UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN KRASNER, et al., Plaintiffs	**MEMORANDUM DECISION**
v.	11 CV 4092 (VB)
RAHFCO FUNDS LP, et al., Defendants.	

Briccetti, J.:

Plaintiffs commenced this action asserting claims under the federal securities laws and supplemental state law claims. Multiple defendants, including Meidinger & Associates, CPA's Prof. LLC and Susan Meidinger ("Meidinger defendants"); Spicer Jeffries LLP; and SFG Accounting PLLC, have moved to dismiss the amended complaint. This ruling resolves only the motions filed by these defendants. (Docs. ##99, 117, 125). For the following reasons, Meidinger defendants' motion is GRANTED; Spicer Jeffries's motion is GRANTED; and SFG Accounting's motion is GRANTED.

The Court possesses jurisdiction over this case pursuant to 28 U.S.C. § 1331 as to the federal law claims and 28 U.S.C. § 1367 as to the state law claims.

BACKGROUND

For purposes of ruling on the motion to dismiss, the Court accepts all well-pleaded allegations of the amended complaint as true.

According to the amended complaint, this case stems from an alleged Ponzi scheme in which certain defendants fraudulently solicited plaintiffs to invest in various investment funds, and then either misappropriated the investors' money or failed to invest it as promised. The amended complaint is comprised of group allegations which make it difficult for the Court to

determine which defendant performed which actions. Many of the defendants are separate, unrelated individuals and corporate entities and lumping them together confuses any role they may have had in the underlying alleged Ponzi scheme. Nonetheless, the Court has attempted to distill, as best it could, the following factual background.

Prior to the creation of the alleged Ponzi scheme, defendant Anthony Johnson was involved in a securities fraud in 2002 and 2003. According to the amended complaint, he pleaded guilty to crimes related to such fraud in the Eastern District of New York. As a result of his having pleaded guilty, Johnson was barred from any association with any NASD member as of October 12, 2006.

In 2004, Anthony Johnson, together with defendants Vincent Puma, Ward Onsa, and Randal Hansen created defendant Capstone Investment Funds, LLP, also known as Capstone Trading Group, LLC. These individuals then formed several other entities, including Innovative Investment Opportunities, Inc., also known as IIE, Inc.; IIE; Innovative Investment Enterprises; IIE I; Gibraltar Funds; Gibraltar I; Gibraltar II; Gibraltar Trading Opportunities II, Inc.; and Gibraltar Trading Opportunities, Inc., also known as GTO I and GTO II.[1] Plaintiffs allege these investment funds then transferred money among themselves so as to deceive investors.

Randal Hansen told investors these investment funds would be dissolved in 2007. Nonetheless, Gibraltar Funds and Gibraltar Partners continued sending out investor statements through 2010. Plaintiffs allege Gibraltar Trading Opportunities was not dissolved, but suspended for failing to pay its taxes. Plaintiffs also allege Capstone Investment Funds LLP had its certification revoked by the state of South Dakota on November 9, 2007.

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[1] Only Gibraltar Funds is a defendant in this matter.

The alleged Ponzi scheme that is the subject of the amended complaint was made up of the following investment funds: defendants Rahfco Funds LP; Rahfco Investment Funds LP; Rahfco Select LP; Rahfco Growth Fund LP; Gibraltar Partners d/b/a Gibraltar Partners Inc.; and Gibraltar Funds d/b/a Gibraltar Funds Inc. (collectively, "fund defendants"). According to the amended complaint, defendant Rahfco Management Group LLC was the general partner of the fund defendants. Most of the checks solicited from plaintiffs were made payable to Gibraltar Partners.

Defendant Capstone Investment Funds LLP allegedly sent letters to investors, including plaintiffs, informing investors that Capstone's accountants would be providing investors with quarterly statements of monthly returns. Such letters contained contact information and correspondence from defendants Anthony Johnson and Randal Hansen. According to Capstone's quarterly statements from 2006 through the first quarter of 2007, defendant Meidinger & Associates CPA's Prof LLC was to provide accounting services. Letters from Anthony Johnson and Randal Hansen indicated defendant Susan Meidinger would provide Gibralter Funds with accounting, financial statements, and tax-related work.

Plaintiffs allege Anthony Johnson solicited funds from investors and had a prominent managerial and trading role with fund defendants. This is despite the fact that he was not mentioned in Rahfco Funds LP's prospectus. Plaintiffs also allege Robert Johnson, Christine Johnson, Allison Johnson, Robert Johnson, Sr., and Annette Johnson had similar roles in soliciting investors. Glenn Griffin is alleged to have been an agent for Anthony Johnson and Robert Johnson in soliciting investments.

