

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

JEAN-PASCAL SIMON,

Plaintiff,

v.

FRANCINVEST, S.A., and JJS GROUP, INC.,

Nominal Defendant,

-and-

FRENCH-AMERICAN SURGERY CENTER, INC.,
FRENCH AMERICAN CLINIC, INC.,
JEAN-FRANCOIS SIMON, CHARLES RAAB,
and GEORGE KESSLER

Defendants.

Index No. 162867/2014

Hon. Melissa A. Crane

REPLY AFFIRMATION

Mot. Seq. 26

NANCY J. VOLIN, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms as follows under penalties for perjury pursuant to CPLR 2106:

1. I am co-counsel for Plaintiff Jean-Pascal Simon (“Plaintiff”), JJS Group, Inc. (“JJS”), and FrancInvest, S.A. (“FrancInvest”) in the above-captioned action. As such, I am fully familiar with the facts and circumstances set forth herein.

2. I am filing this Reply Affirmation in Support of Plaintiff’s Motion for Partial Summary Judgment on Plaintiff’s derivative claim, on behalf of JJS, for aiding and abetting fraud, as against defendant George Kessler (“Kessler”).

3. Plaintiffs’ motion was re-filed at the express direction of Justice Borrok, after Kessler’s defense strategy was completely undermined by production of the Hallandale condominium’s by-laws (NYSECF No. 1157), and a record of over 500 pages of undisputed documentary evidence (NYSECF No. 1544).

4. Kessler, as the former attorney of Plaintiff and his late father, Jean-Jacques Simon, was one of the chief architects of the fraud committed by Judgment Debtor Jean-Francois Simon (“Francois”).¹ Unable to refute the substance of Plaintiff’s claims, Kessler has endeavored on a path of delays, mischaracterizations of the record and the introduction of documents with no probative bearing, and total indifference to settled caselaw.²

¹ As set forth in Plaintiff’s Appeal Brief in Case No. 2020-06615, which resulted in the March 23, 2021 Decision & Order, “Francois is Plaintiff’s younger brother. Through a series of schemes that involved the assistance of the individual defendants Kessler and Charles Raab (“Raab”), Francois took control of FrancInvest and the New York subsidiaries, JJS and FAC, after Jean-Jacques’ death in 2002. Although plaintiff was the largest shareholder of FrancInvest before Francois and Defendants effectuated the schemes that are the subject of this litigation, Francois unlawfully usurped the one-third share ownership of the third Simon sibling, Anne-Valerie, and her directorship of FrancInvest by misrepresenting the companies’ financial situation, then replaced Valerie with Rosenberg as a director of FrancInvest, JJS, and FAC. Kessler, as the longtime attorney for Plaintiff, as well as JJS, FAC, and FASC, also assisted Francois, by sharing and exploiting Plaintiff’s client confidences as well as his intimate knowledge of the workings of the interlocking family corporations.

Unbeknownst to Plaintiff or Jean-Jacques, Francois had been secretly stealing from FASC since 1991, as evidenced by loan reimbursement checks drawn on a secret FASC bank account at a Republic Bank branch on Montague Street, Brooklyn where he had been diverting funds NYSECF No. In fact, Francois had embezzled \$525,000 from FASC in February and March of 2002, by wire-transferring funds into his personal Citibank account in order to fund the acquisition of a condominium, where Kessler assisted with the real estate transactions. NYSECF No. 613.

Francois and Raab, who were also directors of FAC and JJS, proceeded to raid the Defendant corporations of their bounty, first by entering into multiple refinancings of JJS’s valuable asset, the 10,000 sq. ft. ground-floor triplex commercial condominium at 1049 Fifth Avenue (the “Premises”), whereby they retained the cash-outs for their own personal use while the FrancInvest shareholders paid the debt service, and then, by conspiring to sell the FASC’s license to operate an Ambulatory Surgery Center, pursuant to PHL §2800 et seq. to Fifth Avenue ASC Acquisition, LLC (“FAAA”) by misrepresenting FASC’s ownership to New York State Department of Health (“DOH”). On October 29, 2014, Plaintiff first learned that FASC had transferred its license to Fifth LLC, and commenced this litigation shortly thereafter.” (See App. Div. Case No. 2020-06615, Volin Brief at p. 15).

