

Williamson v PriceWaterhouseCoopers, LLP

2005 NY Slip Op 30084(U)

March 18, 2005

Supreme Court, New York County

Docket Number: 0602106/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

RICHARD A. WILLIAMSON, as Successor
Liquidating Trustee on Behalf of Lipper Convertibles,
L.P. and Lipper Fixed Income Fund, L.P.,

INDEX NO. 602106/2004

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO. _____

PriceWaterhouseCoopers, LLP,

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

FILED

MAR 28 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 18, 2005

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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RICHARD A. WILLIAMSON, as Successor
Liquidating Trustee on Behalf of
Lipper Convertibles, L.P. and Lipper
Fixed Income Fund, L.P.,

Index No. 602106/2004

Plaintiff,

DECISION and ORDER

-against-

PriceWaterhouseCoopers, LLP,

Defendant.

-----x

MOSKOWITZ, J.:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

This action is one of several lawsuits resulting from the demise of Lipper Convertibles, L.P. (Fund). Plaintiff seeks damages for defendant Price Waterhouse Coopers LLP's (PWC) alleged improper audit of the Fund's financial statements. The complaint asserts causes of action for negligence, fraud, breach of fiduciary duty and breach of contract.

Non-parties Morgado Family Partners, LLP, and Matthew and Lucille Serino (First Intervenors), move (in motion sequence number 001) to intervene in this action and to dismiss the complaint for lack of standing and failure to state a cause of action.

PWC moves (in motion sequence number 002) to dismiss the complaint for lack of standing, as time-barred, for failure to

state a cause of action and to dismiss the breach of contract and fraud claims as duplicative of plaintiff's malpractice claim.

In motion sequence number 003, the following non-parties move to intervene in this action and to dismiss the complaint for lack of standing and for failure to state a cause of action: The Jones Family Trust, The Jones Family Income Trust, Eagle Partners, L.P., The Henry & Marilyn Taub Foundation, The Taub Family 1998 Trust, Continental Casualty Company, CNA Employees' Retirement Trust, Loews Corporation Cash Balance Retirement Plan, Employees Retirement Plan of Bulova Corporation, Lorillard Tobacco Company Retirement Allowance Plan For Hourly Rated And/Or Piecework Employees, The Retirement Plan For Employees of Lorillard Tobacco Company and One Park Media Services, Inc. (Second Intervenors) (together with First Intervenors, "Intervenors").

The court discussed the facts underlying this dispute in detail in prior decisions in *In Re Lipper*, Index No. 603653/2002 and in related actions *Jones v PriceWaterhouseCoopers LLP*, 2004 WL 3140909 (Sup Ct, NY County 2003) and *Morgado Family Partners, LP v Lipper*, 2004 WL 3142198 (Sup Ct, NY County 2004). Therefore, the court presumes familiarity with the facts and refers the parties to those decisions.

Discussion

Motions to Intervene

The factual allegations of the proposed Intervenors are

consistent with the allegations of the complaint in this action. The Intervenors claim that their intervention in this action is necessary to protect their individual interests that are independent from the interests of this plaintiff. They seek to intervene pursuant to CPLR 1012 and 1013. In opposition, plaintiff argues that the court should deny intervention because the Intervenors fail to satisfy the requirements of either CPLR provision and fail to submit a copy of their proposed pleading pursuant to CPLR 1014.

"Intervention is a joinder procedure by which a nonparty seeks to become an additional plaintiff or defendant in a pending action in which the judgment may adversely affect the intervenor's interests." CPLR 1012, Practice Commentary C1012:1. CPLR 1012 (a) provides:

Upon timely motion, any person shall be permitted to intervene in any action:

1. When a statute of the state confers an absolute right to intervene; or
2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or
3. When the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

"Intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding." (*Vantage Petroleum v Board of Assessment Review*,

etc., of *Town of Babylon*, 91 AD2d 1037, 1040, *affd* 61 NY2d 695).

"[T]he focus should be 'on whether the prospective intervenor has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify [its] inclusion.'" (*Id*).