Randal Hansen is listed in the Rahfco Funds LP investment prospectus as the founder, principal member, and president of Rahfco Funds LP. Defendant Vincent Puma is listed in the

Rahfco Funds LP prospectus as the manager, controlling member, and primary portfolio manager. Defendant Tara Hansen-Leinen is listed as the Vice President of Operations at Rahfco. Defendants Kevin Nugent and Ward Onsa were listed in the Rahfco Funds LP's prospectus as the partnership's traders.[2]

The Rahfco Funds LP prospectus included defendant Hudson Partners NYC LLC as a subadvisor which would manage most of the portfolio, execute trades, provide information and advice, carry out research, and provide analysis and recommendations to the general partners. The prospectus listed Spicer Jeffries LLP as the fund's auditor and SFG Accounting PLLC as the fund's accountant.

Plaintiffs began sending checks to fund defendants in 2005. Of the checks identified in the amended complaint as being sent to fund defendants, only one was actually made payable to a Rahfco fund. The other 37 checks were issued either to Gibraltar Partners or A.R.C. Ventures.

I. Allegations as to Meidinger defendants

Plaintiffs allege Meidinger & Associates CPA's Prof LLC was the accounting firm designated to provide accounting services to fund defendants from 2006 through the first quarter of 2007. In the beginning of 2007, plaintiffs received letters from defendant Anthony Johnson stating that Meidinger defendants would be the accountants for Gibraltar Funds, Inc., and Capstone Investment Funds. Accordingly, plaintiffs Michele and Tamie Tellone received quarterly statements for Capstone Investment Funds representing the Capstone, GTO I, and GTO II funds.

Plaintiffs allege these statements were inaccurate, and the Tellones relied upon the

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[2] Neither Nugent nor Onsa has been served with the complaint or amended complaint.

inaccurate statements. Plaintiffs further allege Meidinger defendants presented statements for fraudulent companies.

II. Allegations as to Spicer Jeffries

According to the amended complaint, Spicer Jeffries failed to audit Rahfco Funds LP and Rahfco Management Group LLC properly. Plaintiffs allege, "upon information and belief" that sometime in 2008, Spicer Jeffries was engaged in an audit of Rahfco Funds LP's financial statement. Further, "upon information and belief," "Spicer Jeffries, through the care of general partner and defendant Randy Hansen, mailed to then investors, a statement providing a review of each party's capital account according to Rahfco Management Group LLC." Plaintiffs allege they relied upon the prospectus, including the fact that Spicer Jeffries was named as the auditor.

Plaintiffs assert that in the spring of 2011, Randy Hansen sent a letter to plaintiffs stating: "It has recently come to my attention that for some time, the earnings figures in our statements have been inaccurate." Plaintiffs argue if Spicer Jeffries had properly audited Rahfco Funds LP, it would have found the inaccurate earnings figures.

Plaintiffs further claim that if Spicer Jeffries was no longer the auditor of Rahfco Funds LP after 2007, it had a fiduciary obligation to inform the investors of that fact.

III. Allegations as to SFG Accounting

According to the amended complaint, SFG Accounting presented quarterly statements for Rahfco Funds LP and Rahfo Management Group, LLC, from the second quarter of 2007 through the last quarter of 2010. (Amended Complaint, ¶ 175.)[3] These quarterly statements were

[3] Later in the amended complaint, plaintiffs allege "[f]rom the second quarter of 2007 until and through the present," SFG Accounting presented quarterly statements "each and every quarter." (Amended Complaint, ¶ 302.) Obviously, these two statements are inconsistent.

certified and "presented" by SFG Accounting and contained inaccurate earnings figures. Plaintiffs allege SFG Accounting knew or should have known about these inaccurate figures and therefore knew or should have known about the underlying alleged fraud. Plaintiffs further assert if SFG Accounting did not know about the fraud, it was grossly negligent. In addition, plaintiffs contend SFG Accounting materially contributed to the inaccurate figures. Finally, plaintiffs assert they relied upon the inaccurate statements.

Plaintiffs assert claims against movants for violations of 15 U.S.C. § 78j(b) and Rule 10b-5 as well as state law claims of conversion, unjust enrichment, common law constructive trust, common law accounting, breach of fiduciary duty, and negligence. Movants have moved to dismiss each claim asserted against them.

DISCUSSION

The function of a motion to dismiss pursuant to Rule 12(b)(6) is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King, 467 U.S. 69, 73 (1984). The complaint must contain the grounds upon which the claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A plaintiff is obliged to amplify a claim with some factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the alleged conduct. Ashcroft v. Iqbal, 556 U.S. 662 (2009). To determine which allegations it may consider, the Court first identifies conclusory pleadings that are not entitled to the assumption of truth. Id. at 678 ("Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice.").

