Vital Spark Found., Inc. v North Am. Globex Fund, L.P.

Supreme Court of New York, New York County

January 31, 2013, Decided

650415/2012

Reporter

2013 N.Y. Misc. LEXIS 455 *; 2013 NY Slip Op 30223(U) **

[2]** VITAL SPARK FOUNDATION, INC., MORRIS FUND LIMITED PARTNERSHIP, JOSH MITTELDORF, ALICE BALLARD, MITTELDORF FAMILY 2001 CHARITABLE REMAINDER UNITRUST NUMBER 1, and MITTELDORF FAMILY 2001 CHARITABLE REMAINDER UNITRUST NUMBER 2, Plaintiffs, -against- NORTH AMERICAN GLOBEX FUND, L.P., NORTHSTAR INTERNATIONAL GROUP, INC., JAMES M. PEISTER, JOHN GEANTASIO, STRATEGIC ASSET MANAGEMENT, LLC, KURCIAS, JAFFEE & COMPANY LLP, JOSEPH F. SOFO, CBA, and MADISONGREY ALTERNATIVE INVESTMENT SERVICES (USA), INC. F/K/A MADISONGREY, LLC, Defendants, Number: 650415/2012

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: Jarvis v. N. Am. Globex Fund, L.P., 823 F. Supp. 2d 161, 2011 U.S. Dist. LEXIS 116837 (E.D.N.Y., 2011)

Counsel: **[*1]** For Plaintiff: Marc Fitapelli, Esq., Fitapelli Law, New York, New York.

For John Geantasio, Defendant: Sophia Ree, Esq., Anna Kornikova, Esq., Landman Corsi Ballaine & Ford, New York, New York.

For Equinox Alternative Investment Services, (USA), Inc., Defendant: James F.X. Hiller, Esq., Belina Anderson, Esq., Wechsler & Cohen, LLP, New York, NY.

For Kurcias, Jaffee & Company LLP and Joseph F. Sofo, CPA, Defendants: Jessica F. Longobardi, Esq., Fred Knopf, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, New York.

For Strategic Asset Management, LLC, Defendant: Deborah M. Zawadzki, Esq., Jonathan B. Bruno, Esq., Kaufman Borgeest & Ryan LLP, New York, NY.

Judges: Ellen M. Coin, A.J.S.C.

Opinion by: Ellen M. Coin

Opinion

DECISION AND ORDER

[3]** **ELLEN M. COIN, J**.:

Plaintiffs Vital Spark Foundation ("Vital Spark"), Morris Fund Limited Partnership ("Morris Fund"), Josh Mitteldorf ("Mitteldorf"), Alice Ballard ("Ballard"), Mitteldorf Family 2001 Charitable Remainder Unitrust Number 1 ("Trust 1"); Mitteldorf Family 2001 Charitable Remiander Unitrust Number 2 ("Trust 2"; collectively referred to herein with Vital Spark, Morris Fund, Mitteldorf, and Trust 1, the "Plaintiffs"), commenced this suit against defendants **[*2]** North American Globex Fund ("Globex Fund"), Northstar International Group, Inc. ("Northstar"), James M. Peister ("Peister"; collectively referred to herein with Globex Fund and Nortstar, the "Globex defendants"), John Geantasio ("Geantasio"), Strategic Asset Management, LLC ("Strategic"), Kurcias, Jaffe & Company LLP ("Kurcias"), Joseph F. Sofo, CPA ("Sofo;" and collectively referred to herein with Kurcias, the "Accounting Firm defendants"), Equinox Alternative Investment Services (USA), Inc ("Equinox"), alleging nine causes of action in total. (Compl. para. 1). Equinox timely filed an answer to the complaint, along with cross-claims for contribution and/or indemnification in case the other defendants are found liable for any injuries to Plaintiffs.

BACKGROUND

Globex Fund was created in 2000, allegedly gaining about 72 investors and eventually managing about $19 million in assets. (Compl. para. 21). According to the complaint, Northstar was a general partner of the

Globex Fund, and Peister was President, chief executive officer, and controlling shareholder of Northstar, allegedly authorized to act as an investment manager and **[**4]** trading manager for the Globex Fund. (Compl. paras. 8-9). **[*3]** Peister, who founded Northstar in 2000, also controlled Globex Fund. (Compl. para. 22).

On or about December 31, 2002, Northstar, Peister, and some limited partners entered into a limited partnership agreement ("LPA") with Globex Fund, which was amended on or around April 1, 2005 and November 1, 2006. (Compl. para. 23). Furthermore, in the Confidential Private Placement Memorandum ("PPM") dated January 2005, the Globex defendants agreed to duties and operations related to the operation of the Globex Fund, and the PPM permitted investments in "a variety of securities and financial instruments," according to the complaint. (Compl. paras. 24-25).

Geantasio served as chief financial officer of Northstar, and the complaint alleges that he was in charge of maintaining an internal accounting system for the Globex Fund. The PPM states that Geantasio "has developed and implemented the system of internal accounting controls ... [and] is responsible for maintaining accountability by performing random internal reconciliations; as well assisting the outside independent auditors." (Compl. para. 27).

According to the complaint, in about 2002 or 2003, defendants attempted to entice Plaintiffs to invest **[*4]** in the Globex Fund by providing them with promotional materials, including the PPM. The PPM "Overview" stated:

> In summary, the Partnership seeks to provide its Limited Partners with consistent above average returns combined with effective management. Although the strategy and asset allocation utilized by the Partnership is primarily centered on publicly traded companies, the General Partner intends to follow a flexible approach in order to place the Partnership in the best position to capitalize on opportunities in the financial markets.

(Compl. paras. 20-31; PPM, Exh. C to Ree Aff., 3). The complaint alleges that Plaintiffs invested in the Globex Fund because of such representations. (Compl. para. 32).

[5]** Plaintiffs repeatedly requested redemption of their investments beginning in 2007, but Globex defendants and Geantasio did not honor such requests, according to the complaint. (Compl. paras. 34-35). Between 2007 and 2009, the Globex defendants allegedly provided Plaintiffs with materially false financial statements, audits, and account statements to mask substantial losses, fraud and unlawful conduct. (Compl. 36-37).

