at ¶ 33.

B. Defendant Jonathan Howard

Moving Defendants argue that this Court does not have personal Jurisdiction over Defendant Howard because: (1) Defendant Howard is a "salaried employee of the Investment Manager;" (2) does not participate in profit sharing; and (3) although Defendant Howard signed the LPA, he was not a signatory to the Side Letter. NYSCEF Doc. No. 70 at 15.

"It is a general principle that only the parties to a contract are bound by its terms. A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary or an alter ego of a signatory or where it is a party to another related agreement that forms part of the same transaction." *Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 184 A.D.3d 116, 121–22 (1st Dept. 2020) (internal citations omitted). When extending the terms of a contract to confer personal jurisdiction upon a non-signatory, "[t]he relationship between the nonparty and the signatory in such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them." *Freeford Ltd. V. Pendleton*, 53 A.D.3d 32, 39 (1st Dept. 2008). Further, a contract containing a forum selection clause and defining the bound parties to include related entities should be upheld by the Court. *Oberon Sec., LLC v. Titanic Ent. Holdings LLC*, 153 N.Y.S.3d 838 (1st Dept. 2021) (holding that a forum selection clause which defined the bound parties to include defendant's "affiliates, subsidiaries, and subsequently formed entities," was sufficient to confer jurisdiction on defendant's related corporate entities). However, "[j]urisdiction over individual defendants employed by a non-domiciliary corporation is appropriate under Section 302(a)(1) where the out-of-state corporate officers were primary actors in the transactions in New York that gave rise to the litigation, and not merely some corporate employee[s] who ... played no part in it." *Sea Tow Services Int'l., Inc. v. Pontin*, 472 F.Supp.2d 349, 361 (E.D.N.Y. 2007) (internal quotations and citations omitted).

Defendant Howard is Anavio's (1) Chief Risk Officer, (2) Chief Operating Officer, and (3) Chief Financial Officer, and is a resident of the United Kingdom. NYSCEF Doc. No. 2 at ¶ 21. Evidently, these roles are integral to the operation of the Investment Manager. Further, Plaintiffs allege that Defendant Howard played a central role by alleging that: (1) Howard was to be notified if any risk threshold in the Funds' risk policies (*id.* at ¶¶ 54–55) and (2) Howard verified the information that Anavio provided to Benchmark in the April 2020 DDQ (*id.* at ¶ 43). Accordingly, Defendant Howard was a primary actor *vis a vis* the allegations in the Complaint and/or had control of the assets of the Defendants. Therefore, the Court can assert personal jurisdiction over Defendant Howard.

C. Defendant Dario Sacchetti

Defendant Sacchetti is both the Chief Investment Officer and founder of Anavio. NYSCEF Doc. No. 2 at ¶ 20. He owns and controls Manager through the Fund GP. *Id.* Defendant Sacchetti is defined as a "Key Person" in the Side Letter, which implies that his presence and/or participation is expected and foreseeable. NYSCEF Doc. No. 76 at 1. Furthermore, it is alleged that Sacchetti personally misrepresented certain information to Plaintiffs. *See, e.g.*, NYSCEF Doc. No. 2 at ¶ 104–107. These allegedly false statements are evidence of Sacchetti's direct role in the events that give rise to this litigation and consequently of the foreseeability of Sacchetti being hauled into New York court. Therefore, although he did not sign either the LPA or the Side Letter himself,

the Complaint sufficient pleads that Defendant Sacchetti is closely related to Anavio. His interests are inextricable from those of Anavio. Accordingly, Sacchetti easily satisfies *Pendleton*'s test of sufficient proximity, and he is beholden to the LPA's forum selection clause.

The Court could also exercise jurisdiction over Sacchetti if he is deemed as a third-party beneficiary. "The third-party beneficiary concept arises from the notion that 'it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay' or perform." *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 485 N.E.2d 208, 211 (N.Y. 1985) (quoting *Seaver v. Ransom*, 120 N.E. 639, 640 (1918)). "Essential to status as an intended beneficiary…is either that 'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' or that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.*, 485 N.E.2d at 212. Again, Sacchetti's status as the founder of Anavio and a "Key Person" in the Side Letter indicates that Sacchetti is effectively more than a third-party and is privy to Anavio's decision-making and uniquely reliant and a beneficiary to its success.