First, the Intervenors fail to identify a statute that confers a right to intervene as CPLR 1012(a)(1) requires.

Moreover, there is no indication that plaintiff is representing the interests of the Intervenors, either individually or as limited partners. Rather, plaintiff's action is on behalf of Lipper Convertibles and Lipper Fixed Income (together, Partnerships). This action is for the benefit of these entities, and the Intervenors have not shown that they have any right to sue on behalf of either of those entities. Nor have the Intervenors shown that a judgment in this action will bind them. Therefore, the Intervenors may not intervene pursuant to CPLR 1012(a)(2).

Further, the Intervenors do not respond to plaintiff's argument that, while the limited partners owned interests in the Fund, they did not directly own the securities the Fund purchased or any other property of the Partnerships. Based on the papers before the court, there is no indication that this action involves the disposition or distribution of property, title to property or a claim for damages for injury to property in which the Intervenors have an interest, that CPLR 1012(a)(3) requires. For the foregoing reasons, the Intervenors

fail to show that they are entitled to intervention as of right, pursuant to CPLR 1012.

The Intervenors also seek intervention, by permission, pursuant to CPLR 1013, that provides:

Upon timely motion, any person may be permitted to intervene in any action ... when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

CPLR 1014 provides that "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought." The Practice Commentaries to CPLR 1014 state that "[t]he motion seeking intervention, whether made under CPLR 1012 or 1013, must include the would-be intervenor's proposed complaint or answer. The court will thereby be better able to ascertain whether proper grounds exist for intervention."

Here, the Intervenors acknowledge, on the one hand, that their claims are "virtually identical" to, and are "the same claims," that the plaintiff raises here (First Intervenors' Mem. of Law, at 3; Second Intervenors' Mem. of Law, at 2); while on the other hand, the Intervenors claim that plaintiff cannot adequately represent their interests in this action and seek dismissal of the complaint. Thus, the Intervenors fail to commit themselves to joining the action as a plaintiff or defendant. As

a result, the Intervenors appear to place themselves on both sides of the dispute. In other words, the Intervenors seek intervention as co-defendants with PWC in this action for the sole purpose of dismissing this action, while remaining PWC's adversaries in their respective pending separate actions, where the Intervenors are plaintiffs and PWC is a named defendant. The Intervenors cite no legal authority to support this use of the CPLR's intervention provisions.

Consistent with their failure to assert intervention as a plaintiff or defendant in this action, the Intervenors also fail to submit a pleading. To this end, the First Intervenors claim that their proposed pleading is their motion to dismiss and the Second Intervenors appear to claim that their memorandum of law and motion to dismiss constitute their proposed pleading. However, motions to dismiss and legal memoranda are not pleadings. See CPLR 3011 (defining pleadings as complaints, answers, cross claims, counterclaims and interpleader). Therefore, these arguments are unpersuasive.

The First Intervenors also claim that they need not submit a proposed pleading, because they submitted a copy of their complaint against PWC in their separate class action. However, the complaint in that action, if anything, aligns the First Intervenors' position with that of plaintiff here, not with PWC. Yet, rather than seek intervention to join in this action as co-plaintiffs, as discussed *supra*, the Intervenors seek intervention

for the sole purpose of moving to dismiss this action. The only conceivable basis for the Intervenors seeking dismissal of the complaint in this action is to gain an advantage in their respective separate actions against PWC by eliminating the Fund's claims against PWC, and, as a result, narrowing the field of litigants who seek recovery from PWC. In essence, the Intervenors seek intervention for the sole purpose of dismissing this action, not participating in it. Following the Intervenors' logic, plaintiff here could intervene in the Intervenors' actions for the sole purpose of dismissing those actions, thereby canceling out all of the actions against PWC. As discussed *supra*, the Intervenors cite no legal authority that supports their current use of the CPLR's intervention rules and Intervenors fail to submit a proposed pleading in accordance with CPLR 1014. For the foregoing reasons, the court denies the Intervenors' motions to intervene.