The complaint claims that the Globex defendants retained Strategic and **[*5]** Kurcias to create financial reports for Plaintiffs. Sofo was the audit engagement partner for Kurcias. (Compl. paras. 11, 13).

The complaint alleges that on or about April 2009, Peister notified Plaintiffs for the first time that the Globex Fund was shutting down and dissolving. Then on or about June 2009, Peister allegedly also told Plaintiffs that there might have been material inaccuracies in the financial statements provided by Accounting Firm defendants. (Compl. paras. 38-39). Allegedly, neither Accounting Firm defendants nor Strategic attempted to fix any of the prior audits or reports provided to plaintiffs after plaintiffs received the June 2009 notification by Peister. (Compl. para. 40).

The complaint claims that the Globex Fund still holds unredeemed assets as follows: $346,031.80 for Vital Sparks; $355,748.37 for Morris Fund; $20,000 for Ballard and Mitteldorf; $247,195.07 for Trust 1; and $395,435.40 for Trust 2. (Compl. paras. 41-45).

On or about February 3, 2011, the U.S. Commodity Future Trading Commission ("CFTC") found that Peister and Northstar defrauded investors through the Globex Fund "by fraudulently concealing trading losses, using participants' funds to make payments **[*6]** to other participants and for business and personal expenses, failing to register Globex Fund as a community pool operator with CFTC, and failing to provide Globex Fund participants with **[**6]** required disclosure forms," according to the complaint. (Compl. para. 46; CFTC Report at 1-2). The CFTC stated that Northstar and Peister concealed losses by sending out false account statements and audit reports each month, and the CFTC consequently sanctioned Peister and Northstar more than $11,000,000. (Compl. paras. 47-48; CFTC Report at 10).

The complaint claims that on or about July 14, 2011, the United States Securities and Exchange Commission ("SEC") found that Sofo permitted the Globex Fund to release materially false financial statements to plaintiffs, explaining that Sofo "failed to exercise due professional care, professional skepticism, and failed to obtain sufficient competent evidential matter to support Kurcias Jaffe's unqualified audit opinions." (Compl. 49-50; SEC Report at 2, 9-10, Exh. B to Fitappeli Aff.).

DISCUSSION

Claims against Globex Defendants

Plaintiffs move for a default judgment pursuant to New York Civil Practice Laws and Rules ("CPLR") §3215 against Globex defendants for **[*7]** compensatory and punitive damages. (Compl. paras. 61-62, 73, 78, 88-89). For the following reasons, the Court grants the motion in part and denies the motion in part.

In support of its application for default judgment, plaintiffs provide an Affirmation of Marc Fitapelli, Esq., attorney for plaintiffs, dated August 8, 2012 [Fitapelli Aff.], an Affidavit of Bruce Mitteldorf, director of the Vital Spark Foundation and trustee of Trust 1 [Mitteldorf Aff.], and affidavits of service.

A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the court to enter a default judgment. (*PDQ Aluminum Products Corp. v Smith*, 20 Misc 3d 94, 96, 864 N.Y.S.2d 681 [2d Dept 2008], *citing Gagen v. Kipany Prods*., 289 AD2d 844, 735 N.Y.S.2d 225 [3d **[**7]** Dept 2001])). Rather, plaintiff must support its motion with enough facts to enable the court to determine that a viable cause of action exists. (*PDQ Aluminum Products Corp*., 20 Misc 3d at 96; *see also Resnick v Lebovitz*, 28 AD3d 533, 534, 813 N.Y.S.2d 480 [2d Dept 2006]). CPLR 3215(f) requires that the party moving for default must submit an affidavit of facts constituting the claim. (*In re Johnson*, 184 AD2d 968, 590 N.Y.S.2d 137 [3rd Dept 1992]).

Plaintiff commenced this action on February **[*8]** 14, 2012, by filing the summons and complaint. (Exh. A to Fitappeli Aff.). The Globex Fund and Northstar were each served in Nevada upon out-of-state agent Danielle Adams on February 21, 2012. (Exhs. Band C to Fitappeli Aff.). Peister was served at his home on February 23. After unsuccessfully attempting to serve Peister at his New York home on four occasions and at different times of the day, the server affixed the papers upon his door, and then served another copy of the papers by First Class mail to the same address. (Exh. D to Fitappeli Aff.). Then on June 26, 2012, plaintiffs served the additional notice pursuant to CPLR § 3215(g) upon each of the Globex defendants. (Exh. E to Fitapelli Aff.).

Plaintiff satisfied the requirements for service of process under CPLR § 308. (CPLR § 308(4)). According to CPLR § 308(2), service of process is complete ten days after proof of service is filed, and defendants have 30 days to answer. (CPLR § 308[2]). Defendants were served here on February 21 and February 23, 2012, and still have not answered the complaint. Therefore, the time to respond has expired.

Plaintiffs bring five causes of action against the Globex defendants: breach of fiduciary **[*9]** duty, breach of contract, unjust enrichment, negligence and fraud.

The first cause of action is for breach of fiduciary duty. To plead a breach of fiduciary duty claim, plaintiff must allege that (1) a fiduciary relationship existed; (2) the defendant **[**8]** engaged in misconduct; and (3) that the misconduct directly caused plaintiffs damages. (*Rut v Young Adult Institute, Inc*., 74 AD3d 776, 901 N.Y.S.2d 715 [2nd Dept 2010]).

"A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."' (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561, 910 N.E.2d 976, 883 N.Y.S.2d 147 [2009] quoting (*EBC I v. Goldman Sachs & Co*., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005])). This fiduciary relationship is associated with a "higher trust" than that usually required in typical business transactions. (*HF Mgmt. Servs., LLC v Pistone*, 34 AD3d 82, 85, 818 N.Y.S.2d 40 [1st Dept 2006]).

A plaintiff may assert a separate tort-based claim in addition to and separate from a breach of contract claim. (*North Shore Bottling Company v C. Schmidt & Sons, Inc*., 22 NY2d 171, 179, 239 N.E.2d 189, 292 N.Y.S.2d 86 [1968]). However, such fiduciary liability cannot solely be dependent upon that, contractual relationship. **[*10]** (*Mason Medical Communications, Inc. v Rogers*, 2008 NY Slip Op 30133U at *11 [Sup Ct, New York County 2008). Additionally, if contracting parties, "do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the, stricter duty for them." (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d 158, 162, 624 N.E.2d 129, 604 N.Y.S.2d 1 [1993]).