II. Failure to State a Claim

On a motion to dismiss brought pursuant to CPLR § 3211(a)(7), "pleadings are to be afforded a liberal construction, allegations are taken as true, the plaintiff is afforded every possible inference, and a determination is made only as to whether the facts as alleged fit within any cognizable legal theory." *CSC Holdings, LLC v. Samsung Elecs. Am., Inc.*, 146 N.Y.S.3d 17, 18 (2021) (internal citations omitted). Nevertheless, "[d]ismissal of the complaint is warranted if the [movant] fails to assert facts in support of an element of the claim, or if the factual allegations and inferences drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 75 N.E.3d 1159, 1162 (N.Y. 2017) (internal citations omitted). The test is "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). Courts will grant a motion to dismiss where the plaintiff states a cognizable cause of action but fails to assert a material fact necessary to meet an element of the claim. *See, e.g., Arnon Ltd v. Beierwaltes*, 3 N.Y.S.3d 31, 33 (1st Dept. 2015).

A. Breach of Contract

"Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003). "[A] complaint for breach of contract is sufficient if it contains 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Such a statement must only give the defendant fair notice of a claim and is to be liberally construed." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (internal citations omitted). "Accordingly, under Delaware's judicial system of notice pleading, a plaintiff need not plead evidence. Rather, the plaintiff need only allege facts that, if true, state a claim upon which relief can be granted." *Id.* Plaintiffs' Complaint alleges that Defendants breached five (5) sections of the Side Letter, namely Sections: 13, 18, 21, 24, and 27. NYSCEF Doc. No. 2 at ¶¶ 182–204.

1) Side Letter Section 13 states, in relevant part:

> To the extent permitted by law, the Manager shall notify the Investor in writing within 10 days of receipt by the Manager of the receipt of any subpoena, request for information …. the Securities and Exchange Commission, FCA, FINRA, the CFTC and any state or attorney-general office or any other regulatory or governmental body involving the Fund, the Manager or any individual affiliated with the Fund or the Manager that could reasonably be expected to have a material adverse effect on the Fund or the Investor's investment…."

NYSCEF Doc. No. 76 at 6. Plaintiffs allege that Defendant Anavio breached this section after they were fined 1.5 million Kroner by Norwegian regulators for improper short sales. NYSCEF Doc. No. at ¶ 202–03. Moving Defendants' argument to dismiss is twofold: (1) that the fine was unlikely to have a "material adverse effect on the fund or the Investor's investment" due to the fine's size (approximately $142,000) relative to the total assets under management (approximately $50 million) and the fine did not meet or exceed the $250,000 amount contractually specified to require disclosure[6]; and (2) that Plaintiffs failed to allege that Defendants' breach of this section, if any, proximately caused any damages. NYSCEF Doc. No. 70 at 21–22.

Moving Defendants' first argument is unavailing. "When evaluating whether a particular issue would reasonably be expected to result in an MAE [material adverse effect], the court must consider 'quantitative and qualitative aspects.'" *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *65 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018). "It is possible, in the right case, for a party in a position… to come forward with factual and opinion testimony that would provide a court with the basis to make a reasonable and an informed judgment of the probability of an outcome on the merits." *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *36 (Del. Ch. Apr. 29, 2005), *judgment entered sub nom. Frontier Oil Corp. v. Holly Corp.* (Del. Ch. 2005). "[The] court will find that a plaintiff has adequately pled a material adverse effect if the pled facts support a reasonable inference that the misrepresentations 'could produce consequences that are materially adverse to the Company.'" *EMSI Acq., Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *15 (Del. Ch. May 3, 2017) (quoting *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554 (Del. Ch. Nov. 19, 2013)). Defendants admit that they were fined by the Norwegian regulatory authority. NYSCEF Doc. No. 70 at 21–22. While the relative size of the fine is not daunting, it is nonetheless a sizeable fine. It is cognizable that Plaintiffs will provide evidence or expert testimony manifesting that the fine incurred had either a qualitatively or quantitatively material adverse effect, despite its relative size. Accordingly, dismissal pursuant to this argument is inappropriate at this stage in the litigation.