I. Venue as to Meidinger Defendants

Meidinger defendants first move to dismiss this case pursuant to Rule 12(b)(3) for improper venue. Venue in a securities action under the Securities Exchange Act is governed exclusively by 15 U.S.C. § 78aa and not 28 U.S.C. § 1391. SST Global Tech., LLC v. Chapman, 270 F. Supp. 2d 444, 452 (S.D.N.Y. 2003). Once venue has been established under Section 78aa, the Court may entertain pendent state law claims as venue is appropriate as to all claims. See Greenwood Partners v. New Frontier Media, 2000 U.S. Dist. LEXIS 2824, at *22-23 (S.D.N.Y. Mar. 9, 2000) ("[B]ecause plaintiffs have met their burden of proving venue for their securities law claim, we need not reach the question of whether they can independently base venue on their state law claims."); Gordon v. Hohmann, 434 F. Supp. 629, 631 (S.D.N.Y. 1977) ("As venue is proper for the claims alleged pursuant to . . . the Securities Exchange Act of 1934, venue is also proper for the common law claims advanced by the plaintiffs.").

Section 78aa provides that: "Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder . . . may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa. It is settled that any non-trivial act in the forum district which helps to accomplish a securities law violation is sufficient to establish venue. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 176 (S.D.N.Y. 2006). Additionally, "[t]he act or transaction committed within the district need not constitute the core of the violation, but should be an important step in the fraudulent scheme." Como v. Commerce Oil Co., Inc., 607 F. Supp. 335, 341 (S.D.N.Y. 1985).

Where the complaint alleges a conspiracy among multiple defendants, venue is

appropriate as to all defendants when it is established even as to one. See Wyndham Assocs. v. Bintliff, 398 F.2d 614, 620 (2d Cir. 1968) (For venue to be proper over a specific defendant, it is enough "if there occurred in that district any act or transaction by any defendant in furtherance of a manipulative scheme in which [the specific defendant] knowingly participated."); Ryan v. Allen, 1997 U.S. Dist. LEXIS 13783, at *11 (S.D.N.Y. Sept. 9, 1997) ("[U]nder the co-conspirator venue theory, where an action is brought against multiple defendants alleging a common scheme of acts or transactions in violation of securities statutes, so long as venue is established for any of the defendants in the forum district, venue is proper as to all defendants.") (quoting Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)).

Plaintiffs allege actions by defendants, specifically defendant Anthony Johnson, which occurred in the Southern District of New York. See, e.g., Amended Complaint, ¶ 338 (alleging communications at Hollow Brook Golf Club, which, based on an internet search, the Court presumes is in Cortlandt Manor in Westchester County). Accordingly, the Court finds venue is proper.

II. Violations of the Securities Exchange Act of 1934

Count One of the amended complaint alleges movants violated Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5. Claims for securities fraud are subject to the heightened pleading standard of Rule 9(b). Ganino v. Citizens Utils. Co., 228 F.3d 154, 168 (2d Cir. 2000). To state a claim for a violation of Section 10(b) and Rule 10b-5 requires plaintiffs plead defendants "(1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff's reliance was the proximate cause of its injury." ATSI Communs., Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 105 (2d Cir. 2007); Stoneridge Investment

Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008). Furthermore, to be held liable under Section 10(b), defendants must have made the statement. It is not sufficient that defendants be referenced in a client's prospectus. See Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

Pursuant to Rule 9(b), when claims are based on a misrepresentation, plaintiffs must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000). Furthermore, plaintiffs' allegations must provide facts "that give rise to a strong inference of fraudulent intent." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994).

Rule 10b-5 makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." 17 C.F.R. § 240.10b-5(b). In Janus Capital Group, Inc. v. First Derivative Traders, the Supreme Court read the word "make" in the rule narrowly such that only "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it" is the "maker" of a statement. 131 S. Ct. at 2302. In so holding, the Court analogized to a situation when a speechwriter writes

a speech for a speaker. In such cases, the Court concluded that the speaker is the "maker" because he, not the speechwriter, ultimately bears credit or blame for the words spoken. Id. As applied to a prospectus, the Supreme Court held that only the filer of the prospectus could be held liable for misstatements therein, absent allegations that either (a) the defendant filed the prospectus and falsely attributed statements to the purported filer or (b) there is evidence on the face of the prospectus that the statements in the prospectus came from the defendant. Id., 131 S. Ct. at 2304-05.

To state a claim, plaintiffs must identify misleading statements and "demonstrate with specificity why and how that is so." Rombach v. Chang, 355 F.3d 164, 174 (2d Cir. 2004). The "why" inquiry – why the statement is misleading – is essential to stating a claim. Id., 355 F.3d at 172; In re Merrill Lynch Inv. Mgmt. Funds Sec. Litig., 434 F. Supp. 2d 233, 239 (S.D.N.Y. 2006); 15 U.S.C. § 78u–4. As the Court of Appeals has observed, "to state a § 10(b) claim against an issuer's accountant, a plaintiff must allege a misstatement that is attributed to the accountant 'at the time of dissemination,' and cannot rely on the accountant's alleged assistance in the drafting or compilation of a filing." Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 153 (2d Cir. 2007). In addition, "[p]ublic understanding that an accountant is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the accountant. Unless the public's understanding is based on the accountant's articulated statement, the source for that understanding – whether it be a regulation, an accounting practice, or something else – does not matter." United States v. Finnerty, 533 F.3d 143, 150 (2d Cir. 2008).