According to plaintiffs, the Globex defendants owed fiduciary duties to plaintiffs as the investment managers of plaintiffs' assets, and were required to "administer the assets in accordance with the highest form of trust, fidelity, and confidence, at all times acting in the clients' best interests with the utmost good faith, utilizing the highest standards of fair and complete disclosure." (Compl. para. 55). Plaintiffs also cite to the "Conflict of Interest" section of the PPM, which states that the "The General Partner is accountable to the Partnership as a fiduciary and, consequently, must exercise good faith and integrity in handling the business of **[**9]** the partnership." (Compl. para. 56; PPM at 38). Plaintiffs also contend that Globex defendants had "sole and final authority" over the investment **[*11]** of the assets, and did not have to obtain plaintiffs' approval before making decisions. (Compl. para. 57). The Court finds that a fiduciary relationship did exist, and that plaintiffs have provided enough evidence for the Court to grant the motion of default judgment regarding breach of fiduciary duty.

The second cause of action is for breach of contract. A claim for breach of contract requires plaintiff to allege that a contract exists, that plaintiff performed under the contract, and that defendant breached the contract, resulting in damages. (*JP Morgan Chase v J.H. Elec. of New York, Inc*., 69 AD3d 802, 803, 893 N.Y.S.2d 237 [2d Dept. 2010]).

The PPM was a valid and enforceable contract. Plaintiffs made investments with the Globex Fund, and based on the information provided, complied with their part of the bargain. (Compl. paras. 64-65). While the PPM does state that the "Partnership seeks to provide its Limited Partners with consistent above average returns combined with effective risk management" with the strategy "primarily centered on publicly traded companies," such assertions are vague. These statements are tempered where, the PPM asserts, "the General Partner intends to follow a flexible approach **[*12]** in order to place the Partnership in the best position to capitalize on opportunities in the financial markets." (Compl. para. 31; PPM, Exh. C to Ree Aff., 4). The PPM also notes that any investment involves a "**high degree of risk**" and "The General Partner may invest in companies without regard to market capitalization, geographic location or market sector." (PPM, Exh. C to Ree Aff., 4). The PPM also states that "The Partnership is not registered as an investment company and is not subject to the investment restrictions" of the Investment Company Act of 1940. (PPM, Exh. C to Ree Aff., 4). Such language suggests that the contract explained the risk involved and the Globex defendants never **[**10]** breached.

However, the "Important General Considerations" section of the PPM does explain that "[a]s a Limited Partner, you may withdraw from the Partnership and receive a payment for your Interests, subject to a one year lock-up period and certain other restrictions..." (PPM, Exh. C to Ree Aff, 7). The "restrictions" referred to by the PPM are found in the LPA, which states that limited partners may withdraw from the fund after a 12-month lock-up period following their initial investment, and after **[*13]** that they may only withdraw at least $10,000 on the last day of any fiscal quarter, with at least 30 days prior notice to the General Partner. Additionally, the General Partner must still consent if such withdrawals would cause the Limited Partner's capital balance to fall below $25,000. (LPA, Exh. B to Ree Aff., 15). Although plaintiffs claim that they requested a return of their investments on multiple occasions, they have not provided enough evidence indicating that they met these prerequisites to withdrawal. Therefore, default judgment on the breach of contract claim is denied.

The third cause of action is for unjust enrichment. "The existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment." (*Cornhusker Farms Inc. v Hunts Point Coop. Mkt., Inc*., 2 AD3d 201, 769 N.Y.S.2d 228 [1st Dept. 2003], *citing Clark-Fitzpatrick. Inc. v Long Island R. Co*., 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). There is a valid and enforceable written contract in this case between plaintiffs and Globex defendants. (Compl. para. 63). As a result, the motion is denied as to the third cause of action.

The Fourth Cause of Action is for negligence. (Compl. para. 75). To plead a cause of action **[*14]** for negligence, the plaintiff needs to show that the defendant owed plaintiff a duty, that defendant breached that duty, and that such breach proximately resulted in plaintiff's injuries. (*See Friedman v Anderson*, 23 AD3d 163, 165, 803 N.Y.S.2d 514 [1st Dept 2005]). Plaintiffs assert in the **[**11]** complaint that the "Globex Defendants had a duty to invest and trade in a reasonable and prudent manner." (Compl. para. 75): However, a plaintiff cannot simply assert a tort claim when the claim arises out of an alleged breach of contract unless a legal duty was violated independent from that produced by the contract. (*Givoldi, Inc. v UPS*, 286 AD2d 220, 221, 729 N.Y.S.2d 25 [1st Dept 2001]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract." (*Clark-Fitzpatrick, Inc. v. Long Island R. Co*., 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). Because any legal duty the Globex defendants owed plaintiffs arises either from contract or is based on the parties' fiduciary relationship, which is separately charged, the negligence cause of action fails as duplicative.

The fifth cause of action is for fraud. A prima facie claim for fraud requires **[*15]** plaintiff to plead that defendant misrepresented a material fact, such representation was untrue, there was intent to induce reliance, the plaintiff justifiably relied, and injury resulted. (*See Ross v Louise Wise Servs., Inc*., 8 NY3d 478, 488, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]).

The CFTC Report found that Peister and Northstar "failed to disclose substantial trading losses to the Globex Fund's participants," and instead, the Globex defendants "provided those participants with false and misleading monthly statements and annual audits that did not reflect actual trading losses through the Globex Group." (CFTC Report, Exh. D to Ree Aff., 5). The report also found that the promotional materials did not reveal the actual performance of the Globex Fund. Further, the report states that, "Peister knew he failed to disclose trading losses, misrepresented the trading results, misappropriated participant funds to make redemptions to other participants and to pay business and personal expenses, and provided false statements." (*Id*. at 5-6). 'Such fraudulent acts may not be attributed merely to breach of contract or failure to **[**12]** meet one's fiduciary duty of care. Accordingly, there is ample information in the record to grant **[*16]** the claim for fraud against the Globex defendants.