[6] Defendants reference Section 15 of the Side Letter, which states, in relevant part, "To the extent permitted by law, the Manager shall notify the Investor in writing within five (5) days of receipt of any final decision by or settlement with any regulatory or governmental body listed above in Paragraph 12 against the Manager or any of its personnel, which decision or settlement includes civil or criminal penalties, restitution or other payments by any such person exceeding in the aggregate $250,000 and that otherwise could reasonably be expected to have a material adverse effect on the Fund or the Investor's investment." NYSCEF Doc. No. 76 at 6.

Moving Defendants' latter argument is similarly unavailing. "As discussed previously, a party need not plead cognizable damages as an element of a claim for breach of contract. All that is required is cognizable harm, and the breach of a contract right gives rise to cognizable harm." *In re P3 Health Group Holdings, LLC*, 2022 WL 16548567, at *30 (Del. Ch. Oct. 31, 2022). "When informational rights are at issue, those principles apply with particular force. The value of an informational right lies in a party's ability to obtain information in real time, during a deliberative process, then use that information to affect the outcome of the discussions." *Id*. Plaintiffs here sought information regarding adverse actions taken by regulatory authorities and the like. Accordingly, Plaintiffs need not plead that they suffered financial damages as a proximate cause of Defendants' breach. Thereby, Moving Defendants' arguments regarding Section 13 of the Side Letter are unavailing.

2) Side Letter Section 18 states, in relevant part:

> The Managers shall promptly notify the Investor if there are any material changes to the Fund's Investment Objective (as set forth in the PPM and outlined in the DDQ). The Manager shall provide Investor with advance written notice thereof and shall not affect any such material change prior to the Investor having the opportunity to withdraw its Interests.

NYSCEF Doc. No. 76 at 7. Plaintiffs provided Defendants with a DDQ and Defendants provided their responses on April 1, 2020. NYSCEF Doc. No. 2 at ¶ 43. In said response, Defendants represented that: (1) convertible bonds would constitute less than ten percent (10%) of the Net Asset Value; (2) Defendant Anavio Capital Partners LLP would manage any overconcentration within two (2) days; and that (3) "the fund is focused primarily on large cap names with a strong focus on liquidity. NYSCEF Doc. No. 2 at ¶ 64; NYSCEF Doc. No. 114 at 19–20. Plaintiffs argue that Defendants' COPL investment breached each of these requirements. NYSCEF Doc. No. 70 at 20. Moving Defendants argue that the terms and objectives of the fund were not breached and that Defendants were entitled to engage in any investment strategy, citing the PPM. NYSCEF Doc. No. 70 at 18–19.

Based on the inconsistencies within the DDQ and the PPM, and the incorporation of both documents within the Side Letter, Moving Defendants' arguments are unavailing. "In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions. Dismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law." *VLIW Tech., LLC*, 840 A.2d at 615. "Because the provisions at issue in the Agreement are susceptible to more than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party." *Id.* Here, the incorporation of the two documents—with each document containing unique requirements as to Defendants' duty to inform Plaintiffs of changes in investment strategy—in the Side Letter demonstrates ambiguity as to whether Defendants' actions abided by the terms of the agreements. Accordingly, denial is necessary to allow for further discovery regarding the parties' intent.

3) Side Letter Section 21 states, in relevant part:

> The Investor shall pay its pro rata share of the Master Fund's expenses as defined in the [PPM] up to a maximum of 1.50% per annum of its average monthly Capital Account balance. [*sic*] (the "Expense Cap"). For the avoidance of doubt, the Investor's pro rata share of the Master Fund's expenses in excess of 1.50% per annum will be incurred by the Manager.