A. Claim as to Meidinger Defendants

Meidinger defendants argue plaintiffs have failed to plead any misrepresentations by

them or demonstrate how any statements by them were misleading.

In plaintiffs' response, they assert Meidinger defendants reported false earnings. This, however, is nowhere pleaded in the amended complaint. Instead, the amended complaint alleges Meidinger defendants presented inaccurate quarterly statements to Tellone plaintiffs. There is no indication why or how these statements were inaccurate. Plaintiffs do not allege what information within the quarterly statements was inaccurate or misleading. Nor do they specify how the statements were prepared in violation of generally accepted accounting principles ("GAAP"), despite alleging they expected the statements to be made in accordance with GAAP. See In re Alstom SA Secs. Litig., 406 F. Supp. 2d 433, 485 (S.D.N.Y. 2005) (dismissing claim based on GAAP violations when plaintiffs failed to identify how violations were related to misleading statements); see also Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir. 1999) ("Allegations of a violation of GAAP provisions or SEC regulations, without corresponding fraudulent intent, are not sufficient to state a securities fraud claim."). Moreover, while plaintiffs allege "Meidinger presented statements for fraudulent companies," they do not specify which companies were fraudulent or how in fact they were fraudulent. Does this allegation mean the companies did not exist or were mere shells? Or does it mean they engaged in fraudulent behavior? Plaintiffs have failed to meet their burden under Rule 9(b).

Plaintiffs argue that "substantial participation in preparation of an unaudited statement may be sufficient for primary liability under § 10b," citing In re Warnaco Group, Inc. Opinion Sec. Litig. (II), 388 F. Supp. 2d 307, 314 (S.D.N.Y. 2005), aff'd sub nom. Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147 (2d Cir. 2007). In dicta, the court in Warnaco Group, assumed substantial participation could create liability under Section 10b before finding plaintiffs had failed to allege such participation. Id., 388 F. Supp. 2d at 314-15. The Court will not read that

statement as setting a standard for liability. Instead, the Court will adhere to Judge Cedarbaum's primary holding in Warnaco Group, which is that "liability may not generally attach to a public auditor for unaudited public statements the company made, which is the case with [the client's] quarterly statements." Id., 388 F. Supp. 2d at 314; see also In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319, 333 (S.D.N.Y. 2004) ("[A]llegations that an auditor helped create financial documents, alone, have been held insufficient to sustain 10(b) liability.").

Plaintiffs further identify two other statements which they allege are misstatements attributable to Meidinger defendants. As to plaintiffs' claims regarding any letters by Susan Meidinger attesting to the reliability and trustworthiness of Randy Hansen, such claims were not included in the amended complaint. Further, these letters were not the audited or certified statements of an accountant. Plaintiffs' claim concerning a letter from Anthony Johnson that Meidinger defendants would be the accountant for Gibraltar Funds, Inc., and Capstone Investment Funds are statements attributable to Johnson, not Meidinger defendants. See Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. at 2302.

Plaintiffs' Section 10(b) claim against Meidinger defendants is dismissed.

B. Claim as to Spicer Jeffries

As to claims against Spicer Jeffries regarding the prospectus, Spicer Jeffries cannot be liable under Section 10(b) for statements in the prospectus under Janus Capital Group, Inc. v. First Derivative Traders. There is no allegation that Spicer Jeffries "made" any statements in the prospectus by authoring or claiming authorship of the prospectus or that Spicer Jeffries had ultimate authority over the statements in the prospectus.

Plaintiffs also contend Spicer Jeffries violated Section 10(b) by failing to audit Rahfco Funds LP appropriately despite indications in the prospectus that it would. Alleging a failure to

disclose material information, where there is no duty to speak, does not state a claim for a misrepresentation under Section 10(b). In re Marsh & McLennan Cos. Sec. Litig., 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006); Chiarella v. United States, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak."). When a defendant does speak, however, its speech must be complete and accurate. See Roeder v. Alpha Indus., Inc., 814 F.2d 22, 26 (1st Cir. 1987).

Plaintiffs assert Spicer Jeffries "spoke" through Hansen's letters to investors and its failed audit. The Court rejects this argument. As to Hansen's letter, there is no well-pleaded allegation that Spicer Jeffries drafted, published, wrote,"spoke," or made a statement in the letter. Therefore, the fact that Hansen sent it did not create a duty for Spicer Jeffries to speak accurately in it or later. See Shapiro v. Cantor, 123 F.3d 717, 721 (2d Cir. 1997) ("[I]f an accountant does not issue a public opinion about a company, although it may have conducted internal audits or reviews for portions of the company, the accountant cannot subsequently be held responsible for the company's public statements issued later merely because the accountant may know those statements are likely untrue."). Second, there are no allegations as to how the audit was done improperly or whether it was even done at all.