PWC's Motion to Dismiss:
Lack of Standing

PWC argues that plaintiff lacks standing to bring claims for lost goodwill or business prospects, because those claims belong to the general partner, Lipper Holdings. In opposition, plaintiff argues that the misstatements about the value of these entities' securities permanently impaired the goodwill of the Partnerships and that these claims belong to the Partnerships, not the general partner.

To have standing, a plaintiff must allege personal injury

fairly traceable to the defendant's allegedly unlawful conduct and the likelihood that a favorable decision would redress the injury. (*Dental Soc. of the State of New York v Carey*, 61 NY2d 330, 338). "If a partner is injured only through his or her interest in the partnership, the claim probably is the partnership's. If the partner is injured in some other way, e.g., in a way that is unique to the partner, the claim is probably the partner's." (*Schupak v Florescue*, 1993 WL 256572, *6 [SD NY 1993], citing 2 Alan R. Bromberg and Larry E. Ribstein, *Bromberg and Ribstein on Partnership* § 5:32 [1992]).

The parties agree that the goodwill at issue in this action is the "expectancy of continued patronage." (*Newark Morning Ledger Co. v U.S.*, 507 US 546, 556). Here, Lipper Convertibles and Lipper Fixed Income allegedly benefitted from their ability to attract and retain limited partners. Because of the alleged misstatements concerning the value of Lipper Convertibles' securities, many limited partners withdrew their investments and the Fund had to dissolve. If part of the injury the dissolution of the Fund caused is the loss of continued patronage, the partnership as a whole sustains that loss and the partners share in it.

PWC argues that any of these losses belong solely to Lipper Holdings, as the general partner of the Fund. However, PWC fails to explain how those losses are unique to Lipper Holdings, as opposed to losses of the partnership as a whole. PWC cites

Stogop Realty Co. v Marie Antoinette Hotel Co. 217 AD 555, 565 for the proposition that "[g]ood-will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage." *Id.* (citations and quotation marks omitted). However, this statement is: (1) dicta and (2) does not support PWC's conclusion that goodwill belongs to Lipper Holdings as the general partner, or that injury resulting from the loss of goodwill is injury unique to the general partner. To the contrary, as discussed *supra*, the partnership as a whole sustains any injury resulting from the loss of goodwill and the partners share in that loss. Thus, PWC fails to show that plaintiff lacks standing to assert claims for lost goodwill.

PWC also argues that plaintiff lacks standing to assert the claims that the limited partners suffered losses and overpaid taxes in connection with their respective interests in Lipper Convertibles and Lipper Fixed Income. PWC argues that these claims belong to the individual limited partners. In opposition, plaintiff argues that he is seeking to enforce rights deriving from the Partnerships' contracts with PWC, whereby PWC was allegedly to prepare and distribute K-1s to the limited partners, detailing each partner's portion of taxable income from the Partnerships.

CPLR 1004 provides that a "person with whom or in whose name a contract has been made for the benefit of another, may sue or

be sued without joining with him the person for or against whose interest the action is brought." Applying the analogous federal law in *Vista Co. v Columbia Pictures Indus.*, 725 F Supp 1286 [SD NY 1989]), the Southern District examined whether the plaintiff limited partnerships had standing to seek recovery of tax losses that purportedly belonged to the individual partners. The district court held that, "[a]lthough the damages sought are tax liabilities incurred by individual partners, the Partnerships can properly bring an action to enforce rights deriving from the contracts it negotiated for the benefit of the individual partners." (*Id.* at 1290). The court reasoned that the partnerships sought "to vindicate rights arising from contracts which were negotiated and signed in the name of the Partnerships for the benefit of the individual partners. These circumstances fit squarely within the scope of Rule 17 (a) and the partnerships therefore have standing to assert the claims on behalf of the partners." (*Id.*).