Claims against Accounting Firm Defendants

Accounting Finn defendants move to dismiss with prejudice pursuant to CPLR 3211 (a)(5), and (a)(7), and 3016(b). They assert that the complaint should be dismissed pursuant to CPLR 3211 (a)(5) on the ground that the Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action are barred by the applicable statute of limitations. Additionally, Accounting Firm defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(7) on the grounds that the Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action fail to state a claim upon which relief may be granted. Alternatively, they claim that such Causes of Action should fail pursuant CPLR 3016(b) on the grounds that the fraud claim was not pled with the required particularity.

The first issue is whether the fraud and aiding and abetting fraud claims are barred by the statute of limitations. On a CPLR 3211(a)(5) motion to dismiss based on the running of the statute of limitations, the defendant has the initial burden of proving that the time to commence the claim has expired and the plaintiff's response "must be given their most favorable intendment." **[*17]** (*Benn v Benn*, 82 AD3d 548, 918 N.Y.S.2d 465 [1st Dept 2011]).

Under CPLR 213(8), a claim for fraud must be brought within six years of accrual of the cause of action, or two years from the date the fraud was discovered or could have been discovered with reasonable diligence. (CPLR 213(8)). Furthermore, courts have held that the statute of limitations may begin to run once the defendant provides substantial assistance to the fraud. (*See Rostuca Holdings, Ltd v Polo*, 231 AD2d 402, 646 N.Y.S.2d 812 [1st Dept 1996]) (holding that action was timely commenced within six years of defendant giving substantial assistance to her **[**13]** husband's fraud). Claims for aiding and abetting fraud share the same statute of limitations. (*See Solow v Tanger*, 258 AD2d 323, 685 N.Y.S.2d 210 [1st Dept 1999]).

Plaintiffs argue that the Accounting Firm defendants issued an audited financial statement containing material misstatements and lacking independent verification, in December 2007. Defendants concede that the allegedly negligently prepared work product was most recently delivered in December 2007. They contend that plaintiffs learned of the Globex Fund in 2002-2003, and invested in the funds following the PPM dated January 2005. (Compl. paras. 24, 30, 32, 82, **[*18]** 83). However, the mere fact that the plaintiffs invested in the fund does not mean that they knew of, or should have known of any fraud. The earliest that plaintiffs may have learned of such fraud was when they first sought redemptions in 2007 (Compl. para. 34), which would be within the statutory period. The fraud and aiding and abetting fraud claims were filed in January 2011, within six years of accrual, and Accounting Firm defendants have not met their burden to prove that the causes of action are barred.

The next question is whether the malpractice claim is barred by the statute of limitations. Non-malpractice claims have a three-year statute of limitations. "A cause of action alleging professional malpractice, i.e., that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession, is governed by the three year Statute of Limitations applicable to negligence actions." (*Fred Smith Plumbing & Heating Co. v Christensen*, 233 AD2d 207, 208, 649 N.Y.S.2d 684 [1st Dept 1996])). A claim alleging accountant malpractice "accrues upon the client's receipt of the accountant's work product." (*Rodeo Family Enters., LLC v Matte*, 99 A.D.3d 781, 952 N.Y.S.2d 581 [2d Dept 2012], **[*19]** *quoting (Ackerman v Price Waterhouse*, 84 NY2d 535, 541, 644 N.E.2d 1009, 620 N.Y.S.2d 318 [1994])). Defendants delivered the alleged negligently prepared **[**14]** financial statements as late as December 2007 (Exh. A to Fitapelli Aff., 5), suggesting that the statute of limitations expired.

The burden shifts to plaintiffs to raise a question of fact as to whether the statute of limitations was inapplicable here, or whether it tolled. (*Rodeo*, 99 A.D.3d 781, 952 NYS2d 581). The statute of limitations may be tolled if there is continuous representation until the period of representation is complete. (*See Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 195, 888 N.Y.S.2d 538 [2d Dept 2009]). Although the rule of continuous representation was originally meant for those in the medical profession, it has since been applied to other professionals. (*See Williamson v Price Waterhouse Coopers, LLP*, 9 NY3d 1, 9, 872 N.E.2d 842, 840 N.Y.S.2d 730 [2007]). The statute will be tolled where further representation on the specific subject matter that the malpractice action arose is "needed and contemplated by the client." (*Shumsky v Eisenstein*, 96 NY2d 164, 170, 750 N.E.2d 67, 726 N.Y.S.2d 365 [2001]). But the toll will "end once the client is informed or otherwise put on notice of the [professional's] withdrawal from representation." **[*20]** (*Id*. at 170-171). Also, the continuous representation tolling period requires "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." (*McCoy v Feinman*, 99 NY2d 295, 306, 785 N.E.2d 714, 755 N.Y.S.2d 693 [2002]).

In this case, the Accounting Firm defendants communicated with plaintiffs concerning audits and the status of the Globex Fund continuously until February 14, 2009, the day the Accounting Firm defendants withdrew. Just two days earlier, the Accounting Firm defendants sent a letter to plaintiffs claiming that they were still in the process of reviewing financial statements. (Mittledorf Aff. paras 13-15). At the very least, plaintiffs have demonstrated that a question of fact exists in regard to the tolling of the statute of limitations for the malpractice cause of action, and the Court denies the motion to dismiss it on such grounds.

[15]** When considering a CPLR 3211 (a)(7) motion to dismiss for failure to state a cause of action, the "sole criterion is whether the pleading states a cause of action, and if from its four comers factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal **[*21]** will fail." (*People v Coventry First LLC*, 13 NY3d 108, 115, 915 N.E.2d 616, 886 N.Y.S.2d 671 [2009], *quoting Polonetsky v Better Homes Depot, Inc*., 97 NY2d 46,54, 760 N.E.2d 1274, 735 N.Y.S.2d 479 [2001] [internal quotation marks omitted]). The facts alleged in the complaint and accompanying affidavits provided in opposition to the motion to dismiss are taken to be true, and the court makes every favorable inference in regard to those allegations. (*See Leon v Martinez*, 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

Accounting Firm defendants seek to dismiss the fraud claim under the Fifth Cause of Action, contending it was not pled with particularity as required by 3016(b). A prima facie claim for fraud requires plaintiff to plead that defendant misrepresented a material fact, such representation was untrue, there was intent to induce reliance, the plaintiff justifiably relied on that fact, and an injury resulted. (*Ross v Louise Wise Servs., Inc*., 8 NY3d 478, 488, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]).