NYSCEF Doc. No. 76 at 7. Plaintiffs allege that Defendants breached this section by passing on costs in excess of the 1.50% cap and that Defendants failed to pay Plaintiff's *pro rata* share of the excess expenses. NYSCEF Doc. No. 2 at ¶¶ 186–187. Moving Defendants argue that Plaintiffs have not incurred damages because Plaintiffs have not yet paid said fees, nor have Defendants refused to incur the costs. NYSCEF Doc. No. 70 at 19–21.

"A claim for breach of contract can give rise to an equitable remedy even in the absence of quantifiable harm." *Cygnus Opportunity Fund, LLC v. Washington Prime Group, LLC*, 302 A.3d 430, 454 (Del. Ch. 2023). "That is because any 'unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury.'" *Id.* The Complaint here alleges that Defendants "have passed through costs Benchmark far in excess of the cap… [and] Anavio did not pay Benchmark's *pro rata* share of Master Fund expenses….". NYSCEF Doc. No. 2 at ¶ 187. Considering Delaware law does not require quantifiable harm or injury, dismissal is inappropriate.

4) Side Letter Section 24 states, in relevant part:

> In the event the Fund ceases operations while Investor is invested in the Fund, Investor will not be charged any fees related to the wind-up, closure or unpaid expenses attributable to the Fund, General Partner, or Manager and such fees and expenses will be incurred by the Manager….

NYSCEF Doc. No. 76 at 7. Plaintiffs allege that Defendants breached this section by allocating "wind-up related fees and/or expenses to Benchmark, and Anavio has not paid all wind-up related fees and expenses." NYSCEF Doc. No. 2 at ¶ 189. Moving Defendants, again, argue that no quantifiable injury has been incurred as Defendants have yet to wind up the business. NYSCEF Doc. No. 70 at 19–21. As discussed, *supra*, Moving Defendants' argument is unavailing pursuant to Delaware law.

5) Side Letter Section 27 states, in relevant part:

> The Fund shall provide (a) financial statements of the Fund, audited by the Fund's independent auditors, to the Investor within 110 days of the end of each fiscal year prepared in accordance with U.S. generally accepted accounting principles….

NYSCEF Doc. No. 76 at 8. Plaintiffs allege that the Defendants breached this section by failing to provide Plaintiffs with the audited financial statements during 2022 and 2023 within the required period. NYSCEF Doc. No. 2 at ¶ 191. Moving Defendants argue, again, that Plaintiffs have not and cannot allege quantifiable damages for any breaches of this section by Defendants. NYSCEF

Doc. No. 70 at 21. However, as discussed *supra*, the Delaware courts do not require quantifiable damages as a harm to Plaintiffs' informational rights is sufficient to survive a motion to dismiss.

Based on the foregoing, Plaintiffs have sufficiently alleged that Defendants breached multiple sections of the Side Letter.

B. Fraud and Intentional Misrepresentation

Moving Defendants seek to dismiss Plaintiffs' fraud and intentional misrepresentation cause of action. NYSCEF Doc. No. 70 at 22–25.

> Common law fraud in Delaware requires: 1) the existence of a false representation, usually one of fact, made by the defendant; 2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) the defendant had the intent to induce the plaintiff to act or refrain from acting; 4) the plaintiff acted or did not act in justifiable reliance on the representation; and 5) the plaintiff suffered damages as a result of such reliance. In addition to overt representations, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.

H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 144 (Del. Ch. 2003). Plaintiffs allege that Defendants defrauded them by making false representations regarding the regarding the relative amount the fund had invested in the COPL investment through: (1) verbal communications; (2) filing false risk reports; (3) filing false AIFMD misrepresenting Defendants' COPL position; and (4) by misrepresenting the fund's relative COPL position in "Factsheets" sent to Plaintiffs. NYSCEF Doc. No. 2 at ¶¶ 107, 111, 120, 125, 129–131.

