A Participations Ltd. v Velissaris
2026 NY Slip Op 31495(U)
April 9, 2026
Supreme Court, New York County
Docket Number: Index No. 652720/2023
Judge: Melissa A. Crane

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 03/03/2025

MOTION SEQ. NO. 027

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

Plaintiff,

- v -

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

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 027) 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 495, 496, 497, 499, 504, 505, 542

were read on this motion to/for DISMISSAL.

In motion sequence no. 027, defendant EisnerAmper LLP ("EA") moves to dismiss plaintiffs' second amended complaint (the SAC). For the reasons set forth below, the motion is granted, and the SAC is dismissed against EA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

For a full recitation of the facts and the relevant procedural history in this action, the court refers to its prior decisions and orders, in particular the decision and order for motion 30 (Doc 567), with which familiarity is presumed. Additional facts are drawn from the SAC unless noted otherwise, and facts in the SAC are presumed to be true for this decision's purposes.

This action arises out of the collapse of Infinity Q Volatility Alpha Fund (the Hedge Fund), that was comprised of Infinity Q Volatility Alpha Fund, L.P., a master fund organized as a Delaware limited partnership, and Infinity Q Volatility Alpha Offshore Fund, Ltd., a feeder fund organized as a Cayman Islands exempt company (Doc 368 [SAC] at 1 n 1). EA, along with defendant EisnerAmper US (Cayman) Ltd. ("EA Cayman"), acted as the Hedge Fund's auditor and issued Form K-l tax statements to investors (*id.*, ¶¶ 9, 12, and 137).

The Hedge Fund collapsed in February 2021 after the Securities and Exchange Commission (SEC) discovered that Defendant James Velissaris (Velissaris), co-founder of defendant Infinity Q Capital Management, LLC (IQCM), and the Hedge Fund's general partner and investment advisor responsible for its day-to-day management (*id.*, 130 and 134-135), had been manipulating and inflating the value of the Hedge Fund's OTC Derivatives, thereby inflating the Hedge Fund's overall value (*id.*, ¶¶ 4-5, 177, and at 4 n 3). Velissaris pleaded guilty to securities fraud and was sentenced to 15 years in prison (*id.*, ¶¶ 188 and 190; *United States v Velissaris*, 2023 WL 2875487, *1 and 11, 2023 US Dist LEXIS 62740, *1 and 30 [SDNY, Apr.

10, 2023, No. 22cr105 (DLC)], *affd* 2024 WL 4502201, 2024 US App LEXIS 26034 [2d Cir, Oct. 16, 2024]).

Previously, EA moved to dismiss the First Amended Complaint (FAC) pursuant to CPLR 3211(a)(1), (a)(7) and CPLR 3013. The court dismissed unjust enrichment against all defendants and granted the remainder of EA's motion to dismiss (Doc 257 [Decision + Order]). The court found all the claims plaintiffs asserted directly against EA should have been brought derivatively and dismissed "all causes of action against EA for lack of standing pursuant to CPLR 3211(a)(3)" (*id.* at 9-12). The court also held in the alternative that plaintiffs' claims against EA for fraud, aiding and abetting fraud and aiding and abetting breach of fiduciary duty must be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action (*id.* at 12-15).

Plaintiffs have since interposed the SAC and EA moves to dismiss. As against EA, the SAC pleads fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty. The motion is opposed.

DISCUSSION

"On a motion to dismiss for failure to state a claim under CPLR 3211 (a) (7), the Court affords the pleading 'a liberal construction' and must 'accept the facts as alleged … as true, accord [the nonmoving party] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Taxi Tours Inc. v Go N.Y. Tours, Inc.*, 41 NY3d 991, 993 [2024] [internal citation omitted]; *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

"Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Burrow v 75-25 153rd St., LLC*, — NY3d —, 2025 Slip Op 01669, *2 [2025] [internal quotation marks and citation omitted]).