According to CPLR 3016(b), a fraud allegation must explain the "circumstances constituting the wrong" in detail in order to afford the defendant a fair opportunity to defend such claims. CPLR 3016(b). The rule "merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice." **[*22]** (*Houbigant, Inc. v Deoitte & Touche LLP*, 303 AD2d 92, 97, 753 N.Y.S.2d 493 [1st Dept 2003]). The New York Court of Appeals states that the CPLR 3016(b) pleading requirements "should not be confused with unassailable proof of fraud." (*Pludeman v Northern Leasing Sys., Inc*., 10 NY3d 486, 492, 890 N.E.2d 184, 860 N.Y.S.2d 422 [2008]). If the facts allow for a "reasonable inference" of the purported fraud, then the standard is met, and, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud." (**[**16]** *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 910 N.E.2d 976, 883 N.Y.S.2d 147), *quoting Pludeman*, 10 NY3d at 492-493). The First Department specifically addressed the pleading standard for fraud-based claims against auditors and accountants:

> In a fraud case against an auditor, a showing of gross negligence or recklessness will permit the trier of fact to draw the inference that a fraud was in fact perpetrated. However, the showing need not be of an evidentiary nature; CPLR 3016 (b) requires only that a claim of fraud be pleaded in sufficient

> detail to give adequate notice, particularly in situations where it may be impossible to state in detail the circumstances constituting the fraud, inasmuch **[*23]** as the surrounding circumstances are sometimes peculiarly within the knowledge of the party against whom the claim is being asserted.

(*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303, 788 N.Y.S.2d 69 [1st Dept 2005]). However, an allegation of ordinary negligence is not enough to withstand such a standard. (*See Rotterdam Ventures v Ernst & Young LLP*, 300 AD2d 963, 964, 752 N.Y.S.2d 746 [3rd Dept 2002]). Furthermore, there must be some demonstration of "fraudulent intent" on the part of the defendant. (*CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472, 925 N.Y.S.2d 439 [1st Dept 2011].

The plaintiffs allege that Accounting Firm defendants did not independently corroborate the information given by Globex defendants, and that Accounting Firm defendants made materially false representations to plaintiffs. (Compl. paras. 49-52, 83; Mitteldorf Aff. para. 21). The administrative finding by the SEC, which stated that the Accounting Firm defendants made material misrepresentations in audits, gives credence to the fraud allegations. According to the SEC report, "Kurcias Jaffe's audit opinions stated that the financial statements were prepared in conformity with GAAP and had been audited in accordance with GAAS. In fact, the Globex Fund's **[*24]** financial statements were not prepared in conformity with GAAP and had not been audited in accordance with GAAS. The audit reports were nonetheless provided to investors and prospective investors ... " (SEC Report, Exh. A to Fitapelli Aff., para. 10).

[17]** Such evidence demonstrates that Plaintiff's fraud claim is not simply a matter of negligence, as Accounting Firm defendants argue, and it at the very least meets the requisite gross negligence or recklessness standard for the fraud cause of action to proceed. (*See Foothill Capital Corp. v Grant Thornton, LLP*, 276 AD2d 437, 715 N.Y.S.2d 389 [1st Dept 2000]) (allegations of gross negligence or recklessness sufficiently pled to suggest fraud, where allegations claimed that firm failed to independently verify information provided by the company)).

The next issue is whether the Seventh Cause of Action for aiding and abetting fraud against Accounting Firm defendants should be dismissed. An aiding and abetting fraud claim requires the plaintiff to allege that a fraud exists, defendant had actual knowledge of the fraud, and defendant provided substantial assistance in advancing the fraud. (*See Oster v Kirschner*, 77 AD3d 51, 55, 905 N.Y.S.2d 69 [1st Dept 2010]).

To state a valid **[*25]** claim for aiding and abetting fraud, allegations must provide a reasonable inference that defendants knew about the falsity. (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-60, 910 N.E.2d 976, 883 N.Y.S.2d 147-60). A "necessary element of aiding and abetting fraud, means more than just performing routine business services for the alleged fraudster." (*CRT Invs., Ltd.*, 85 AD3d at 472). However, actual knowledge need only be pled generally at this point, because defendant's state of mind may be difficult to discern at the pre-discovery stage. (*See Oster*, 77 AD3d at 55).

Accounting Firm defendants do not dispute that there was an underlying fraud or that they provided "substantial assistance" to Globex defendants; they only contend that the allegations do not lead to a reasonable inference of knowledge. There is no information in the SEC report to support a claim that Accounting Firm defendants knew that Globex defendants were misrepresenting the financial health of the fund, only that Accounting Firm defendants did not **[**18]** follow proper accounting procedures and relied on representations of Globex defendants improperly. However, the SEC filing does indicate that Accounting Firm defendants knew that the Globex **[*26]** defendants were misrepresenting their accounting procedures. In the 2006 financial statements, the footnotes stated that "our auditors have received confirmation from NAGG's independent accountant confirming NAGG's assets and liabilities...," and Accounting Firm defendants permitted this language even though they knew that this was not true. (SEC Report, Exh. A to Fitapelli Aff., 5-6). This is sufficient information to allow the aiding and abetting fraud claim to proceed.

Accounting Firm defendants seek to dismiss the negligent representation claim under the Eighth Cause of Action for failure to state a cause of action. There are four requirements that must be met to make out a negligence claim against auditors, when a non-contractual party is seeking relief based on information in financial reports.

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part

of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

(*Sykes v RFD Third Ave. I Assoc., LLC*, 15 NY3d 370, 373, 938 N.E.2d 325, 912 N.Y.S.2d 172 [2010], **[*27]** citing *Credit Alliance Corp. v Arthur Anderson & Co*., 65 NY2d 536, 551, 483 N.E.2d 110, 493 N.Y.S.2d 435 [1985]).