Moving Defendants do not dispute the third and fifth elements but argue that Plaintiffs have failed to allege the first, second, and fourth elements and further argue that the cause of action is duplicative of the Breach of Contract claim. NYSCEF Doc. No. 70 at 22–25.

1) Duplicative Claims

"Generally stated, '[f]or both a breach-of-contract claim and a tort claim to coexist in a single action, the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract.'" *Anschutz Corp. v. Brown Robin Capital, LLC*, 2020 WL 3096744, at *15 (Del. Ch. June 11, 2020) (quoting *EZLinks Golf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209 (Del. Super. Mar. 13, 2017)). "Delaware courts will find that improper bootstrapping has occurred when the plaintiff simply 'add[s] the words "fraudulently induced" or alleg[es] that the contracting parties never intended to perform' as a means to plead fraud in cases where the parties are bound by contract." *Pilot Air Freight, LLC v. Manna Freight Sys., Inc.*, 2020 WL 5588671, at *25 (Del. Ch. Sept. 18, 2020). However, "the anti-bootstrapping rule does not prevent parties from bringing a fraud claim if… 'damages for plaintiff's fraud claim may be different from plaintiff's breach of contract claim….'" *Levy Fam. Inv'rs, LLC v. Oars + Alps LLC*, 2022 WL 245543, at *8 (Del. Ch. Jan. 27, 2022).

Here, Plaintiffs allege that Defendants breached the contract by: (1) failing to properly notify Plaintiffs of Defendants' purported change in investment strategy; (2) failing to provide Plaintiffs with their bargained-for informational rights; and (3) failing to pay the required fees or expenses. NYSCEF Doc. No. 2 at ¶¶ 182–204. Meanwhile, Plaintiffs allege fraud or intentional misrepresentation due to Defendants failure to accurately report their respective COPL holdings. *Id.* at ¶¶ 107, 111, 120, 125, 129–131. Considering the unique allegations for the causes of action, it is cognizable that Plaintiffs' recovery under the two causes of action will be different. Accordingly, the Court determines that Plaintiffs have not "bootstrapped" a fraud cause of action such that dismissal is warranted.

2) Misrepresentations

Moving Defendants argue that the Complaint fails to allege a misrepresentation by the Defendants because: (1) Defendants notified Plaintiffs of their investment strategy in the PPM; (2) Defendants' alleged misstatements were inactionable future promises; and (3) the admissions purportedly made by Defendants' unnamed employees were not pled with the requisite particularity pursuant to CPLR § 3016(b).[7] NYSCEF Doc. No. 70 at 23–24.

Moving Defendants' first and third arguments are unconvincing. Moving Defendants seem to contend that, because the PPM allowed the fund to shift strategies, Defendants could freely misrepresent their relative COPL positions to Plaintiffs. A fund that is entitled to shift investment strategy, is not therefore permitted to make misrepresentations to their investors. As to their third argument, Moving Defendants contend that admissions made by Defendants' employees, if any, were not sufficiently attributed to specific employees, requiring dismissal for lack of particularity. Moving Defendants conflate their alleged verbal and written/filed misrepresentation to Plaintiffs with their employees' alleged admission to misrepresenting information. Misrepresenting information to an investor is not the same as admitting to misrepresenting information to an investor. In fact, by definition, one must precede and catalyze the other.

Regarding Moving Defendants' second argument, Plaintiffs admit that certain alleged misrepresentations relate to Defendants' intent to reduce their COPL position in the future, but maintain that these statements are still actionable misrepresentation. "Opinions and statements as to probable future results are not generally fraudulent even though they relate to material matters." *Esso Standard Oil Co. v. Cunningham*, 114 A.2d 380 (Del. Ch. 1955). "Courts, however, will convert an unfulfilled promise of future performance into a fraud claim if particularized facts are alleged that collectively allow the inference that, at the time the promise was made, the speaker had no intention of performing." *Grunstein v. Silva*, 2009 Del. Ch. LEXIS 206, *45 (Del. Ch. Dec. 8, 2009). "To assert a claim for promissory fraud, the plaintiff also must plead specific facts that lead to a reasonable inference that the promissor had no intention of performing at the time the promise was made." *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 Del. Ch. LEXIS 196, *32 (Del. Ch. Dec. 23, 2008).