A. Standing – Direct vs. Derivative

EA moves to dismiss the SAC on the ground that plaintiffs lack standing to sue because their fraud and aiding and abetting claims against EA are derivative. On a pre-answer motion to dismiss brought under CPLR 3211 (a) (3), the defendant bears the burden of demonstrating that the plaintiff lacks standing to sue (*Homelink Intl., Inc. v Law Offs. of Sanjay Chaubey*, - AD3d -, 2025 NY Slip Op. 05460, *1 [1st Dept 2025]).

The court has already ruled that plaintiffs' fraud in the inducement claims against other defendants are direct in nature (*see e.g.* Doc 567 [Decision + Order, MS 30]). That is, the court ruled that plaintiffs have standing for their fraud claims against other defendants to the extent that plaintiffs assert that they were fraudulently induced to make their initial investments (*id.* at 14-15).

Unlike plaintiffs' fraud claims against the other defendants, plaintiffs' fraud claim against EA is not styled as one for "Fraud/Fraudulent Inducement" (*compare* Doc 368 [SAC] at 138 [asserting "FRAUD/FRADULENT INDUCEMENT" against USB], *id.* at 163 [same against Lindell], *id.* at 178 [same against Velissaris], and *id.* at 182 [same against IQCM], *with id.* at 148 [asserting only "FRAUD" against EA and EA Cayman]). Instead, plaintiffs' fraud claim against EA purports to encompass fraudulent inducement for initial investments, fraudulent inducement for later additional investments, and "holder"-like claims for remaining invested (*see id.*, para 560 ["Plaintiffs relied on the Audit Reports in deciding to invest, remain invested, or make additional investments in the Hedge Fund . . ."], *id.*, para 563 ["Plaintiffs have suffered damages . . . including

but not limited to[] the amount that each Plaintiff overpaid for their interests in the Hedge Fund as of the date of their investments and payment of taxes on illusory income."]). In this fraud claim, plaintiffs also seek to recover for "payment of taxes on illusory income" (*e.g. id.,* para 573).

For similar reasons as those stated in connection with MS 30, the court declines to dismiss plaintiffs' aiding and abetting IQCM's fraud and aiding and abetting fiduciary duty claims for lack of standing. Likewise, the court will not dismiss plaintiffs' fraud claim for lack of standing to the extent that the claim is based on fraudulent inducement to make initial investments (*see e.g.* Doc 567 at 8-17 [decision and order resolving MS 30]). As the court discussed in its prior decisions dealing with the SAC, the claim for fraudulently inducing initial investments is direct (*see e.g. id.*).

However, the parts of plaintiffs' fraud claim concerning subsequent investments and "holding" their investments are derivative. As the court noted in its decision granting EA's motion to dismiss the first amended complaint (Doc 257), these claims "ultimately arise out of [EA's] alleged actions in contravention of [the Master Fund's right] to accurate audits" (*id.* at 10-11). These fraud prongs are derivative rights masquerading as personal rights. As before, under *Tooley*, these prongs "are derivative because the Hedge Fund suffered the alleged harm and would receive the benefit of any recovery" because "the alleged damages are inextricably linked with damage to the Hedge Fund through the fraudulent mismarking of the NAV" (*id.* at 11). These plaintiffs opted out of the class action involving both the Hedge Fund and the Mutual Fund (*see In re Infinity Q Diversified Alpha Fund Securities Litig.*, Index No. 651295/2021, and *Dominus Multimanager Fund, Ltd. v Infinity Q Mgmt. LLC*, 652906/2022). Indeed, the Trust is already suing EA and US Bancorp on the Mutual Fund's behalf in *Trust for Advised Portfolios, on behalf of the Infinity Q Diversified Alpha Fund v U.S. Bancorp Fund Servs., LLC* (Index No. 652179/2024). Although

they potentially could have done so, these plaintiffs never asserted derivative claims on the Hedge Fund's behalf.

B. Fraud

A cause of action for fraud requires the plaintiff to 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]).