The "linking requirement" under prong three is the only subject of dispute here. This factor calls for a "a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance." (*LaSalle Nat'l Bank v Ernst & Young LLP*, 285 AD2d 101, 106, 729 N.Y.S.2d 671 [1st Dept 2001]), quoting *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484, 741 N.E.2d 506, 718 N.Y.S.2d 709 [2000]). The linking requirement necessitates a "word or action" by the accountant directed toward plaintiffs to elicit **[**19]** reliance; the requirement is not satisfied if plaintiffs merely obtain the audited financial statements. (*Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d. 92,94, 753 N.Y.S.2d 493 [2003]). But the linking requirement is generally met if plaintiffs are a settled and particularized class of persons. In *Chaikovska v Ernst & Young, LLP*, the Fourth Department held, "plaintiffs have sufficiently, alleged that defendant had a duty to act in a non-negligent manner toward plaintiff because plaintiff was known to defendant to be a limited partner of one of the companies to which it was contractually obligated to furnish the report at issue." (21 AD3d 1324, 1326, 801 N.Y.S.2d 864 [4th Dept 2005]). **[*28]** In other words, in *Chaikovska*, the accounting firm knew that the plaintiffs would rely on their reports. In *European Am. Bank & Trust Co. v Strauchs & Kaye*, the companion case to *Credit Alliance*, the court also noted that the direct communications between the accountants and the plaintiffs helped establish the necessary nexus. (65 NY2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 [1985]).

The linking requirement is sufficiently alleged here. The Accounting Firm defendants and plaintiffs communicated often. The relationship is evidenced by the resignation notice sent to plaintiffs. (Exh. B to Mitteldorf Aff. paras 7-10). Sofo emailed Mitteldorf on December 2, 2008 saying that he "was investigating the Globex Fund's holdings and assets on their behalf," suggesting that the Accounting Firm defendants were aware that plaintiffs were relying on their advice. (Exh. B to Mitteldorf Aff., para 10): Plaintiffs have sufficiently pled the privity requirement for a negligence cause of action against the Accounting Firm defendants.

A negligence claim for accounting malpractice requires the plaintiff to establish that the accountant departed from accepted professional standards, and that such breach proximately caused the injury to plaintiff. **[*29]** (*Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 703 N.Y.S.2d 451 [1st Dept 2000]).

[20]** In the complaint, plaintiffs contend that the Accounting defendants did not "exercise due care [and] appropriate professional skepticism." (Compl. paras. 50, 116). The SEC Order alone is sufficient to indicate that the Accounting Firm defendants deviated from accepted standards. It explicitly states that they "failed to exercise due care" by not properly monitoring the financial activities of Globex Fund. (SEC Report, Exh. A to Fitappeli Aff., 5). According to the SEC Report, the work did not meet the standards of the GAAP or the GAAS. (SEC Report, Exh. A to Fitappeli Aff., 3). Although it cannot be determined at this stage whether any malpractice by Accounting Firm defendants could have or would have prevented plaintiffs from investing in the fund in the first place, plaintiffs could have liquidated their assets at a much earlier date. According to Mitteldorf, "had the Accounting Firm Defendants ever expressed any suspicion or advised plaintiffs and the public of the fact that the Globex Fund was a fraud, or that the value of its assets were overstated or fictitious, we would have withdrawn our assets on a much earlier **[*30]** date." (Mitteldorf Aff, para. 17). Furthermore, the SEC Order determined that the Accounting Firm defendants contributed to the fraud, which in turn injured the plaintiffs. (SEC Report, Exh. A to Fitappeli Aff., 6). Plaintiffs have properly pleaded the elements of a professional malpractice claim against the Accounting Firm defendants.

The final issue is whether the Sixth Cause of Action for aiding and abetting breach of fiduciary duty claim should be dismissed as to Accounting Firm defendants. A claim for aiding and abetting a breach of fiduciary duty claim has three elements: (1) a breach by a fiduciary of obligations to another, (2) knowing inducement or participation in the breach, and (3) resultant damages. (*Kaufman v Cohen*, 307 AD2d 113, 126, 760 N.Y.S.2d 157 [1st Dept 2003]).

Courts refer to the knowing inducement or participation element as "substantial assistance." (*Yuko Ito v Suzuki*, 57 AD3d 205, 208, 869 N.Y.S.2d 28 [1st Dept 2008]). "Substantial assistance **[**21]** occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." (*Kaufman*, 307 AD2d at 113). The defendant must have had actual, not constructive, knowledge of the breach of fiduciary **[*31]** duty, and conclusory allegations that the aider or abettor knew or should have known about the breach are insufficient. (*Global Minerals & Metals Corp. v Holmes*, 35 AD3d 93, 101-102, 824 N.Y.S.2d 210 [1st Dept 2006]). Also, according to Kaufman, "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." (*Kaufman*, 307 AD2d at 126).

The pleading is not sufficient here to support the aiding and abetting of a breach of fiduciary duty claim. The complaint abounds with alleged examples of the Accounting Firm defendants' failing in their responsibilities to monitor the financial activities of the firm, but the allegations are sparse about their actual knowledge of the nature of duties the Globex defendants owed to plaintiffs and whether the Globex defendants were plaintiffs' fiduciaries. Even if plaintiffs could show that there was actual knowledge, they would have to demonstrate that there was substantial assistance. There is no evidence that Accounting Firm defendants affirmatively assisted, or helped conceal the facts of a fiduciary breach. There may be evidence that Accounting Firm defendants possessed actual **[*32]** knowledge and failed to act; however, failure to act also requires that the defendant owe a fiduciary duty directly to the plaintiff, not alleged here. Therefore, the claim for aiding and abetting the breach of a fiduciary duty will be dismissed.

Claims against Geantasio

The first issue concerns whether the statute of limitations on plaintiffs' claims against Geantasio has run. Choice of law provisions usually only apply to substantive, not procedural issues. (*See Tanges v Heidelberg N. Am*., 93 NY2d 48,53, 710 N.E.2d 250, 687 N.Y.S.2d 604 [1999]). Statutes of limitations are **[**22]** labeled "procedural" because they pertain to "'the remedy rather than the right.'" (*Id*. at 54-55, *quoting Martin v Dierck Equip. Co*., 43 NY2d 583, 588, 374 N.E.2d 97, 403 N.Y.S.2d 185 [1978]).