Plaintiff here alleges that Defendant Sacchetti represented on January 18, 2023, that the fund had taken a 10% position in COPL and that they would be out of the investment by June

[7] Delaware Courts apply a similarly heightened pleading standard to claims of fraud and intentional misrepresentation. *See* Del. Ch. Ct. R. 9(b); Del. Super. Ct. Civ. R. 9(b).

2023. NYSCEF Doc. No. 2 at ¶ 105. However, 19 days earlier, Defendants had increased their COPL position through purchasing more bonds. *Id.* at ¶ 108. Further, on February 8, 2023, 21 days after Defendant Sacchetti's statement, Defendant Sacchetti "admitted that the COPL investment had grown." *Id.* at ¶ 106. Additionally, Defendant Sacchetti's previous statement was false as "[t]he original COPL position was more than 30% of Master Fund net asset value." *Id.* at ¶ 107. Accordingly, dismissal is not warranted.

3) Scienter

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Del. Ch. Ct. R. 9(b). "Under Delaware law, *scienter* can be proven by establishing that the defendant acted with knowledge of the falsity of a statement or with reckless indifference to its truth." *In re Wayport, Inc. Litig.*, 76 A.3d 296, 326 (Del. Ch. 2013). "While knowledge may be pled generally, when a plaintiff pleads a claim of fraud that charges that the defendants knew something, it must allege sufficient facts from which it can reasonably be inferred that this 'something' was knowable and that the defendants were in a position to know it." *Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006). "Stated differently, if a defendant was in a position to know a knowable fact, it is reasonably conceivable that the defendant did know that fact." *Matrix Parent, Inc. v. Audax Mgt. Co., LLC*, 319 A.3d 909, 934 (Del. Super. 2024).

Here, Plaintiffs sufficiently allege that Moving Defendants knew the extent of the COPL position because they were responsible for the COPL trades and received accurate risk reports. *See, e.g.*, NYSCEF Doc. No. 2 at ¶¶ 33, 76. Furthermore, Plaintiffs allege that Moving Defendants were in the position to know of COPL positions. *Id.* at ¶¶ 226–228. Accordingly, Plaintiffs have sufficiently pled *scienter*.

4) Justifiable Reliance

Moving Defendants dispute that Plaintiffs could not have justifiably relied on representations made Defendants as: (1) the representations were ones of future performance; and (2) the PPM disclaims any assurances that the investment objective will be reached. NYSCEF Doc. No. 70 at 24–25.

> The third element of a fraud claim is justifiable reliance. To plead this element, a plaintiff must allege facts making it reasonably conceivable that the plaintiff acted based on the material representation or omission. Assessing reliance requires a context-dependent inquiry that takes into account the plaintiff's knowledge and experience. *The issue is not generally suitable for resolution on a motion to dismiss unless a fully integrated contract contains an explicit anti-reliance representation*.

Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC, 318 A.3d 450, 465 (Del. Ch. 2024) (emphasis added). The anti-reliance language of the PPM states, in relevant part, "There

can be no assurance that the investment objective of the Master Fund will be achieved." NYSCEF Doc. No. 74 at 15. However, Plaintiffs do not allege that they relied on Defendants' representations of future positions; rather, Plaintiffs relied on Defendants' material misrepresentations of the COPL positions at the time the representations were made. NYSCEF Doc. No. 2 at ¶¶ 107, 111, 120, 125, 129–131, 209, 219. Accordingly, the PPM's anti-reliance language is inapplicable, and it is not suitable for the Court to consider dismissal.

Based on the foregoing, Plaintiffs have sufficiently alleged the requisite elements of fraud or intentional misrepresentation.