In addition, plaintiffs fail to cite any statute or case law for the proposition that Spicer Jeffries owed them a fiduciary duty which would necessitate Spicer Jeffries telling plaintiffs when its engagement ended. In fact, courts in this District and in New York have repeatedly held that an accounting firm engaged to conduct an audit does not owe a fiduciary duty to the company's investors or shareholders. See In re Warnaco Group, Inc. Opinion Sec. Litig. (II), 388 F. Supp. 2d at 318; Friedman v. Anderson, 803 N.Y.S.2d 514, 516-17 (App. Div. 1st Dep't 2005); Tal v. Superior Vending, LLC, 799 N.Y.S.2d 532, 533 (App. Div. 2d Dep't 2005); see

also BHC Interim Funding, L.P. v. Finantra Capital, Inc., 283 F. Supp. 2d 968, 987 (S.D.N.Y. 2003) ("When the allegedly aggrieved party is at best a third party to an accountant-client relationship, and no commercial transaction is executed between two parties – indeed, when no relationship whatsoever exists between two parties – no fiduciary duties may be imposed on either party.").

In response to defendant's argument, plaintiffs contend information which would support this claim is entirely within the possession of Spicer Jeffries. The Court does agree that where information is solely in the possession of the defendant, it would be unfair to require plaintiffs to plead facts which they cannot know until discovery. See DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1248 (2d Cir. 1987); Brims v. Ramapo Police Dep't, 2011 U.S. Dist. LEXIS 152760, at *8 (S.D.N.Y. Dec. 23, 2011) (citing Arista Records LLC v. Doe, 604 F.3d 110, 120 (2d Cir. 2010)). In this case, however, the Court disagrees that the information which would support plaintiffs' claim is solely within defendants' control. Plaintiffs presumably received the prospectus. They presumably read it. They can determine if any statements are attributed to Spicer Jeffries.

Similarly, plaintiffs allege Spicer Jeffries sent them a letter through Hansen which provided a review of each investor's capital account.[4] This letter was sent on Rahfco Funds, LP, letterhead, refers to Spicer Jeffries in the third-person, and is signed by Randy Hansen on behalf of Rahfco Management Group, LLC. Each of these points is inconsistent with an allegation that Spicer Jeffries made the statements within the letter. They do not support the allegation that

[4] Although plaintiffs do not attach such letter to the amended complaint, having referred to it and based a claim on the alleged misrepresentations therein, it is appropriate for the Court to review it in deciding the Rule 12(b)(6) motion. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)

Spicer Jeffries had ultimate control over the content of the letters. Therefore, plaintiffs cannot maintain claims under Rule 10b-5 against Spicer Jeffries.

Tellingly, in their opposition, plaintiffs do not cite Janus Capital Group, Inc. v. First Derivative Traders. Plaintiffs fail to distinguish this case or otherwise show that Spicer Jeffries made any statements upon which it could be held liable under Section 10(b). Janus, however, represents binding authority upon this Court. The Supreme Court's holding that only a party with ultimate authority over a statement is the maker of the statement, combined with plaintiffs' failure to allege any facts which would support such a finding, dooms plaintiffs' Section 10(b) claim against Spicer Jeffries.[5]

C. Claim as to SFG Accounting

SFG Accounting bases its motion to dismiss the Section 10(b) claim on the amended complaint's failure to plead scienter adequately. In a securities fraud case, plaintiffs must plead facts supporting the alleged violation and scienter with particularity. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007). Scienter has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." Id., 551 U.S. at 319 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-194 & n.12 (1976)). It can also be met by alleging a strong inference of reckless disregard for the truth. South Cherry St., LLC v. Hennessee Group LLC, 573 F.3d 98, 109 (2d Cir. 2009). "To qualify as 'strong' within the intendment of [the Private Securities Litigation Reform Act of 1995 ("PSLRA")] . . ., an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." Tellabs, Inc., 551 U.S. at 314.

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[5] Having found no statements made by either Meidinger defendants or Spicer Jeffries, the Court does not reach the issues of scienter, causation, or reliance.

This state of mind can be met by alleging defendants: "(1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." South Cherry St., LLC v. Hennessee Group LLC, 573 F.3d at 110 (quoting Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000)). For "recklessness on the part of a non-fiduciary accountant [to] satisfy Ernst & Ernst's requirement of scienter," it must "approximate an actual intent to aid in the fraud being perpetrated by the audited company." Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 120-21 (2d Cir. 1982); see also South Cherry St., 573 F.3d at 110.