While the LP A and PPM contain forum selection choice-of-law clauses selecting the Nevada law, the two agreements are not explicit about the requisite statute of limitations. When an agreement is silent on the matter, the court should apply CPLR 202. (*See Global Fin. Corp. v Triarc Corp*., 93 NY2d 525, 528, 715 N.E.2d 482, 693 N.Y.S.2d 479 [1999] ["there is a significant difference between a choice-of-law question, which is a matter of common law, and this Statute of Limitations issue, which is governed by particular terms **[*33]** of the CPLR"]).

According to CPLR § 202, "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued." This means that "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (*Triarc*, 93 NY2d at 528). If the alleged injury is economic in character, the claim usually accrues "where the plaintiff resides and sustains the economic impact of the loss." (*Id*. at 529). Plaintiffs are domiciliaries of New York, Pennsylvania and California, and Geantasio resides in New Jersey. (Compl paras. 1-6, 10). The Court will apply the New York statute of limitations.

As explained below, all claims against Geantasio will be dismissed except for the Fifth Cause of Action for fraud. Therefore, the Court will only address the statute of limitations related to fraud. Under CPLR 213(8), a fraud claim must be brought within six years of accrual of the cause of action, or two **[*34]** years from the date the fraud was discovered or could have been discovered with reasonable diligence. (CPLR 213(8)). The statute of limitations may begin to **[**23]** run when the defendant provides substantial assistance to the fraud. (*See Rostuca Holdings, Ltd v Polo*, 231 AD2d 402, 646 N.Y.S.2d 812 [1st Dept 1996])). Geantasio allegedly provided Accounting Firm defendants materially false information about the Globex Fund in 2007 and thereafter, which the Accounting Firm defendants subsequently provided to plaintiffs in December 2007. (Mitteldorf Aff. paras. 7-8). According to New York's statute of limitations, any fraud that began in 2007 falls within the six-year fraud statute of limitations.

In terms of the substantive law, New York will apply the law chosen by the parties in a contract, as long as it has a "reasonable relationship" to the agreement and the law does not contravene a fundamental public policy of New York. (*Finucane v. Interior Constr. Corp.*, 264 AD2d 618, 620, 695 N.Y.S.2d 322 [1st Dept 1999]). The fact that a party's principal place of business is located in the foreign jurisdiction chosen in the contract is sufficient for the court to adopt that law, even if New York has a superior interest in the litigation. **[*35]** (*See*

Id.). In this case, the contractual choice of law is Nevada. Globex Fund and Northstar were both created under the laws of Nevada, creating a reasonable relationship to the state. (Compl. paras 7-8). Therefore, Nevada law will control determination of contractual issues only.

The first issue is whether plaintiffs failed to adequately plead their claim for breach of contract under the Second Cause of Action. In both Nevada and New York, a breach of contract claim requires Plaintiff to allege that a valid contract existed, that the defendant breached the contract, and that the breach resulted in damages. (*See Saini v International Game Technology*, 434 F Supp 2d 913, 919-920 [D. Nev. 2006]); (*Harris v. Seward Park Housing Corp*., 79 AD3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]). Therefore, a breach of contract claim must allege that a defendant is a party to the applicable contract.

[24]** In the complaint, plaintiffs only allege that "Globex Defendant and/or their authorized agents and/or affiliates" breached the PPM. (Compl. para 66). However, there is nothing in the PPM suggesting that Geantasio was a party in his individual capacity to the LPA or the PPM. (Exhs. B and C to Ree Aff.). While in the PPM **[*36]** Geantasio is mentioned as the CFO of Northstar, the general partner to the Fund, he is not a signatory to the contract. Thus, the breach of contract cause of action against Geantasio is dismissed.

The next question is whether plaintiffs failed to adequately plead their claim for breach of fiduciary duty under the First Cause of Action. A cause of action for breach of fiduciary duty does not necessarily involve a contract, and therefore the Court does not have to apply the Nevada law. New York has similar rules regarding fiduciary relationships, so there is no conflict anyway. In regard to the first element, New York courts state that "[a] fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters with the scope of the relation. '" (*ERC I, Inc. v Goldman Sachs & Co*., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]). "It exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and domination over him." (*People ex. Rel Cuomo v Coventry First LLC*, 13 NY3d 108, 115, 915 N.E.2d 616, 886 N.Y.S.2d 671 [2009]).

Plaintiffs allege that it was Geantasio's job to validate the accuracy of information that Globex **[*37]** Fund sent to the Accounting Firm defendants. (Compl. para. 27). Plaintiffs refer to him as a "gatekeeper." (Pl.'s Opp. Mem., 18). Geantasio contends that plaintiffs' mere statements that a fiduciary relationship existed are simply conclusory, and therefore insufficient. Geantasio asserts that there should be no fiduciary duty because plaintiffs did not claim that Geantasio was a party to the agreements or that he was an officer or employee of the Globex Fund. (Geantasio Mem. 12). Furthermore, "plaintiffs' own subjective claims of reliance on defendants' expertise" **[**25]** and not enough to support a fiduciary duty. (*RNK Capital LLC*, 76 AD3d 840, 841, 907 N.Y.S.2d 476 (citations and internal quotation marks omitted)).

While plaintiffs are correct that there need not be a contractual relationship for a fiduciary duty to exist, there does need to be some reliance on that party's expertise. Plaintiff's cite the legal principle that, "a corporate officer stands as a fiduciary to a corporation and this fiduciary relationship requires a duty of good faith, honesty and full disclosure." (Pl's Opp Mem, 18). However, such principle is inapplicable here, as the Fund is a partnership and not a corporation. Making the relationship **[*38]** more tenuous, Geantasio was the CFO of Northstar, the general partner of the Globex Fund. There is also no evidence that plaintiffs relied on Geantasio. Geantasio is only mentioned in the PPM as the CFO of Northstar. (*See Hynes v Sbarro, Inc*., 2011 NY Slip Op 31355U, *9-10 [Sup Ct, Suffolk County, 2011]) (explaining that when a corporation was in a partnership, the CEO of the corporation did not owe a fiduciary duty to the limited partners where the CEO did not sign an agreement in his personal capacity). Therefore, the fiduciary duty claim against Geantasio fails.