EA contends that plaintiffs inadequately plead that EA knowingly made any material misrepresentations to plaintiffs. In dismissing the FAC against EA, the court found that plaintiffs "fail[ed] to identify with specificity to whom [EA] made the misrepresentations or which Plaintiffs received the audits and justifiably relied on them" (Doc 257 at 13 [5/16/24 decision and order]). Plaintiffs assert that they cured this defect in the SAC by "alleg[ing] in detail each Plaintiffs' receipt and reliance on the Audit Reports in connection with their investment decisions" (Doc 495 [mem opp] at 14 n8). Plaintiffs rely on *Houbigant, Inc. v. Deloitte & Touche LLP* (303 A.D.2d 92 [1st Dep't 2003]) for the proposition that a "plaintiff must only allege facts from which it may be inferred that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff" (*id.* at 100).

In *Houbigant*, the Appellate Division, First Department explained that "the plaintiff must only allege facts from which it may be inferred that the defendant [accountant] was aware that its misrepresentations would be reasonably relied upon by the plaintiff" (*id.*). That is, the trial court erred in dismissing the *Houbigant* fraud claim on the basis that "it cannot be inferred that [the accountant] made the misrepresentations with the specific intent to induce [plaintiff's] acts" (*id.*). The First Department held that the pleading requirement was "satisfied by the allegation that [the accountant] knew, from the contractual requirement that the licensees forward audited statements to [plaintiff], that [plaintiff] was relying upon [the accountant's] audits" (*id.*).

As narrowed above in Section A (*supra*), the issue here is whether EA knew that the Audit Reports included false information and was aware that plaintiffs would reasonably rely on the Audit Reports at the pre-investment/due diligence stage (*Houbigant, Inc.*, 303 AD2d at 100 [1st Dept 2003] ["(T)he plaintiff must only allege facts from which it may be inferred that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff, not that the defendant intended to induce the particular acts of detrimental reliance ultimately undertaken by the plaintiff."]; *see also Bullen v CohnReznick, LLP*, 194 AD3d 637, 637 [1st Dept 2021]).

Even assuming that the alleged red flags and alleged GAAS violations support a "strong inference of scienter," satisfying the knowledge element at this pre-answer stage, plaintiffs still must plead with particularity factual allegations supporting an inference that EA was aware that the plaintiffs would rely on the misrepresentations. In *Houbigant*, the plaintiff satisfied

> "[t]his pleading requirement . . . by the allegation that Deloitte [auditor-defendant] knew, from the contractual requirement that the licensees forward audited statements to Houbigant, that Houbigant was relying upon Deloitte's audits to assure itself that RCI was satisfying the requirements that it maintain a $10 million net worth and that the licensees remain solvent"

(*Houbigant, Inc.*, 303 AD2d at 100 [1st Dept 2003]).

In *Bullen*, the auditor-defendant "acknowledge[d] it contacted plaintiffs directly to confirm certain investments (TR 13) and it in no way dispute[d] plaintiffs' allegation that many investors spoke with CohnReznick's managing partner Mr. Levy about their investments" (*Bullen v CohnReznick LLP*, 68 Misc 3d 1205(A) [NY Sup 2020], *affd* 194 AD3d 637 [1st Dept 2021]).

Here, plaintiffs do not contend that EA directly communicated with them, and plaintiffs concede that they "do not allege fraud based on" the "two interactions with Plaintiffs' Advisors" (Doc 495 at 14 [mem opp]). Plaintiffs claim that they "cured" their prior pleading's failure to identify "to whom [EA] made the misrepresentations or which Plaintiffs received the audits" (Doc 257 at 13) by "allege[ing] in detail each Plaintiffs' receipt and reliance on the Audit Reports in connection with their investment decisions" (Doc 495 at 14 n8). They contend that EA "knew its Audit Reports would be sent to investors and relied upon" because the "PPM provided the Audit Reports would be . . . 'provided to Partners within 90 days after the end of each Fiscal Year' " (*id.* at 14, quoting PPM). However, the PPM does not provide that Audit Reports will be sent to *prospective* investors at the due diligence stage. It states that "audited financial statements of the Fund prepared in accordance with Generally Accepted Accounting Principles will be provided to Partners within 90 days after the end of each Fiscal Year" (Doc 380 at 8). One cannot be both a Limited Partner (within the PPM's meaning [*id.* at 1] and a prospective investor (i.e., a prospective Limited Partner).