² Kessler’s opposition affidavit falsely accuses plaintiff’s counsel of violating the Florida Bankruptcy Court’s Injunction (as part of the Settlement Agreement between Francois and JJS) against further claims against Jean-Francois Simon (“Francois”) by “petition[ing] the Court for improper relief,” NYSECF No. 1571 at paragraph 21. The truth is that (i) plaintiff’s counsel apprised the Court by letter, February 3, 2023, NYSECF No. 1535, that the first Order to Show Cause, NYSECF No. 1516, utilized a proposed Order that pre-dated the Florida Bankruptcy Court Injunction; (ii) as a result, this Court Amended the Order on February 6, 2023, NYSECF No. 1541; (iii) Kessler was served with the Amended Order to Show Cause and Supporting Papers on February 6, 2023, NYSECF Nos. 1543, 1544; and (iv) Kessler was also served the Amended Order to Show Cause and Supporting Papers by Fed Ex, NYSECF No. 1545.

The Three Elements of the Claim for Aiding and Abetting Fraud: Existence of the Underlying Fraud; Actual Knowledge; and Substantial Assistance Are Satisfied Here

5. For all of Kessler's complaints in his opposition papers, the simple truth is that the relevant facts supporting Plaintiff's aiding and abetting claim are undisputed, or at least undisputable.

6. The Appellate Division's Decision & Order, dated March 23, 2021, reinstated the 11th cause of action, a double-derivative claim for aiding and abetting fraud, on behalf of JJS, as against George Kessler:

"To state a claim for aiding and abetting fraud, a plaintiff must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Chambers v Weinstein*, 135 AD3d 450 [1st Dept 2016] [internal quotation marks omitted]). On a prior appeal **this Court reinstated the underlying double derivative fraud claim against François** (178 AD3d at 437-438). Our decision constitutes "a change in the law that would change the prior determination" warranting the granting of the renewal motion (CPLR 2221[e][2]). This Court's prior decision also **satisfies the first element of pleading** an underlying fraud. The TAC alleges that **Kessler negotiated and/or prepared certain documents, including a below- market-rate lease for the property**, thereby aiding and abetting François in his scheme to **gain control of FrancInvest** so as ultimately to sell FASC and **defraud plaintiff**. This allegation fulfills the "substantial assistance" element of the aiding and abetting fraud claim. The final element, that of actual knowledge, "need only be pleaded generally" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010])."

Simon v. FrancInvest, 2021 NY Slip Op 1733 (1st Dep't 2021) (emphasis added).³

7. Concerning the first element of the aiding and abetting fraud claim, the underlying fraud, the Appellate Division's previous Decision & Order, dated December 3, 2019, stated: "François mismanaged JJS funds, including by **refinancing the mortgage and keeping**

³ The record before the Appellate Division is instructive in understanding the facts pertaining to Kessler's credibility that where before the Court in adjudicating the Appeal. See App. Div. Case No. 2020-06615, Volin Brief at p. 27, which references plaintiff's affidavit, NYSECF No. 728 at paragraph 40-42, where, in an attempt fabricate evidence concerning François's embezzlement of \$525,000 in 2002, Kessler and François filed exhibits purporting to be a letter from Jean-Jacques awarding François a \$525,000 bonus, but which were exposed as fakes when they filed different versions of the same documents. Compare NYSECF No. 688 with NYSECF No. 702 (reporting different zip codes). Plaintiff's affidavit and Defendants' exhibits were included in the Joint Record, at page 505, and continue to demonstrate Kessler's lack of credibility.

the cash-outs for himself, and **by receiving ‘kickbacks’ for negotiating a below market rate lease** for the property.” *Simon v. FrancInvest, S.A., et al.*, 178 A.D.3d 436 (1st Dep’t 2019) (emphasis added). In other words, the Appellate Division expressly addressed two specific points: Francois’s refinancing of the JJS mortgage and Francois’s receiving kickbacks in relation to the lease, *i.e.*, receiving kickbacks from the same party that was a party to the below market rate lease.

8. Kessler does not dispute that the JJS mortgage was refinanced and that Defendant Francois kept the cash-outs for himself, with Kessler’s substantial assistance. Kessler does not dispute these facts because the documentary evidence is irrefutable.