It should be noted here that Peister, the CEO of Globex Fund, *did* sign the LPA, and that is why judgment is entered against him in regard to the breach of fiduciary duty claim, and not against CFO Geantasio. (See LPA, Exh. B to Ree Aff., 35)

The next issue is whether plaintiffs failed to adequately plead their claim for unjust enrichment. According to New York law, "'[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what it sought to be recovered.'" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 411, 926 N.Y.S.2d 494 [1st Dept 2011]) **[*39]** (*quoting Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182, 944 N.E.2d 1104, 919 N.Y.S.2d 465 [2011])). While an unjust enrichment claim does not require **[**26]** privity, there still must be "a connection or relationship between the parties that could have induced reliance or inducement on the plaintiffs part." Additionally, "an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest." (*Georgia Malone & Co., Inc*., 86 AD3d at 408).

In this case, plaintiffs claim that they paid money into the Globex Fund that Geantasio used as payment for his services, and such services were allegedly improperly performed. (Mitteldorf Aff. para 3). Just as with the breach of fiduciary duty claim, there is nothing to suggest that plaintiffs relied on Geantasio personally in any way, or that services were performed at Geantasio's personal behest. The unjust enrichment claim against Geantasio is dismissed.

The next issue is whether plaintiffs adequately pled their claim for negligence. In New York, a negligence claim requires the plaintiff to show that there is an existing duty of care, breach, legal causation and damages. (*See Friedman v Anderson*, 23 AD3d 163, 165, 803 N.Y.S.2d 514 [1st Dept 2005]). Plaintiffs argue **[*40]** that Geantasio's duty of care stemmed from the fact that he "[had] developed and implemented the system of internal accounting controls ... [and] is responsible for maintaining accountability by performing random internal reconciliations, as well as assisting the outside independent auditors." (Compl. para. 27). According to plaintiffs, Geantasio breached this duty by giving the Accounting Firm defendants materially false information, and that information was later passed on to investors, thus proximately causing the injuries in question. (Mitteldorf Aff. paras 6-8).

Geantasio argues that he did not owe plaintiffs a duty of care, and that the economic loss doctrine that is followed in New York bars the negligence claim here ("absent...injury to person or property, a plaintiff may not recover in negligence for economic loss" (*Clark-Fitzpatrick, Inc. v Long Island R. Co*., 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987] (citations omitted)). However, the sufficiency of **[**27]** the negligence cause of action against Geantasio is, moot, because this claim is barred by the statute of limitations, as mentioned previously, and will be dismissed.

The next issue is whether plaintiffs adequately pled their claim for fraud. Under **[*41]** the New York law, the elements of fraud are as follows: A prima facie claim for fraud requires plaintiff to plead the misrepresentation of a material fact, such fact was untrue, there was intent to induce reliance, and plaintiff justifiably relied, resulting in injury. (*See Ross v Louise Wise Servs., Inc*., 8 NY3d 478, 488, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]). Furthermore, fraud must be pleaded with particularity. (CPLR 3016(b)).

Plaintiffs allege that it was Geantasio's obligation to validate information passed on to investor plaintiffs (Compl. para. 27), and that the information distributed to the Accounting Firm defendants was materially false. (Mitteldorf Aff. para. 6). According to plaintiffs, Geantasio either knew that such information was false or he acted with gross recklessness by not checking its accuracy. (Mitteldorf Aff. paras 6-9). As a result, plaintiffs claim that it was reasonable and justifiable for them to rely on Geantasio's representations "because Geantasio assured them that the Globex Fund was a legitimate investment fund, that the financials were accurate and that he himself lost money." (Pl's Mem., 26). Finally, plaintiffs assert that that Geantasio's conduct caused them to lose $1,400,000. **[*42]** (Compl. paras 41-45). The alleged facts are sufficient at this stage, and Geantasio's motion to dismiss the fraud claim is denied.

Geantasio also requests to have any punitive damages precluded, as Plaintiff is seeking punitive damages for the breach of fiduciary duty and fraud claims. (Compl paras 61, 89). A trial court may award punitive damages where it finds that the defendant's conduct amounts to to "willful or wanton negligence" or to "a wonton or reckless disregard of plaintiff's rights." **[**28]** (*Giblin v Murphy*, 73 NY2d 769, 772, 532 N.E.2d 1282, 536 N.Y.S.2d 54 [1988]) (quotations omitted). It is premature to gauge Geantasio's conduct against this standard, so the Court will not preclude such damages.

Geantasio finally asks the court to dismiss this action based on CPLR §4545(c) on the grounds that any recovery here functions as a double recovery for plaintiffs, because the February 3, 2011 Order of the CFTC already directed Northstar and Peister to pay restitution and interest to investors of the Fund. (Exh. D to Ree Aff., 10-13.) This argument is misguided, as CPLR 4545 is concerned with reducing damages when the case has been decided, not disqualifying a case at an early stages. According to CPLR §4545(c), "Any **[*43]** collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict." (CPLR §4545(c)). The motion to dismiss based on double recovery is denied.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for a default judgment against Globex defendants is granted as to the First and Fifth Causes of Action; and it is further

ORDERED that plaintiffs' motion for default judgment against Globex defendants is denied as to the Second, Third and Fourth Causes of Action; and it is further

ORDERED that the motion to dismiss the Fifth, Seventh, Eighth and Ninth Causes of Action against Accounting Firm defendants are denied; and it is further

ORDERED that the motion to dismiss the Sixth Cause of Action against Accounting Firm defendants is granted, and the Sixth Cause of Action against Accounting' Firm defendants is dismissed; and it is further

ORDERED that the motion to dismiss the First, Second, Third and Fourth Causes of Action against Geantasio is granted, and the First, Second, Third and Fourth Causes of Action against Geantasio are dismissed; and it is further

[29]** ORDERED that the motion to dismiss the Fifth Cause **[*44]** of Action against Geantasio is denied; and it is further

ORDERED that Geantasio's motion to preclude punitive damages is denied without prejudice; and it is further

ORDERED that defendants serve and file their answer to the causes of action remaining in the complaint within thirty (30) days from the date of filing of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on May 15, 2013 at 2:00 pm

This constitutes the decision and order of the Court.

Dated: January 31, 2013

New York, New York

ENTER:

/s/ Ellen M. Coin

Ellen M. Coin, A.J.S.C.

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