Plaintiffs' opposition to SFG Accounting's motion relies heavily on the conclusory allegations of the amended complaint and ignores the dearth of specific factual allegations which are necessary to support such conclusions. Plaintiffs allege SFG Accounting presented inaccurate quarterly statements. There is no indication in the amended complaint that SFG Accounting had the requisite scienter to support a claim under Section 10(b). Plaintiffs have failed to include sufficient allegations "to give rise to a strong inference of either fraudulent intent or conscious recklessness." South Cherry St., LLC v. Hennessee Group LLC, 573 F.3d at 112. Just as in South Cherry St., there are no allegations defendant had knowledge its statements were untrue or allegations of facts relating to fund defendants which was known to SFG Accounting at the time it made its statements which create a strong inference of wrongful conduct.

Furthermore, there are no allegations SFG Accounting benefitted from any wrongful conduct or was aware of the purported truth and chose to ignore it. When read in its entirety, plaintiffs' claims against SFG Accounting, as well as the other accountant and auditor

defendants, support an inference of "garbage in, garbage out." That is, SFG Accounting's statements may have been allegedly misleading, but this is more likely the result of obtaining wrong numbers from fund defendants than fraudulent or devious behavior by SFG Accounting itself. Plaintiffs' claims are not cogent and are not as compelling as any alternative inference of nonfraudulent intent. This claim is dismissed as to SFG Accounting.

III. Claim under Section 15(b)(6)(B)(i) of the Exchange Act

In response to Meidinger defendants' motion, plaintiffs have withdrawn any claims under Section 15(b)(6)(B)(i) of the Exchange Act as it relates to Meidinger defendants.

IV. Claim for Conversion

Plaintiffs allege movants converted plaintiffs' investment funds for their own use.[6] Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Vigilant Ins. Co. of Am. v. Hous. Auth., 87 N.Y.2d 36, 44 (1995). To state a claim for conversion under New York law, plaintiffs must allege: "(1) an actionable wrong other than breach of contract caused plaintiff's injury; (2) plaintiff had ownership of the funds or an immediate superior right of possession to the funds at the time they were converted; (3) defendant exercised unauthorized dominion over the funds; (4) the funds were specific and identifiable; and (5) defendant was to have treated the funds in a particular manner but they were not so treated." Kohler v. Errico, 2011 U.S. Dist. LEXIS 36985, at *17 (S.D.N.Y. Feb. 23, 2011); Rozsa v. May Davis Group, Inc., 152 F. Supp. 2d 526, 534 (S.D.N.Y. 2001). "Money may be the subject of conversion if it is specifically identifiable and

[6] Despite movants' arguments, the Court finds the Martin Act, N.Y. Gen. Bus. Law § 352, does not preempt any of plaintiffs' state law claims because such claims do not sound in fraud. See Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc., 18 N.Y.3d 341 (2011).

there is an obligation to return it or treat it in a particular manner." Hoffman v. Unterberg, 780 N.Y.S.2d 617, 619 (App. Div. 2d Dep't 2004). "The conversion claim must be for recovery of a particular and definite sum of money, although the specific bills are not identified." ADP Investor Commun. Servs. v. In House Atty. Servs., 390 F. Supp. 2d 212, 224 (E.D.N.Y. 2005)

Plaintiffs allege defendants converted plaintiffs' investment funds when they received payments for their work from fund defendants. Specifically, they assert the funds were converted when Randal Hansen and fund defendants paid expenses owed to movants with funds from the investors.

Plaintiffs' argument must fail because the funds paid by fund defendants to Meidinger defendants, Spicer Jeffries, or SFG Accounting are not specific or identifiable. Plaintiffs cannot identify with any degree of certainty the money which was presumably paid to movants as being from their "investments." Plaintiffs rely on Newbro v. Freed, in which the court found that a victim of a fraudulent investment scheme could maintain a conversion claim against another victim because the plaintiff could specifically identify the funds paid to the other investor through the investors' respective account statements. See 409 F. Supp. 2d 386, 395 (S.D.N.Y. 2006). Based on the allegations of the amended complaint, plaintiffs here cannot specifically identify which of their funds went to movants. This claim is therefore dismissed.

V. Claim for Unjust Enrichment

Movants next move for dismissal of plaintiffs' claim for unjust enrichment. To assert a claim for unjust enrichment under New York law, plaintiffs must allege "(1) that the defendant was enriched; (2) that the enrichment was at the plaintiff's expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff." Golden Pac. Bancorp v. FDIC, 273 F.3d 509, 519 (2d Cir.

2001). A claim for unjust enrichment alleges that defendant has received money or a benefit at the expense of plaintiffs. Paramount Film Distrib. Corp. v State of New York, 30 N.Y.2d 415, 421 (1972).

Plaintiffs' claim is deficient because there are no allegations that movants benefitted at plaintiffs' expense. See In re Leslie Fay Cos., 918 F. Supp. 749, 770 (S.D.N.Y. 1996). According to the amended complaint, plaintiffs paid money to fund defendants who then allegedly paid movants for their services as accountants and auditors. The Court finds these allegations are insufficient to state a claim for unjust enrichment.