9. Shortly after the third Simon sibling, Anne-Valerie Simon, was replaced as a FrancInvest director by Kessler’s life partner, former defendant Lynn Rosenberg, in December 2002, Francois refinanced the JJS mortgage with HSBC. NYSECF No. 121. Francois then caused JJS to take out a second mortgage loan with HSBC in 2004 for \$300,000. NYSECF No. 1133. Francois then caused the refinancing of the JJS mortgage with Park Avenue Bank on February 24, 2005 for \$2,400,000, with a cash-out of \$952,984.48. NYSECF Nos. 122, 1259. Francois then transferred \$425,000 of the cash-out proceeds to his personal account on June 6, 2005. NYSECF Nos. 1251, 1252. Following this cash-out, Francois yet again refinanced the JJS mortgage on August 3, 2011 for \$3,300,000 with a cash-out of \$688,788.72. NYSECF Nos. 123, 1089. Much of these funds were then transferred to Francois through two checks, one for \$261,339.18 (NYSECF No. 1242) and another for \$192,365.61 (NYSECF No. 1243). Francois then yet again refinanced the JJS mortgage for \$4,500,000 on December 30, 2020, in direct and knowing violation of a court-ordered injunction, with a cash-out payment of \$1,967,080.60. A portion of the proceeds was used to pay \$87,000 to Kessler. NYSECF No. 1098 at pages 1, 2.

10. Ostensibly, the JJS 2011 mortgage was intended to finance Francois's purchase of Kessler's condominium in Hallandale, Florida – for no legitimate business purposes. Kessler prepared the JJS resolution authorizing the purchase of his Hallandale condominium, knowing full well that the authorization was intended to deceive JJS and FrancInvest shareholders into believing that the purported purpose of the 2011 refinancing was to provide JJS with tax-free funding to enable JJS to purchase the condominium, NYSECF No. 1003, while the property was in fact being diverted to Francois.

11. Specifically, Kessler then executed a deed, NYSECF No. 1004, whereby Francois purchased the property in his own name, – not in the name of JJS, as intended by the JJS resolution, and assisted Francois in obtaining a purchase money mortgage from First Choice Bank of New Jersey, n/k/a Berkshire Bank, NYSECF No. 749, the *same bank* that refinanced the 2011 JJS mortgage, NYSECF No. 238, while Francois pocketed the cash-out from the JJS mortgage, NYSECF Nos. 1242, 1243.

12. Each of these transactions was designed to drain assets from JJS for Francois' benefit. And Kessler was intimately involved in each of them. For example, Kessler not only represented JJS on the 2011 mortgage refinance, NYSECF Nos. 1088, 1090, he personally provided the Opinion Letter for the 2011 mortgage, NYSECF No. 1039. Furthermore, the power of attorney for Francine Simon (Plaintiff's and Francois' mother who owned 20% of JJS in her individual capacity) used in connection with obtaining the 2011 mortgage loan was prepared by and returnable to Kessler. NYSECF No. 809.

13. When the details of these schemes were disclosed to Justice Borrok at the September 9, 2021 Proceedings, Kessler attempted to defend his executing the deed to Francois by alleging that the Hallandale condominium by-laws prohibited corporate ownership in 2011,

the time of the sale. This was later proven to be false. Not only did the by-laws expressly permit corporate ownership, NYSECF No. 1157, but the attorney for the Venetian Park II Condominium Association, of which the Hallandale condominium was a part, later permitted the transfer of the deed from Francois to JJS because it was deemed grandfathered even after the bylaws had been changed to prohibit corporate ownership. NYSECF No. 1208 at page 2.

14. Because the by-laws permitted corporate ownership at the time of the purchase of the Hallandale condominium, and because JJS's own checks evidence that the mortgage cash-out was pocketed by Francois, there is no issue of fact that Francois had refinanced the mortgage and kept the cash-out for himself, with Kessler's assistance.

The Relevant Facts Concerning Kessler's Role in Francois's Kickback Scheme Are Undisputed

15. As with the fraudulent cash-out mortgages, the undisputable documentary evidence makes plain that Francois received kickbacks from JJS's tenants for negotiating a below-market rate lease for the Premises, and that Kessler aided and abetted that scheme,

16. For example, the record shows that the First Amended Administrative Services Agreement, dated April 8, 2009, was entered into at the same time the tenant renegotiated its lease for the Premises to JJS's detriment. And that agreement was negotiated with Kessler's assistance. NYSECF No. 1093 at page 2 (email from Kessler to Francois, Subject heading: "1st Amendment to administrative services agreement" (sic)). The First Amendment to Administrative Services Agreement was nothing more than a method for tenants to provide kickbacks to Francois, as it provided for Francois to receive a salary of \$227,471 from an affiliate of the tenant, Madison Associates ASC Management, Inc ("Madison"), for a no-show job. NYSECF No. 1037, at page 3, paragraph 4(iii). Not only was the agreement negotiated by Kessler, but the Notice Provision of the agreement provides that all Notices should be sent to

Kessler. NYSECF No. 1037 at page 5, paragraph 11.