Applying the same reasoning under CPLR 1004, according to plaintiff, Lipper Convertibles and Lipper Fixed Income contracted with PWC to prepare Form K-1s to send the partners each year, reporting on the income each partner received during the year. Plaintiff claims that PWC knew that the partners would use the Form K-1s to determine their taxable income and pay their taxes. Because of the inflated values PWC allegedly reported, the partners allegedly paid taxes in excess of what they actually

owed. Plaintiff now seeks to vindicate rights arising from the Partnerships' contracts with PWC, that plaintiff purportedly entered into for the benefit of the individual partners. Therefore, plaintiff has standing to bring this action. For the foregoing reasons, the court denies PWC's motion to dismiss plaintiff's claims for lack of standing.

The court notes that this decision does not prevent the individual limited partners from asserting claims based upon their individual tax liability. However, there cannot be double-recovery for tax claims that multiple parties assert in parallel litigation.

PWC's Motion to Dismiss:
Claims As Time-Barred

PWC moves to dismiss the first cause of action for negligence, for claims from 1995 through 1999, as time-barred.¹ In opposition, plaintiff argues that the continuous representation doctrine tolled the statute of limitations until at least February 2002.

A three-year statute of limitations governs accounting malpractice claims. CPLR 214 (6). The limitations period "begins to run on the date the accountant's work product is received by the client since this is the first time the client can rely on the alleged negligent work product." (*Ackerman v Price Waterhouse*, 84 NY2d 535, 538). However, the continuous

¹ PWC does not challenge the timeliness of plaintiff's claims for malpractice after 1999.

representation doctrine operates to toll the statute of limitations if facts supporting its application exist. (*Ackerman v Price Waterhouse*, 252 AD2d 179, 205). For the doctrine to apply, the "continuous representation must be in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship. The mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services." (*Id.*) (citations and internal quotation marks omitted).

The complaint alleges that "PWC's services to the Partnerships for each year incorporated and built upon the services rendered in prior years. PWC's services to the Partnerships was continuous and performed in the same manner and for the same purpose through at least 2002." (Complaint, ¶ 3). Plaintiff also claims that each audit was allegedly "one step in a continuous and interrelated service that PWC provided during those years." (Plaintiff's Opp. Mem. of Law, at 4).

While the court is sympathetic to plaintiff's position, the annual audits form the only basis for plaintiff's claims. Taken together, plaintiff's claims underscore that the audits PWC performed constituted the continuation of a general professional relationship. Those audits are insufficient to toll the statute of limitations under the continuous representation doctrine.

(See *Levin v PricewaterhouseCoopers, LLP.*, Index No. 110886/2000 [Sup Ct, NY County Nov. 21, 2001], *affd* 302 AD2d 287, 288 [no continuous representation found where annual audits formed the only basis for the plaintiff's claim; each audit was a discrete service, ending with the accountant's delivery of an annual audit letter; and the parties signed separate engagement letters for each fiscal year that the accountant agreed to perform the audit]).

Plaintiff does not dispute that, for fiscal years 1995 through 1999, PWC issued its last audit opinion on March 10, 2000. Therefore, plaintiff's claims concerning those audits expired on March 10, 2003. Plaintiff commenced this action on July 2, 2004, over one year after the expiration of the statute of limitations.

The court notes that the parties entered into a tolling agreement, whereby they agreed to toll the limitations periods for plaintiff's claims that had not expired as of December 15, 2003 through June 30, 2004. (Cutler Aff., Ex. 18). However, as discussed *supra*, plaintiff's malpractice claim, for the years 1995 through 1999, expired on March 10, 2003, well before the commencement of the tolling period. For the foregoing reasons, PWC's motion to dismiss plaintiff's first cause of action for malpractice as time-barred is granted with respect to claims relating to audits conducted from 1995 through 1999.

PWC's Motion To Dismiss:
Duplicative Claims

PWC moves to dismiss the second cause of action for fraud, arguing that that claim is duplicative of the negligence cause of action. In opposition, plaintiff argues that he is permitted to plead alternative causes of action and that his claims are not duplicative.

