

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

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EURYCLEIA PARTNERS, LP, EDISON FUND LIMITED,  
FAIRFAX FUND LIMITED, NUCLEUS FUND LIMITED,  
SHAKTI FUND LIMITED, SONATA MULTI-MANAGER  
FUND, LP, LHS VENTURES LIMITED PARTNERSHIP,  
ALEXANDER H. TYNBERG, NAN C.F. TYNBERG, THE  
REDINGTON MOOR RESIDUAL TRUST, EMERALD PRIVATE  
EQUITY FUND, JOHN M. EBERLE, FRANK D. HARRISON,  
CAPSTONE PARTNERS, L.P., JANICE J. DEGENHART,  
BARBARA DEHAVEN AS TRUSTEE OF THE JOSEPH W.  
DEHAVEN MD PC PENSION ACCOUNT, FRANK BANKO,  
ERIK GUSTAFSON, IVISIONARY MULTI-STRATEGY FUND,  
L.P., AND VCG MANAGEMENT, INC.

**FILED**

JUL 23 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs,

-against-

Index No.  
600874/07

UBS SECURITIES, LLC,

Defendants.

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**Charles Edward Ramos, J.S.C.:**

Defendant UBS Securities, LLC (UBS) moves to dismiss the complaint (CPLR 3211 [a] [1], [3], [7]).

**Background**

Plaintiffs<sup>1</sup> are limited partners that invested in Wood River Partners, L.P. (The Fund), a now defunct hedge fund, from January 2003 to August of 2005. UBS was the prime broker and custodian for the Fund's stock.

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<sup>1</sup> Plaintiffs are comprised of Eurycleia Partners, LP, Edison Fund Limited, Fairfax Fund Limited, Nucleus Fund Limited, Shakti Fund Limited, Sonata Multi-manager Fund, LP, LHS Ventures Limited Partnership, Alexander H. Tynberg, Nan C.F. Tynberg, the Redington Moor Residual Trust, Emerald Private Equity Fund, John M. Eberle, Frank D. Harrison, Capstone Partners, L.P., Janice J. Degenhart, Barbara Dehaven as Trustee of the Joseph W. Dehaven Md PC Pension Account, Frank Banko, Erik Gustafson, Ivisionary Multi-strategy Fund, L.P., and VCG Management, Inc. (together, Plaintiffs).

Beginning in 2004, the Fund's investment manager, John Whittier, amassed, and heavily traded in, shares of Endwave Corporation (Endwave), a volatile stock that consistently reported losses, allegedly in contravention of representations contained in offering memorandum that the Fund would be diversified.

Plaintiffs allege that UBS was aware that the Fund owned an excess of outstanding Endwave stock that triggered SEC reporting requirements, and that the Fund had not made the required reports. Nonetheless, instead of making disclosures or withdrawing as prime broker, UBS allegedly began manipulating the Endwave market to suit its own needs. According to the complaint, UBS artificially created a short market for Endwave stock, secretly borrowed from the Fund's account, and caused the value of the Fund's portfolio to decrease.

Further, while Whittier was allegedly demanding that UBS cease short selling Endwave stock, UBS knew that Whittier could not complain to the authorities, that would have revealed his own violation of federal securities laws.

Consequently, allegedly faced with the price erosion of Endwave stock caused by the short market that UBS was creating, Whittier began to accumulate more Endwave shares, that caused the price of Endwave stocks to rise. However, as a result of UBS's alleged improper short sales, the price of Endwave stock immediately dropped significantly, that reduced the face value of the Fund's portfolio by nearly \$20,000,000.

In late summer of 2005, the Fund was unable to honor redemption requests due to a massive decrease in value of the Fund's holdings, and it ultimately collapsed.

In September of 2005, the Securities and Exchange Commission (SEC) began investigating the Fund, and subsequently commenced an action against Whittier and Wood River, alleging securities fraud. The SEC obtained an injunction, and placed the Fund into receivership.

Whittier was indicted, and eventually pleaded guilty to violations of federal securities laws in connection with his management of the Fund.