17. For more context on the larger scheme at play, Defendant Charles Raab was the managing member of the tenant, Fifth Avenue ASC Acquisition, LLC (referred variously as “FAAA” or “Fifth Avenue LLC”), NYSECF No. 369 at page 617, 633, and also the managing member of Madison, NYSECF No. 107 at page 8. At the same time, Raab was also serving as Treasurer of JJS, French-American Surgery Center, Inc. d/b/a Fifth Avenue Surgery Center (“FASC”), and French-American Clinic, Inc. (“FAC”).

18. On April 8, 2009, Raab executed the First Amendment to Lease, NYSECF No. 369 at page 570, and the Amended Services Agreement, NYSECF No. 1037. The Amended Lease provided for a promissory note, from FASC to JJS, of \$100,000 and an allonge providing that JJS would repay the loan to its tenant, FAAA. NYSECF No. 369 at page 579-583. Kessler acted as attorney for Francois, JJS, FAC, *and* FASC at the April 8, 2009 “closing”, NYSECF No. 1036, and another document executed at the April 8, 2009 closing, the “Assignment, Assumption, and Amendment Agreement” expressly provides for payments to Kessler “as approved by the Landlord and the Seller” and that “Landlord and Seller [further] acknowledge that Administrator has previously paid ... \$7,500 to George H. Kessler to cover certain legal fees of the Landlord and Seller owed to same” NYSECF No. 1035 at page 6, paragraph 18.

19. As the records produced by Nixon Peabody LLP show NYSECF No. 1093, Kessler participated in all aspects of the fraudulent scheme. For example, work product dated February 25, 2009, NYSECF No. 1094 at page 1, indicated that “George Kessler w/ call Denise re: lease amendment” and on March 10, “Charley [Raab] will meet w/ George Kessler - Jennifer Vechio [buyer’s attorney, of McDermott, Will & Emery]” and “George wanted minutes re: approval of the sale from Charlie...” Kessler’s involvement in the details of the transaction is

further evidenced by NYSECF No 1094, at page 2, 3, which is an email exchange with the subject heading: “RE: Could you provide George and Claudia a copy of the FASC board of director meeting/minutes re dissolution of fasC” (sic).

20. Francois’s communications with Nixon Peabody further show that Kessler and his life partner Rosenberg cooperated with Francois in concealing the fraudulent transfer. For example, Francois temporarily “gave” Rosenberg his purported 10% interest in FASC: “I am giving my 10 shares of FASC to Mrs. Lynn Rosenberg. For the reason, involving my brother and my family, I do not wish to release any information ... I do not wish to have my name showing on this (letter of intent).” NYSECF No. 1034. To accommodate Francois, the Letter of Intent,⁴ dated February 15, 2006 between FASC and FAAA falsely shows Lynn Rosenberg as vice-president of FASC. NYSECF No. 1033 at page 6. The Nixon Peabody Waiver of Conflict of Interest (the “Conflict Waiver”) opening paragraph states: “Reference is hereby made to that certain Letter of Intent (“Letter of Intent”), dated February 15, 2006, among French-American Surgery Center, Inc. d/b/a Fifth Avenue Surgery Center (“FASC”) and the Buyers named therein (“Buyers”), a copy of which is attached hereto.” NYSECF No. 1033 at page 2. The Conflict Waiver further states that Kessler acted as attorney for Rosenberg: “We [Nixon Peabody] do not represent Lynn Rosenberg, who is represented by George H. Kessler, Esq.” NYSECF No. 1033 at page 2, first bulleted paragraph. Insofar as Kessler was acting as attorney for Rosenberg⁵ in her purported capacity as vice-president of FASC for the purpose of cloaking her with the

⁴ The Letter of Intent states: “This letter of Intent briefly summarizes our mutual understanding regarding the proposed acquisition (the “Acquisition”) of French American Surgery Center, Inc. d/b/a “Fifth Avenue Surgery Center” a New York corporation (the “Company”, by the undersigned as listed on the signature page hereto under “Buyers” (the “Buyers”). NYSECF No. 1033 at page 6.

⁵ Rosenberg’s signature appears on the exhibit at page 12.

apparent authority necessary to execute the Letter of Intent referencing the acquisition of FASC by a group of buyers led by defendant Charles Raab, NYSECF No. 1033 at page 11, Kessler was acting as attorney for FASC. Therefore, Francois's purported 10% interest was a fiction at all times, and, contrary to his protestations, Kessler aided and abetted Francois's scheme "to sell FASC and defraud plaintiff" from the onset.