Thus, even if plaintiffs' allegations concerning red flags and GAAP/GAAS violations are sufficient to support a strong knowledge inference, the fraud claim [as to initial investments] is not pleaded with requisite specificity. As before, plaintiffs have not come forward with allegations from which the court can infer that EA directly made misrepresentations to the plaintiffs, or that EA was aware that these plaintiffs would rely on the alleged misrepresentations at the pre-

investment stage. It is not enough that the Audit Reports simply existed and (somehow) found their way into due diligence packages that plaintiffs or their advisors reviewed. In addition, as discussed in the decision resolving EA's motion to dismiss the prior FAC, the right to accurate audits belonged to the Master Fund under the engagement letters (*see* Doc 257 at 10, citing Feb. 2018 Engagement Letter at 6, 8).

The court also dismisses the fraud claim to the extent plaintiffs allege "excessive and/or incorrect taxes by Volatility Master Fund investors based on the illusory income reported by [EA] in the Form K-1 tax statements" (*e.g.* Doc 368, para 186). Plaintiffs do not allege sufficient particularized facts showing that each individual plaintiff actually filed taxes. The SAC merely generalizes that "[a]ll Plaintiffs who invested in the . . . Master Fund relied on the false information in their individual Form K-1 tax statements to calculate and pay their individual taxes" (*id.,* para 561).

Accordingly, the court dismisses the fraud claim against EA.

C. Aiding and Abetting Fraud and Aiding and Abetting Breach of Fiduciary Duty

Plaintiffs allege that EA aided and abetted IQCM's fraud and its breach of fiduciary duties (Doc 368, Count VI). On February 24, 2026, the court dismissed the fraud claim against IQCM (Doc 573 at 6-12 [Decision + Order, MS 31]). Consequently, the aiding and abetting fraud claim is dismissed against EA.

Plaintiffs do not assert a breach of fiduciary duty claim against IQCM in the SAC (*see generally* Doc 368 [including one claim only against IQCM (fraud/fraudulent inducement)]). Plaintiffs conceded in their memorandum opposing MS 31 that they do not plead breach of fiduciary duty against IQCM (Doc 467 at 22 ["Plaintiffs do not assert a breach of fiduciary duty claim against IQCM; they assert a fraud claim."]). Therefore, plaintiffs' aiding and abetting breach

of fiduciary duty claim has no primary fiduciary duty claim in the SAC to which to attach. This claim must also be dismissed. Even so, plaintiffs fail to plead that EA had actual knowledge.

> "Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability"

(*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citations omitted]).

In *Bullen*, "the complaint sufficiently alleged defendant's actual knowledge" for aiding and abetting breach of fiduciary duty based on "defendant's access to the fund's financial information, as well as defendant's 'strong financial motive' to aid the fund manager, given its allegedly inflated fees" (*Bullen*, 194 AD3d at 638 [citations omitted]). Moreover, "[t]here [we]re allegations . . . that defendant 'affirmatively assist[ed]' the fund manager to convince one investor plaintiff to invest additional capital . . ." (*id.* [citations omitted]). Here, plaintiffs essentially conclude, without sufficient factual allegations, that EA had actual knowledge of IQCM's purported breach due to EA's access to the financial information.

For the reasons stated above, the court dismisses both aiding and abetting claims against EA.

CONCLUSION

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

Accordingly, it is

ORDERED that the motion brought by defendant EA to dismiss the second amended complaint (motion sequence no. 027) is granted in part, and the second amended complaint is dismissed as against this defendant, with costs and disbursements 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.

4/9/2026
DATE

MELISSA A. CRANE, J.S.C.

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