In a related action arising out of Wood River's collapse, a group of investors sought to recover from the Fund's outside professionals, including its legal counsel, Seward & Kissel, LLP (Seward), and its designated auditor, American Express Tax and Business Services, Inc. (TBS).<sup>2</sup>

The Appellate Division dismissed all of the causes of action asserted against Seward, on the ground that, as counsel to the Fund, it did not owe a fiduciary duty to the investors, and that there was no privity or a relationship nearing privity between Seward and the investors (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400, 402-03 [1<sup>st</sup> Dept 2007]). Additionally, the Appellate Division dismissed all of the causes of action

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<sup>2</sup> Plaintiffs in that action asserted causes of action for fraud, negligent misrepresentation, and breach of fiduciary duty, arising out of alleged misrepresentations contained in the Fund's offering memorandum.

asserted against TBS, on the ground that the plaintiffs failed to allege that TBS made an actual misrepresentation, and the existence of a misrepresentation (*id.*).

In May of 2007, plaintiffs instituted this action against UBS, and asserted seven causes of action for fraud, constructive fraud, breach of fiduciary duty, aiding and abetting fraud and breach of fiduciary duty, negligence, unjust enrichment, and tortious interference with contract.

#### **Discussion**

UBS moves to dismiss the complaint on the ground that the plaintiffs, as limited partners in a hedge fund, lack individual standing to directly assert causes of action against UBS based upon the diminished the value of the partnership, which causes of action are derivative in nature. Additionally, UBS contends that the complaint fails to state a cause of action, because the plaintiffs do not allege the existence of a duty, contractual or otherwise, owed by UBS to the plaintiffs.

For the reasons stated below, affording the complaint a liberal construction, accepting the facts alleged as true and according the plaintiffs the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1<sup>st</sup> Dept 2004]), the facts alleged do not support the causes of action.

To bring a direct action, a limited partner must demonstrate suffering an injury that exists independent of any injury to the partnership, or otherwise the breach of a duty owed independent

of any duty owed to the partnership (*In re Granite Partners, L.P.*, 194 BR 318, 327-38 [SD NY 1996]; see also generally *Higgins v New York Stock Exchange, Inc.*, 10 Misc 3d 257, 264 [Sup Ct, NY County 2005, Ramos J.]).

Plaintiffs attempt to characterize their causes of action against UBS as direct rather than derivative, by contending that UBS's misconduct caused them to invest in or hold their investments in the Fund, because they relied upon what UBS "made the market appear to be" (Plaintiffs' Memo. of Law, 8).

However, the core of plaintiffs' allegations depict the injury suffered due to UBS's misconduct in creating a short market for Endwave stock as resulting in the dissipation of the value of Fund's portfolio (Complaint, ¶¶ 8, 110). Consequently, UBS's alleged misconduct resulted in a direct injury to the partnership, and the corresponding loss in value to the plaintiffs' investment, in turn, flowed directly from the harm to the partnership. Thus, the injury that plaintiffs seek redress is foremost an injury to the partnership, rather than constituting an independent injury to the limited partners.

Therefore, any claims arising out of UBS's alleged wrongdoing that caused the value of the Fund's portfolio to diminish must be asserted directly or derivatively on behalf of the partnership. Consequently, these plaintiffs lack standing to assert causes of action for fraud, constructive fraud, breach of fiduciary duty, aiding and abetting fraud and breach of fiduciary duty, and negligence.

In any event, plaintiffs fail to demonstrate that they shared a fiduciary relationship with UBS, such that UBS was required to alert them that the Fund had amassed Endwave stock, and failed to make corresponding SEC filings (*accord Eurycleia Partners, LP*, 46 AD3d 400, 401 [1<sup>st</sup> Dept 2007]). Rather, plaintiffs merely assert that, by virtue of UBS's position as prime broker, clearing broker and custodian for the Fund, UBS assumed a fiduciary duty to the plaintiffs, as limited partners. These allegations, without more, are not sufficient to establish the existence of a fiduciary relationship.

Additionally, plaintiffs merely allege bare, conclusory allegations of fraud and constructive fraud, that are insufficient to sustain the causes of action (*Callwood v Cabrera*, 49 AD3d 394, 394 [1<sup>st</sup> Dept 2008]).

Further, plaintiffs do not plead facts to demonstrate that UBS rendered substantial assistance to the Fund's principals, namely Whittier, in breaching its fiduciary duty to the limited partners, to support its aiding and abetting causes of action. In fact, plaintiffs allege that Whittier's alleged scheme ran counter to UBS's, insofar as Whittier allegedly could not complain to the authorities, because that would have revealed his own violation of federal securities laws. These allegations do not amount to substantial assistance in a breach of fiduciary duty.

Finally, plaintiffs fail to plead that UBS intentionally induced Whittier to breach any agreement with it.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 1, 2008

ENTER:



J.S.C.

**HON. CHARLES E. RAMOS**

**FILED**  
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NEW YORK