21. Kessler attempts to smooth over his inherent conflicts, but notably, Kessler's purported Waiver of Conflict of Interest, NYSECF No. 1578, is only an excerpt of the full document. Kessler's exhibit contains the ECF stamped legend showing that it is a truncated version of plaintiff's exhibit, NYSECF No. 956, filed on April 15, 2021⁶ (which was shortly after it had been produced by Nixon Peabody). The ECF stamped legend further shows that Kessler had previously filed his truncated version on July 9, 2021, NYSECF No. 989 to support his argument: "Kessler was not the lawyer representing either JJS, FASC or Francois at the time, nor was he present or even aware of or knew where or when such closing was to take place." Seigel Aff. at page 2, ¶ 2, fourth line from bottom, NYSECF No. 986. In filing the truncated version of the exhibit, NYSECF No. 1578, Kessler again attempts to conceal the complete piece of evidence that includes the Letter of Intent, *i.e.*, NYSECF No. 1033 because the complete exhibit tells a materially different story: tying Kessler to Francois's scheme "to sell FASC and defraud plaintiff."

22. As the Appellate Division's March 23, 2021 Decision & Order stated, "Kessler negotiated and/or prepared certain documents, including a below-market-rate lease for the property, thereby aiding and abetting Francois in his scheme to gain control of FrancInvest so as ultimately to sell FASC and defraud plaintiff."

⁶ It also goes without saying that Kessler should have properly produced these documents in discovery.

23. Kessler's involvement is clear. Any self-serving claims by Kessler to the contrary should be disregarded.

Kessler Received Substantial "Compensation" For His Roles In Francois' Schemes

24. Concurrent with execution of the JJS 2011 mortgage, FrancInvest and JJS opened bank accounts at the mortgagee bank, First Choice Bank of New Jersey, n/k/a Berkshire Bank, and Kessler's partner, Rosenberg, was a signatory to those accounts. NYSECF No. 1097. Thus Kessler had clear access to FrancInvest's and JJS's funds once the JJS 2011 mortgage was in place.

25. Kessler does not dispute that shortly after the JJS 2011 mortgage closing, he caused the formation of three shadow entities, JJS Group, Inc. new Tax ID #80-0808914 ("JJS-Florida"), NYSECF Nos. 657, 1042, 1044, 1043, 1060; French-American Clinic, Inc. new Tax ID #32-0375933 ("FAC-Florida"), NYSECF No. 21 at page 137; and French-American Surgery Center, Inc. new Tax ID #45-4646441 ("FASC-Florida"), NYSECF No. 1061. The Receiver's Forensic Accounting, NYSECF No. 1467 at page 3, stated: "At some point in time, Jean Francois Simon ("JFS") formed identical entities in Florida using the exact same names as the Entities (*i.e.*, JJS, FAC and FASC)."

26. In her Supplemental Report, NYSECF No. 1467 at paragraphs 9-15, the Receiver elaborates that substantial Management Fees were paid to JJS-Florida. Although FrancInvest owns 80% of JJS, there was no reference to a shadow JJS entity, nor of management fees paid to that entity, in its files. The reason is that the shadow entities were formed to conceal income from the JJS and FrancInvest shareholders, and Kessler has never disputed the fact that he formed those entities.

27. Further, as noted in the Receiver's Supplemental Forensic Accounting, Kessler received substantial payments from JJS:

Mr. Kessler, a named defendant in this matter, received close to **three quarters of a million dollars during the course of the Forensic Period**. The Reports contain Schedules reflecting additional detail of these funds being paid to Mr. Kessler, based upon identical agreements with JJS from 2012 through 2021 (Schedule E attached to my Report). In addition, Mr. Kessler received hourly billings above and beyond certain flat retainer amounts. A review of the limited invoices provided, raised some concerns as to the amount of fees being charge, the services being rendered, especially considering the descriptions provided appear to indicate that at times Mr. Kessler might have been paid to analyze pleadings regarding himself.

NYSECF No. 1467 at page 8 (emphasis added).⁷

Kessler Admission to the Key Fact Concerning His Role in the April 8, 2009 Closing

28. The documentary evidence irrefutably demonstrates Kessler's knowledge, complicity, and substantial assistance in the fraud.

29. Kessler concedes – because he cannot deny – that he represented Francois, JJS, FASC, and FAC at the April 8, 2009 closing where defendants and co-conspirators Francois and Raab executed multiple documents that put the fraudulent scheme into action. See Kessler Aff. at paragraph 7.