C. Breach of Fiduciary Duty

"The equitable tort for breach of fiduciary duty has only two formal elements: (i) the existence of a fiduciary duty and (ii) a breach of that duty." *Basho Techs. Holdco B, Ltd. Liab. Co. v. Georgetown Basho Inv'rs, Ltd. Liab. Co.*, 2018 Del. Ch. LEXIS 222, at *55 (Del. Ch. July 6, 2018). Moving Defendants argue that the cause of action should be dismissed as: (1) it is duplicative of Plaintiffs' breach of contract claim; (2) Defendants are protected by the Business Judgment Rule; (3) the LPA only allows recovery for bad faith, gross negligence, willful misconduct, or fraud; and (4) as to Defendant Howard, no duty was owed because he was not a general partner.

1) Duplicative Claims

Preliminarily, it is noteworthy that Plaintiffs assert their breach of contract claims against only the Fund GP and the Investment Manager while their breach of fiduciary duty claim is asserted against all Defendants. The "case law only requires dismissal where a fiduciary duty claim wholly overlaps with a concurrent breach of contract claim." *Backer v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 109 (Del. 2021). Here, Plaintiffs are asserting different theories against different actors based on their respective individual involvement in the alleged scheme. Accordingly, by definition, the Plaintiffs' breach of fiduciary duty claim is not just a bootstrapped breach of contract claim.

Plaintiffs are permitted to allege theories which are duplicative. "[A] court is not required to wrestle at the pleading stage with how one claim might interact with another. 'Not all disputes can or should be resolved at the pleading stage.'" *Garfield v. Allen*, 277 A.3d 296, 361 (Del. Ch. 2022) (internal citations omitted).

> The current case does not warrant additional pleading-stage pondering… All of the claims arise from a common nucleus of operative fact, so a pleading-stage ruling is unlikely to simplify discovery or the presentation of the evidence at trial. There is no benefit to be gained at this stage from delving into the alternative theories to assess how they may interact.

Id. at 361–62. Accordingly, regardless of whether Plaintiffs' causes of action plead the same set of facts or allegations, the Court declines to dismiss the breach of fiduciary duty claim at this stage.

2) Business Judgment Rule

> The business judgment rule is a 'presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company'… 'Unless the procedural presumption of the business judgment rule is rebutted, a 'court will not substitute its judgment for that of the board if the [board's] decision can be 'attributed to any rational business purpose.'"

Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 927-28 (Del. 2003) (internal citations omitted). "The business judgment rule embodies the deference that is accorded to managerial decisions of a *board of directors*." *Id.* at 928 (emphasis added). The Moving Defendants do not argue that any of them are members of the Board of Directors. Further, Moving Defendants do not identify any corporate decisions to which the Business Judgment Rule would apply. Accordingly, Moving Defendants are not immunized by the Business Judgment Rule.

3) Limitations of the Limited Partnership Agreement

Moving Defendants argue that Plaintiffs' theories for recovery are limited by the LPA, which states.

> No Indemnified Party shall be liable to any Partner or the Partnership for any costs, losses, claims, damages, liabilities, expenses …, judgments, fines or settlements (collectively, "Indemnified Losses")… except for any Indemnified Losses arising out of, related to or in connection with any act or omission that is Judicially Determined to be primarily attributable to the bad faith, gross negligence, wilful [*sic*] misconduct, fraud or breach of fiduciary responsibility under ERISA, if applicable, of such Indemnified Party.

NYSCEF Doc. No. 75 at § 4.05(a). Moving Defendants argue that Plaintiffs have failed to show that the present action arises from their "bad faith, gross negligence, wilful [*sic*] misconduct, fraud or breach of fiduciary responsibility under ERISA." NYSCEF Doc. No. 70 at 27–28. However, Moving Defendants ignore that Plaintiffs' allegations include several instances of bad faith, gross negligence, willful misconduct, or fraud. *See, e.g.*, NYSCEF Doc. No. 2 at ¶¶ 107, 111, 120, 125, 129–131, 209, 219.