"An action for fraud requires that the plaintiff demonstrate the making of a material misrepresentation, known to be false, made with the intention of inducing reliance on the part of the victim, on which the victim does in fact rely and, as a result of which, he sustains damages." (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assoc.*, 257 AD2d 1, 9 [quotation marks and citation omitted]). However, when the plaintiff asserts claims for both malpractice and fraud,

[i]t is only when the alleged fraud occurs separately from and subsequent to the malpractice that a plaintiff is entitled to allege and prove a cause of action for intentional tort ... and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice.

(*Abbondandolo v Hitzig*, 282 AD2d 224, 225 [quotation marks and citation omitted]). On the other hand, CPLR 3014 provides that "[c]auses of action ... may be stated alternatively or hypothetically."

The fraud claim alleges that "PWC knew about the improper valuation techniques Strafacci used to significantly inflate the

value of the securities held by the Fund and that the 1995, 1996, 1997, 1998, 1999 and 2000 financial statements of the Fund materially overstated the value of securities held by the Fund" Complaint, ¶ 127. The complaint also alleges that, because of the procedures that PWC followed in auditing the Fund, PWC learned that the Fund's securities were reported in the financial statements at prices significantly greater than the marks PWC obtained from independent third-party sources. *Id.* at ¶ 36. According to the complaint, PWC "contacted several securities dealers to confirm the valuations being used by Strafaci and found that the valuations reported by the securities dealers for the securities at issue were lower than those being reported by Strafaci" (*Id.* at ¶ 71).

These allegations, if proven, show that PWC concealed its direct knowledge of the alleged overvaluation of the Fund's securities, and that, notwithstanding the overvaluation, PWC repeatedly issued clean audit opinions, thereby satisfying the element of scienter, an element that distinguishes plaintiff's fraud claim from its malpractice claim. A fraud claim is not vitiated just because a plaintiff alleges some of the same acts and misrepresentations in connection with its malpractice claim as in its fraud and breach of fiduciary duty claims. (*Serio v Pricewaterhousecoopers LLP*, 9 AD3d 330, 331 [fraud claim sustained where defendant accounting firm allegedly "failed to undertake even the most minimal audit," thereby showing that

defendant allegedly "had notice of particular circumstances raising doubts as to the veracity of such information"]; see also *Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d 92, 97 [fraud claim sustained where plaintiff alleged that defendant accountant certified accuracy of financial statements, even though it knew, but failed to acknowledge, that the statements contained "serious irregularities and inaccuracies, which it knew could have a material impact on the accuracy of the financial statements' recitation of the corporation's net worth"]).

For the foregoing reasons, plaintiff's fraud claim is not duplicative of the malpractice claim. Accordingly, at this juncture in the litigation, dismissal of the fraud claim is unwarranted, and plaintiff is entitled to plead his fraud and malpractice claims in the alternative, in accordance with CPLR 3014. Therefore, the court denies PWC's motion to dismiss the second cause of action for fraud.

PWC moves to dismiss the fourth cause of action for breach of contract, arguing that that claim is duplicative of the negligence cause of action. In opposition, plaintiff argues that, in addition to breaching its duty of care, PWC allegedly failed "to perform the procedures it had agreed to conduct." (Plaintiff's Opp. Mem. of Law, at 15).

The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, plaintiff's performance, defendant's failure to perform and

resulting damage. (*Furia v Furia*, 116 AD2d 694). However, a breach of contract claim premised on "the failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38-39).

According to the allegations of the complaint, plaintiff's breach of contract cause of action relies upon PWC's failure "to perform its audits and accounting services in conformity with GAAP and GAAS." Complaint, ¶ 143. Plaintiff also claims that PWC contracted to provide audit and accounting services, and that its alleged inadequate audit procedures "amounted to no audit at all." Complaint, ¶¶ 109, 142. However, plaintiff's characterization merely recasts its malpractice claim into a breach of contract claim, without explaining how the breach of contract claim is anything more than allegations of malpractice. In essence, this cause of action alleges that PWC failed to abide by general professional standards. Therefore, this claim is duplicative of plaintiff's malpractice cause of action. Accordingly, the court grants PWC's motion to dismiss the fourth cause of action for breach of contract and dismisses the fourth cause of action without prejudice. Plaintiff has leave to replead this cause of action, if he can plead facts that set forth a separate breach of contract.