30. On the one hand, Francois, as an officer and director, signed leases, promissory notes, and kickback agreements on behalf of JJS, FAC, and FASC. As a contractual counterparty, Raab, also an officer and director of JJS, FAC, and FASC, signed in his capacity as an equity owner and managing member of the tenant, FAAA, and its management service organization, Madison. NYSECF No. 1036. All of this was done with Kessler's aid and assistance.

31. The contents of the minutes of the April 8, 2009 closing are telling:

“Mr. Simon called the meeting to order. The purpose of the meeting was to finalize documents between French American Surgery center, as seller and Fifth Avenue Acquisition, LLC., as purchaser, in order to proceed to final documents to finalize the sale of substantially all of the assets of the French American Surgery Center, Inc.

⁷ The Receiver's Report also noted that JJS paid Kessler's counsel, William Siegel \$129,016.90 to defend Kessler in this litigation. 2022 NYSECF No. 1458 at page 15.

Ms. Diamond brought the original copies of the **Assignment, Assumption and Amendment Agreement, the First Amendment to Lease Agreement and Asset Purchase Agreement, Promissory Note, First Amendment to Administrative Services Agreement, Amendment to Anesthesiology Agreement, Escrow Agreement, Mutual Limited Release, Side Letter to Mutual Limited release and the Employment Agreement for Francois Simon.**

Ms. Diamond and **George Kessler** reviewed the Unanimous Written Consents of the Fifth Avenue ASC Corp., Fifth Avenue ASC Acquisition, LLC, and the Madison Associates ASC management, Inc., and agreed that the paperwork was in order and agree to move forward.

Upon motion made and acceptance the Unanimous Written Consents of both the Seller's Directors and Shareholders were put in place, and the prepared documents were executed. It was agreed that **the signed documents would be bound and forwarded to George Kessler, Esq., Jennifer Vecchio of McDermott, Will & Emery and Charles Raab.**"

NYSECF No. 1036 (emphasis added). Notably, neither Kessler nor Raab produced any of the documents from this closing that were "forwarded to George Kessler...and Charles Raab" pursuant to court-ordered discovery.

32. The reason is clear. The Nixon Peabody work product lays bare the existence fraud at issue here. For example, Nixon Peabody attorneys noted: "Telephone call with P. Millock. Question? **Are we defrauding payors.** Flagrant attempt to jack up billings through separate PC because friendly PC is controlled by 5th Ave Surgery Center and money gets swept-up to 5th Ave...." NYSECF No. 1052 (emphasis added).

33. There can be no doubt that undisputed facts irrefutably prove that Kessler aided and abetted Francois's fraudulent scheme. It was Kessler who brought Francois's scheme to life.

Kessler's Counterclaims Against Plaintiff Must Be Dismissed As A Matter of Law

34. Finally, in an attempt to distract from his liability, Kessler has continually referenced his \$15 million counterclaim against Plaintiff, his former client. (NYSECF No. [].) Yet as a matter of settled law, "[S]tockholders suing derivatively are not subject to counterclaim

against them as individuals.” *Binon v. Boel*, 66 N.Y.S.2d 425 (1st Dep’t 1946). See also *Select Theatres Corp. v. Harms, Inc.*, 78 N.Y.S.2d 159, 273 A.D. 505 (1st Dep’t 1948)(lv denied 273 A.D. 1007, 79 N.Y.S.2d 880); *Handler v. Belmare Lighting Co.*, 168 N.Y.S.2d 288, 8 Misc. 2d 687 (N.Y. Sup. Ct. 1957).

35. The sole claim against Kessler is the eleventh cause of action, a derivative claim for aiding and abetting fraud, on behalf of JJS. All of Kessler's counterclaims are asserted against Plaintiff, as an individual and no counterclaims are asserted against nominal defendants JJS or FrancInvest. Thus, as a matter of law, Kessler’s counterclaims must be dismissed.

36. Therefore, Plaintiff’s motion should be granted in its entirety, along with such other relief as the Court deems just, proper, and equitable.

Dated: New York, New York
March 22, 2023

Respectfully submitted,

/s/ Nancy J. Volin
Nancy J. Volin, Esq.

ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Nancy Volin, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Affirmation complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 4178 words, excluding the parts of the Affirmation exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this Affirmation.

Dated: New York, New York
March 22, 2023

/s/ Nancy J. Volin
Nancy J. Volin