VI. Claim for Constructive Trust

Defendants next move to dismiss plaintiffs' claim for a constructive trust. To impose a constructive trust under New York law, plaintiffs must demonstrate "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." Sharp v. Kosmalski, 40 N.Y.2d 119, 121 (1976). The Court of Appeals has warned "the absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity." In re Koreag, Controle et Revision S.A., 961 F.2d 341, 353 (2d Cir. 1992).

Plaintiffs contend the Court should apply a relaxed standard in evaluating whether plaintiffs have properly stated a claim against movants because of movants' "statements" to plaintiffs.

Concerning Meidinger defendants and SFG Accounting, plaintiffs have failed to identify a confidential or fiduciary relationship, a promise, or unjust enrichment. Therefore, they cannot state a claim for a constructive trust.

As to Spicer Jeffries, plaintiffs admit there was no contractual relationship between Spicer Jeffries and them. Further, there are no allegations concerning statements made by Spicer

Jeffries. The two purported statements – Hansen's letter and the prospectus – were not drafted, issued, or published by Spicer Jeffries. The amended complaint is devoid of any promises made by Spicer Jeffries to plaintiffs. According, plaintiffs cannot assert a claim for a constructive trust against Spicer Jeffries.

VII. Claim for an Accounting

"A party seeking an accounting must first establish four conditions: (1) relations of a mutual and confidential nature; (2) money or property entrusted to the defendant imposing upon him a burden of accounting; (3) that there is no adequate legal remedy; and (4) in some cases, a demand for an accounting and a refusal." St. John's Univ. v. Bolton, 757 F. Supp. 2d 144, 171 (E.D.N.Y. 2010) (quoting Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 179 (S.D.N.Y. 1994)). Plaintiffs assert an accounting is proper to ensure movants have sufficient assets to pay any damages. It would also enable plaintiffs to determine where movants' payments came from and the extent of culpability to plaintiffs.

The Court rejects these arguments. Plaintiffs have failed to meet the threshold conditions for obtaining an accounting. There are no allegations of a mutual or confidential nature or that plaintiffs entrusted either movant with any funds. This claim is dismissed.

VIII. Claim for Breach of Fiduciary Duty

Movants next move to dismiss plaintiffs' breach of fiduciary duty claim. To plead a claim for breach of fiduciary duty, plaintiffs must allege (1) the existence of a fiduciary relationship; (2) misconduct by defendant; and (3) damages directly caused by defendant's misconduct. Rut v. Young Adult Institute, Inc., 901 N.Y.S.2d 715, 717 (App. Div. 2d Dep't 2010). A fiduciary relationship may be found "when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Thermal

Imaging, Inc. v. Sandgrain Sec., Inc., 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001); see also Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 599 (2d Cir. 1991). The existence of a fiduciary relationship cannot be determined "by recourse to rigid formulas." Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1231 (S.D.N.Y. 1991), rev'd on other grounds, 967 F.2d 742 (2d Cir. 1992). Rather, the focus is on whether one person has reposed trust or confidence in another who thereby gains a resulting superiority or influence over the first." Id. Mere reposal of one's trust or confidence in a party, however, does not automatically create a fiduciary relationship; the trust or confidence must be accepted as well. Apple Records, Inc. v. Capitol Records, Inc., 529 N.Y.S.2d 279, 283 (App. Div. 1st Dep't 1988).

As the Court found above, movants, as accountants, do not owe a fiduciary duty to a third party. See In re Warnaco Group, Inc. Opinion Sec. Litig. (II), 388 F. Supp. 2d at 318; Vtech Holdings Ltd. v. Pricewaterhouse Coopers LLP, 348 F. Supp. 2d 255, 268 (S.D.N.Y. 2004) ("In New York, the accountant-client relationship does not generally give rise to a fiduciary relationship absent special circumstances."); Greenblatt v. Richard Potasky Jewelers, 1994 U.S. Dist. LEXIS 258 (S.D.N.Y. Jan. 13, 1994) (holding accounting firm to a consignment store did not owe fiduciary duty to customer of store). As Judge McKenna wrote in Greenblatt, "when the allegedly aggrieved party is at best a third party to an accountant-client relationship, and no commercial transaction is executed between two parties – indeed, when no relationship whatsoever exists between two parties – no fiduciary duties may be imposed on either party." Id., 1994 U.S. Dist. LEXIS 258, at *12. Although plaintiffs attempt to argue that it is not clear that fund defendants and (a) Meidinger defendants; (b) Spicer Jeffries; or (c) SFG Accounting had an accountant-client relationship, the allegations of the amended complaint do not support any other type of relationship which would lead to a fiduciary duty. Therefore, this claim must

be dismissed.