PWC's Motion to Dismiss:
Breach of Fiduciary Duty

PWC moves to dismiss the third cause of action for breach of

fiduciary duty, arguing that the relationship between an accountant and a client is not a fiduciary relationship, and that this claim is duplicative of plaintiff's malpractice cause of action. In opposition, plaintiff argues that a fiduciary duty existed, because PWC allegedly knew of, but concealed, the misconduct that led to the Fund's collapse.

Generally, the duty owed by an accountant to a client is not fiduciary in nature. (*DG Liquidation, Inc. v Anchin, Block & Anchin, LLP*, 300 AD2d 70, 71). However, courts have recognized limited circumstances where an accountant-client relationship may become a fiduciary relationship. (*Id.*). For example, in *Lavin v Kaufman, Greenhut, Lebowitz & Forman* (226 AD2d 107), the First Department sustained a cause of action for breach of fiduciary duty where the complaint alleged that the defendant-accountant engaged in a series of acts, representations and omissions relating to 16 specific investments; made all investment decisions for the plaintiff for 16 years; recommended specific investments, and concealed pertinent information about those investments. Similarly, in *Kanev v Turk*, 187 AD2d 395, the First Department concluded that the plaintiff stated a cause of action for breach of fiduciary duty, where the defendant-accountant advised the plaintiff to loan \$25,000 to another one of his clients and that there was no need to secure the loan, that he knew of the borrower's insolvency and intentionally deceived the plaintiff, and that the plaintiff relied on the defendant's

advice.

Here, the complaint alleges, at most, that PWC knew of the misconduct of the general partner's employee that led to the Fund's collapse, but failed to advise senior management of the misconduct. These allegations do not rise to the level of the type of loss of independence contemplated in *Lavin*, 226 AD2d 107, *supra*, and *Kanev*, 187 AD2d 395, *supra*, where the plaintiffs relied upon the defendant-accountants' recommendations of specific investments, while at the same time concealing material information concerning the investments. Therefore, these cases are distinguishable on their facts and plaintiff fails to plead fact to show that the claim for breach of fiduciary duty falls within the limited circumstances where the duty an accountant owed to a client is fiduciary in nature. Accordingly, the court grants PWC's motion to dismiss the third cause of action for breach of fiduciary duty.

PWC's Motion To Dismiss
For Lack of Proximate Cause

PWC next argues that it could not have proximately caused injuries resulting from Lipper Holdings' decision to liquidate the Fund's holdings and the public announcement that it was selling off its entire portfolio. In opposition, plaintiff argues that PWC's argument is premature at the pleading stage of the litigation and that PWC proximately caused all reasonably foreseeable losses that resulted from its conduct.

PWC's argument regarding proximate cause does not address

the sufficiency of the malpractice claim. Rather, it prematurely addresses a potential factual question that would be more appropriately addressed in a motion for summary judgment. Accordingly, the court denies PWC's request for dismissal of plaintiff's claim for damages resulting from Lipper Holdings' decision to sell the Partnerships' assets.

Accordingly, it is hereby

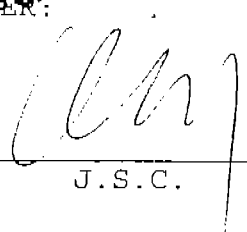
ORDERED that the motions to intervene (motion sequence numbers 001 and 003) are denied; and it is further

ORDERED that the defendant's motion to dismiss is granted in part as follows: (1) that the first cause of action is dismissed as time-barred with respect to claims relating to audits defendant PWC conducted from 1995 through 1999; (2) the third and fourth causes of action are dismissed in their entirety, the third with prejudice and the fourth without prejudice and (3) the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: March 18, 2005

FILED
MAR 28 2005
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.