4) Defendant Howard's Fiduciary Duty

Finally, Moving Defendants reason that Defendant Howard did not owe a fiduciary duty to the Plaintiffs as Defendant Howard worked solely as the Chief Risk Officer, Chief Operating Officer, and Chief Financial Officer of Defendant Anavio Capital Partners LLP. NYSCEF Doc. No. 70 at 28. However, "[p]ursuant to *USACafes* and its progeny, the 'individuals and entities who control the general partner owe to the limited partners at a minimum the duty of loyalty.'" *Fannin v. UMTH Land Dev., L.P.*, 2020 WL 4384230, at *19 (Del. Ch. July 31, 2020). Here, Plaintiff allege that: (1) Defendant Anavio Capital Partners LLP invested all of the fund assets and

owned 100% of the General Partner (NYSCEF Doc. No. 2 at ¶ 16); and (2) Defendant Howard was the CFO, CRO, and COO of Defendant Anavio Capital Partners LLP (*Id.* at ¶ 21). It is difficult to imagine that a party holding multiple c-suite titles within a parent firm, which acted as the General Partnership, would not have control of the assets such that no fiduciary duty would be owed. Accordingly, Moving Defendants' argument is unconvincing.

D. Aiding and Abetting Breach of Fiduciary Duty

Moving Defendants argue that Plaintiffs' cause of action for aiding and abetting breaches of fiduciary duties should be dismissed for two reasons: (1) aiding and abetting requires a sufficiently pled underlying breach of a fiduciary duty, which does not exist here; and (2) Plaintiffs fail to allege knowing participation or substantial assistance. NYSCEF Doc. No. 70 at 29.

> Under Delaware law, a valid claim for aiding and abetting a breach of fiduciary duty requires: (1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.

Globis Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007). Moving Defendants do not dispute the first and fourth elements. Further, Moving Defendants' argument regarding the absence of an underlying breach of fiduciary duty is moot as per this Court's analysis.

"To withstand a motion to dismiss, a plaintiff must plead facts making it reasonably conceivable that the defendant knowingly supported a breach of duty *and* that his resulting assistance to the primary actor constituted substantial assistance in causing the breach." *In re Oracle Corp. Derivative Litig.*, 2020 Del. Ch. LEXIS 218, *33 (Del. Ch. June 22, 2020). Moving Defendants argue that Plaintiffs' allegations of substantial assistance are conclusory. NYSCEF Doc. No. 70 at 29. However, a cursory review of the Complaint dispels this argument. The Complaint alleges that each of these parties knowingly provided substantial assistance by: (1) actively disregarding and violating risk policies; and (2) making misrepresentations to Plaintiffs. NYSCEF Doc. No. 2 at 246–248. Further, throughout the Complaint, Plaintiffs allege instances in which Defendants increased their COPL positions, while making misrepresentations regarding the same. Based on these allegations, the Court can reasonably conceive that Defendants knowingly and substantially assisted in any alleged breach of fiduciary duties relating to Defendants' COPL positions. Accordingly, Moving Defendants argument is unconvincing.

Based on the foregoing, Plaintiffs have sufficiently pled the requisite elements of aiding and abetting breach of fiduciary duty to survive the present motion.

Accordingly, it is hereby

ORDERED that Defendants Dario Sacchetti, Jonathan Howard, Anavio Equity Capital Markets Fund GP Limited, Anavio Capital Partners LLP, and Nominal Defendant Anavio Equity Capital Markets Fund LP's motion to dismiss is DENIED in its entirety; and it is further,

ORDERED that the Order of Stay previously entered on March 6, 2025, is vacated; and it is further,

ORDERED that the parties shall file a Joint Proposed Amended Preliminary Conference order within ten (10) days of this Decision and Order; and it is further

ORDERED the Moving Defendants shall file their answer to the Amended Complaint within twenty (20) days of the e-file date of this Decision and Order.

The foregoing constitutes the Decision and Order of this Court.

20250424181810ARPATEL4B7ABB42D33A151B02E4D784723C0FD

4/24/2025
DATE

ANAR R. PATEL, A.J.S.C.

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