IX. Claim for Negligence

Finally, movants move to dismiss plaintiffs' negligence claim. Meidinger defendants argue plaintiffs' negligence claim is barred by the statute of limitations, while Spicer Jeffries and SFG Accounting argue plaintiffs have failed to allege facts to maintain a negligence action against an accountant pursuant to Credit Alliance Corp. v. Arthur Anderson & Co., 65 N.Y.2d 536 (1985). To plead a claim for negligence under New York law, plaintiffs must allege (1) a duty owed by defendants to plaintiff; (2) a breach of that duty; and (3) injuries proximately caused by the breach. Stagl v. Delta Airlines, 52 F.3d 463, 467 (2d Cir. 1995). In addition, the New York Court of Appeals has held that:

> [b]efore accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (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.

Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d at 551. In White v. Guarente, the Court of Appeals noted a negligent statement could only form the basis for liability when

> there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage, but such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all.

43 N.Y.2d 356, 363 (1977).

A. Meidinger Defendants

Meidinger defendants assert that because their affiliation with Capstone ended in March 2007, as alleged in the complaint, and the complaint was not filed until June 16, 2011, plaintiffs are barred from asserting a negligence claim against them by the statute of limitations. Plaintiffs did not address this argument in their opposition to the motion.

The statute of limitations under New York law for accounting malpractice is three years. See N.Y. C.P.L.R. § 214(6); Arnold v. KPMG LLP, 543 F. Supp. 2d 230, 235 (S.D.N.Y. 2008). The date of accrual is the date on which the malpractice occurs, not the date it is discovered or the injuries suffered. See Glamm v. Allen, 57 N.Y.2d 87, 93 (1982). For an accountant, courts have held the action accrues when the client receives the accountant's work product "since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies." Ackerman v. Price Waterhouse, 84 N.Y.2d 535, 541 (1994); Arnold, 543 F. Supp. 2d at 235-36 (finding the action accrued on the date the accountant issued its opinion letter, not when the client learned it was fraudulent).

This action against Meidinger defendants accrued no later than March 2007 when they stopped performing work for fund defendants. Indeed, plaintiffs allege receiving statements from Meidinger defendants only in 2007. The action was commenced after more than three years had passed. Therefore, plaintiffs' negligence claim is barred by the statute of limitations.

B. Spicer Jeffries and SFG Accounting

Plaintiffs' allegations fail to properly allege any prerequisite under Credit Alliance Corp. Plaintiffs do not allege affirmative conduct or statement expressed directly by Spicer Jeffries or SFG Accounting. Nor do plaintiffs any "linking conduct" which would demonstrate an action

by Spicer Jeffries or SFG Accounting directed to plaintiffs. Houbigant, Inc. v. Deloitte & Touche LLP, 753 N.Y.S.2d 493, 495 (App. Div. 1st Dep't 2003). These deficiencies in the allegations are fatal to plaintiffs' claim, and plaintiffs' negligence claim is dismissed against Spicer Jeffries and SFG Accounting.

X. Dismissal With Prejudice

After several defendants filed motions to dismiss, plaintiffs, on September 1, 2011, without leave of the Court, filed their amended complaint. At a hearing held on January 11, 2012, plaintiffs' counsel told the Court the reason for the amended complaint was to correct deficiencies identified in the then-pending motions to dismiss. Plaintiffs have had two chances to assert their various claims. The Court will not permit them a third by granting leave to replead. Plaintiffs' protests that additional investors have come forward with claims against defendants are insufficient to warrant further amendment. Plaintiffs in this case, having twice been given the opportunity to assert claims, cannot try again. Their claims are dismissed with prejudice. See Fed. R. Civ. P. 8(a); Ashcroft v. Iqbal, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.").

XI. PSLRA

The Private Securities Litigation Reform Act ("PSLRA") requires that a district court, at the conclusion of any private securities action, "include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b)." 15 U.S.C. § 78u-4(c)(1). Prior to finding a violation of Rule 11, the Court must give the offending party or attorney notice and an opportunity to respond. Id. § 78u-4(c)(2). In addition, if the Court determines that the rule has been violated, it must impose sanctions. Id.

The Court does not believe sanctions are warranted in this case, but nonetheless will permit defendants to submit papers to the Court on the issue of the appropriateness of sanctions after this action has concluded. As other defendants and claims remain at present, the Court will not entertain a motion for fees and costs at this time.

CONCLUSION

The motions to dismiss of defendants Meidinger & Associates, CPA's Prof. LLC; Susan Meidinger; Spicer Jeffries, LLP; and SFG Accounting PLLC are GRANTED.

The Clerk is instructed to terminate the pending motions. (Docs. #99, 117, and 125).

The Clerk is also instructed to terminate Meidinger & Associates, CPA's Prof. LLC; Susan Meidinger; Spicer Jeffries, LLP; and SFG Accounting PLLC as defendants in this case.

Dated: August 9, 2012
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge