

Serino v Lipper

2006 NY Slip Op 30220(U)

September 28, 2006

Supreme Court, New York County

Docket Number: 0604396/2002

Judge: Karla Moskowitz

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SCANNED ON 10/5/2006
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MATTHEW SERINO and LUCILLE SERINO,
individually and on behalf of all others similarly
situated,

Index No. 604396/2002

Plaintiffs,

-against-

KENNETH LIPPER, LIPPER HOLDINGS, LLC,
PRICEWATERHOUSE COOPERS LLP, LIPPER &
COMPANY, INC., ABRAHAM BIDERMAN,
LAWRENCE BLOCK, EDWARD STRAFACI and
MICHAEL VISOVSKY,

Defendants.

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DECISION and ORDER

LIPPER HOLDINGS, LLC, LIPPER & COMPANY,
L.P., JEROME SERVICES CORP. LDC and
KENNETH LIPPER,

Plaintiffs,

Index No. 600150/2005

-against-

PRICEWATERHOUSECOOPERS LLP, and
PRICEWATERHOUSECOOPERS LLP
(NETHERLANDS ANTILLES),

Defendants.

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MOSKOWITZ, J.:

Motion sequence numbers 017 (in *Serino v Lipper, et al.* [Index No. 604396/02] [the
Serino Action]) and 001 and 002 (in *Lipper Holdings, LLC, et al. v PricewaterhouseCoopers
LLP, et al.* [Index No. 600150/05] [the *Lipper* Action]) are consolidated for disposition.

These two actions are among several lawsuits resulting from the demise of Lipper

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Convertibles, L.P. (Lipper Convertibles) and other investment funds. Plaintiffs seek damages for, among other things, the defendant accounting firms' improper audits of the funds' financial statements including the firms' failure to discover that the funds had overstated their earnings.

The five-count amended complaint in the *Serino* Action asserts causes of action for breach of fiduciary duty, money had and received and unjust enrichment, breach of contract, negligence, negligent misrepresentation and malpractice, and aiding and abetting breach of fiduciary duty. Defendant PricewaterhouseCoopers LLP (PWC) answered the amended complaint, asserting five contribution-based cross claims, including claims for fraud, negligent misrepresentation, negligence, breach of fiduciary duty, and breach of contract. Defendants Kenneth Lipper (Lipper), Lipper Holdings, LLC (Lipper Holdings), and Lipper & Company, Inc. (Lipper, Inc.) answered PWC's cross claims, asserting cross claims against PWC for fraud, negligence and malpractice, breach of fiduciary duty, breach of contract, negligent misrepresentation and contribution. Defendant Abraham Biderman (Biderman) answered PWC's cross claims, asserting cross claims against PWC for fraud, and contribution and negligence.

The *Lipper* Action involves the defendant accounting firms' independent audits of the following investment funds: Lipper Convertibles, from 1989 through the second quarter of 2002; Lipper Offshore Convertibles, L.P. (Lipper Offshore), from 1993 through the second quarter of 2002; Lipper Convertibles Series II, L.P. (Lipper Series II), from 1998 through the second quarter of 2002; and Lipper Fixed Income Fund, L.P. (Lipper Fixed Income), from 1993 through the second quarter of 2002. The six-count complaint contains causes of action for fraud, negligence and malpractice, breach of fiduciary duty, breach of contract, negligent misrepresentation, and contribution and indemnification.

In motion sequence number 017 in the *Serino* Action, PWC moves to dismiss the cross claims of Lipper, Lipper Holdings, Lipper, Inc. (together, Lipper Parties) and Biderman, except for the cross claims for contribution.

In motion sequence number 001 in the *Lipper* Action, PWC moves to dismiss the complaint. In motion sequence number 002 in the *Lipper* Action, defendant PricewaterhouseCoopers LLP (Netherlands Antilles) (PWC NA) moves to dismiss the complaint.

The court discussed the facts underlying both the *Serino* and *Lipper* Actions in detail in prior decisions in the related action *Jones v PriceWaterhouseCoopers LLP* (6 Misc 3d 1014[A], 2004 WL 3140909 [Sup Ct, NY County 2004]) and the prior decision of *Morgado Family Partners, LP v Lipper* (6 Misc 3d 1014[A], 2004 WL 3142198 [Sup Ct, NY County 2004], *affd* 19 AD3d 262 [1st Dept 2005]). Therefore, the court presumes familiarity with the facts and will only discuss new facts to the extent that they are relevant to this decision.

Discussion

PWC's Motion to Dismiss Cross claims in the *Serino* Action

Motion to Dismiss Lipper Parties' Cross claims

In motion sequence number 017 in the *Serino* Action, PWC argues that the court should dismiss the Lipper Parties' cross claims because these claims are identical to the claims the Lipper Parties assert in the *Lipper* Action. In opposition, the Lipper Parties argue that PWC has already agreed that consolidation of their cross claims in this action and the *Lipper* Action is appropriate, that statute of limitations differences exist between this action and the *Lipper* Action and that there is not complete identity of parties.

CPLR 3211 (a) (4) permits dismissal of an action where “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.” (See *Employers Ins. of Wausau v Primerica Holdings, Inc.*, 199 AD2d 178, 178 [1st Dept 1993] [dismissing action under CPLR 3211 (a) (4) based upon “the identity of issues” and a “substantial identity of the parties”]; see also *Screen Gems-Columbia Music, Inc. v Hansen Publ., Inc.*, 42 AD2d 897, 898 [1st Dept 1973], *affd* 35 NY2d 885 [1974]).

On January 13, 2005, after plaintiffs filed their amended complaint in the *Serino* Action, the Lipper Parties commenced the *Lipper* Action against PWC and PWC NA. On February 15, 2006, PWC moved to dismiss the *Lipper* Action, and the Lipper Parties served their answers to PWC’s cross claims and their own cross claims against PWC. The complaint in the *Lipper* Action and the Lipper Parties’ cross claims against PWC in the *Serino* action are all based upon PWC’s alleged failure to properly audit the financial statements of certain investment funds and PWC’s alleged failure to discover and/or disclose overvaluations and problems with internal controls after conducting audits of those funds. The Lipper Parties’ cross claims in the *Serino* Action are identical to the claims that they assert against PWC in the *Lipper* Action. Thus, PWC has shown that “[t]here is another action pending by defendants for the same relief and the issues raised may properly be considered in such action.” (See *Screen Gems-Columbia Music, Inc.*, 42 AD2d at 898).

The Lipper Parties argue that the court should consolidate claims in the *Lipper* Action with the Lipper Parties’ cross claims in the *Serino* Action, because PWC already agreed to this consolidation. PWC moved to consolidate the six Lipper-related actions for trial. On May 4,

2006, the court heard oral argument on PWC's consolidation motion and denied the motion from the bench, with leave to renew. (5/4/06 Tr., at 6-7).

As a preliminary matter, the Lipper Parties have not cross-moved for consolidation of their claims in the *Lipper* Action and the *Serino* Action. Moreover, the Lipper Parties' argument assumes that PWC's motion to consolidate six actions is tantamount to an admission that consolidation of two actions, the Lipper and Serino Actions, is appropriate. However, PWC did not contemplate in its motion carving out the claims in these two actions for consolidation and the Lipper Parties fail to show that PWC consented to the consolidation. Therefore, the Lipper Parties' argument is unpersuasive.

The Lipper Parties argue that their cross claims in the *Serino* Action are timely under CPLR 203 (d); whereas, if the continuous representation doctrine does not apply to their claims in the *Lipper* Action, dismissal of the *Serino* Action could deprive them of remedies that might be available in the *Lipper* Action.

CPLR 203 (d) provides that "[a] defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed"

That the Lipper Parties may have timely asserted their cross claims in the *Serino* Action does not alter the fact that their cross claims in the *Serino* Action seek recovery for the same injuries as their claims in the *Lipper* Action. As discussed above, in the two actions, the parties, the causes of action and the injury are all substantially identical. Moreover, because they are the same claims, the same statutes of limitations apply in both actions. Therefore, the Lipper Parties' argument is unpersuasive.

The Lipper Parties claim that the dismissal of this action pursuant to CPLR 3211 (a) (4) might substantially prejudiced them. However, the Lipper Parties made a strategic decision to commence the *Lipper* Action and assert their claims as plaintiffs. The Lipper Parties did not cross-move to consolidate the two actions. Nor did they seek to withdraw their complaint in the *Lipper* Action in favor of their cross claims in the *Serino* Action. The court fails to see how the Lipper Parties might prejudice their own litigation strategy. In any event, as discussed below, a majority of the Lipper Parties' claims are not time-barred in the *Lipper* Action.

The Lipper Parties argue that dismissal under CPLR 3211 (a) (4) is inappropriate, because there is not complete identity of the parties.

Under New York law, courts may dismiss claims based upon "the identity of issues" and the "substantial identity of the parties." *Employers Ins. of Wausau*, 199 AD2d at 178.

[I]t is necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions. With respect to the parties, the requirement is that there be substantial identity. ... The presence of additional parties, however, will not necessarily defeat a motion pursuant to CPLR 3211 (a) (4) where, as here, both suits arise out of the same subject matter or series of alleged wrongs.

(*White Light Prod., Inc. v On The Scene Prod., Inc.*, 231 AD2d 90, 93-94 [1st Dept 1997]

[internal citations and quotation marks omitted]).

A review of the overlapping Lipper Parties between the *Lipper* and *Serino* Actions reveals that only Lipper, Inc. is a defendant in the *Serino* Action but not a plaintiff in the *Lipper* Action. Thus, there is a substantial identity of parties. Moreover, the court takes note of PWC's assertion that Lipper Convertibles' former general partner, Lipper & Company, L.P represents the interests of Lipper, Inc. (Lipper Holding's managing member) in the *Lipper* Action. Further,

the progression of two actions “involving substantially the same parties and issues” would be an “indefensible ... waste of judicial energies.” (See *Krisel v Phillips Petroleum Co.*, 32 AD2d 628, 629 [1st Dept 1969]). Accordingly, the court grants PWC’s motion to dismiss the Lipper Parties’ cross claims, except the cross claims for contribution.

Motion to Dismiss Biderman’s Cross claims

Biderman is a defendant and cross claimant in the *Serino* Action, but not a party in the *Lipper* Action. Biderman asserts two cross claims against PWC, one for fraud and one for contribution. Motion sequence number 017 seeks dismissal of Biderman’s fraud cross claim, for failure to state a cause of action. As discussed above, PWC does not seek dismissal of the contribution claim.

According to PWC, Biderman fails to allege that PWC had any interest in knowingly failing to disclose a misstatement in the financial statement and that he reasonably relied upon PWC’s misrepresentations.

“In order to recover for fraud, plaintiffs must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.” (See *Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006]).

Here, Biderman alleges that he served as executive vice-president of Lipper & Company, L.P. and Lipper Holdings, and as co-manager of Lipper Convertibles. His cross claim for fraud avers that PWC failed to inform him or the other Lipper Parties that Lipper Convertibles’ portfolio manager overvalued Lipper Convertibles’ securities and that PWC falsely represented that it audited Lipper Convertibles’ financial statements in accordance with its obligations.

Specifically, Biderman's cross claim alleges that PWC's audit papers reveal that PWC discovered significant discrepancies in the valuations of Lipper Convertibles' portfolio manager, defendant Edward Strafaci (Strafaci). Strafaci's overvaluation ultimately caused Lipper Convertibles to reduce its net equity value by approximately \$400 million (about 40%). Biderman avers that PWC nevertheless continued to issue clean audit opinions and failed to inform Biderman or the Lipper Parties of the discrepancies, even though PWC was aware of information that contradicted its own work papers. Biderman claims that PWC knew of the importance of Lipper Convertibles valuations and assured Biderman and the Lipper Parties that PWC would confirm the valuations through its audit.

Biderman alleges that PWC falsely represented that it had audited Lipper Convertibles in accordance with Generally Accepted Auditing Standards (GAAS), that Lipper Convertibles' financial statements were prepared in conformity with Generally Accepted Accounting Principles (GAAP), that Lipper Convertibles' financial statements fairly represented its financial position in all material respects, and that Lipper Convertibles' portfolio had been confirmed against third-party sources' market information. Biderman claims that he relied upon the financial statements in operating and managing Lipper Convertibles. These allegations support a claim for fraud. (*See e.g. Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d 92, 97 [1stDept 2003] [fraud claim sustained where accountant certified the accuracy of financial statements when it knew, but failed to acknowledge, that the "statements actually contained numerous 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"]).

PWC argues that Biderman cannot bring a fraud claim because he annually represented to

PWC in letters that he was “responsible for the fair presentation in the financial statements of financial position, results of operations, and cash flows in conformity with generally accepted accounting principles.” (Hannon Aff., Ex. B). However, Biderman maintains that he was an innocent member of Lipper Convertibles’ management and that he was unaware of misstatements on financial statements. PWC cites no legal authority in support of its argument that the fraud claim should be dismissed under these circumstances. Moreover, according to Biderman, the law firm Fried Frank Harris Shriver & Jacobsen, LLP, after an investigation, concluded that Lipper Convertibles’ management, including Biderman, was not aware of Strafaci’s wrongdoing. If anything, Biderman’s awareness of the misstatements raises a question of fact inappropriate for resolution on a motion to dismiss for failure to state a cause of action. (See *Gutierrez v Bernard*, 27 AD3d 377, 378 [1st Dept 2006] [“issues of fact ... should not have been resolved on a motion to dismiss”]). Therefore, PWC’s argument is unpersuasive. For the foregoing reasons, the court denies PWC’s motion to dismiss Biderman’s cross claim for fraud.

PWC’s Motion to Dismiss Complaint in Lipper Action

Statute of Limitations

In motion sequence number 001 in the *Lipper* Action, PWC argues that plaintiffs’ claims for negligence/malpractice, negligent misrepresentation and breach of contract are all time-barred, because they are subject to the three-year malpractice statute of limitations in CPLR 214(6). In opposition, plaintiffs argue that the continuous representation doctrine tolled the statute of limitations with respect to these claims.

A three-year statute of limitations governs malpractice claims, “regardless of whether the underlying theory is based in contract or tort.” CPLR 214(6). “[T]he Statute of Limitations

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." (See *Ackerman v Price Waterhouse*, 84 NY2d 535, 538 [1994]).

However, the continuous representation doctrine operates to toll the statute of limitations if facts supporting its application exist. (*Ackerman v Price Waterhouse*, 252 AD2d 179, 205 (1st Dept 1998). 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]). However, on a motion to dismiss, the plaintiff must be given an "opportunity to develop through discovery, and to establish, the asserted fact that each audit was merely a step in a continuous and interrelated service that PwC provided through the years in question." (*Williamson v PricewaterhouseCoopers LLP*, 817 NYS2d 61, 2006 NY Slip Op 05116, *2 [1st Dept 2006]).

As conceded by PwC in its opening brief, the facts of the *Lipper* Action are "precisely the same facts" alleged in *Williamson*. (PwC Mem. of Law, at 10). In *Williamson*, the First Department determined that "the firm's alleged reliance each year on its faulty conclusions from the prior year in conducting each year's audits may well support a factual conclusion that the accounting firm's services for [Lipper Convertibles] were continuous." (*Williamson*, 817 NYS2d at 65, 2006 NY Slip Op 05116, at *5). The court concluded that, therefore, the otherwise time-barred claims "should not have been dismissed prior to a full exploration of the facts." (*Id.*).

The complaint in the *Lipper* Action avers that PwC continued to provide accounting and

audit-related services with respect to the funds at issue through the second quarter of 2002. (Lipper Complaint, ¶¶ 146-150). Thus, under *Williamson*, if the continuous representation doctrine applies to toll the statute of limitations, plaintiffs' claims would be timely through the second quarter of 2005. The *Lipper* Action was commenced on January 15, 2005, which would be prior to the expiration of the statute of limitations.

As the First Department stated in *Williamson*, “[w]e cannot yet tell whether the circumstances here actually warrant the application of the doctrine. But the ... claims should not [be] dismissed prior to a full exploration of the facts.” (817 NYS2d at 65, 2006 NY Slip Op 05116, at *5). Thus, PWC’s motion to dismiss plaintiffs’ claims based upon a three-year statute of limitations is denied. Plaintiffs are, therefore, afforded an “opportunity to develop through discovery, and to establish, the asserted fact that each audit was merely a step in a continuous and interrelated service that PwC provided through the years in question.” (*Id.*, at 61, *2.).

Duplicative Claims

A. Fraud

PWC argues that the court should dismiss the first cause of action for fraud as duplicative of the second cause of action for malpractice.

“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 [1st Dept 1999] [quotation marks and citation omitted]). 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 [1st Dept 2001] [quotation marks and citation omitted]). CPLR 3014 provides that “[c]auses of action ... may be stated alternatively or hypothetically.”

The allegations of the complaint show that “PWC knew or recklessly disregarded that Strafaci was ascribing values to securities held in the Convertibles Funds that were substantially greater than values provided by independent third-party sources.” (Complaint, ¶¶ 166, 114-16, 126-28, 138-40, 164-73.). PWC’s own work papers allegedly reflected its knowledge of discrepancies between Strafaci’s valuations and valuations of independent sources, and, notwithstanding this knowledge, PWC allegedly issued clean opinions and assurances that there were no problems with the funds at issue. (*Id.*).

As in *Williamson*, these allegations, if proved, show that PWC concealed its direct knowledge of the alleged overvaluations while repeatedly issuing clean audit opinions, thereby satisfying the element of scienter, an element that distinguishes plaintiffs’ fraud claim from their 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 with its fraud and breach of fiduciary duty claims. (*See Serio v PricewaterhouseCoopers LLP*, 9 AD3d 330, 331 [1st Dept 2004] [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” [quotation marks and

citation omitted)]; *see also Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d at 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, plaintiffs’ fraud claim is not duplicative of their malpractice claim. Accordingly, at this juncture in the litigation, dismissal of the fraud claim is unwarranted, and plaintiffs are entitled to plead their fraud and malpractice claims in the alternative, in accordance with CPLR 3014. Therefore, PWC’s motion to dismiss the first cause of action for fraud is denied.

B. Breach of Contract

PWC argues that plaintiffs’ fourth cause of action for breach of contract is duplicative of their malpractice claim, based upon this court’s reasoning in the *Williamson* decision. In opposition, plaintiffs argue that PWC made a contractual promise to achieve a particular result or perform a particular task, and then breached that promise.

The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant’s failure to perform, and resulting damage. (*See Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). 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.” (*See Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38-39 [1st Dept 1998]). “In order to bring both a malpractice claim and a breach of contract claim the plaintiff must allege that the professional

promised to achieve a specific result or to perform a particular task and then breached that promise.” (See *Common Fund for Non-profit Org. v KPMG Peat Marwick LLP*, 2000 WL 124819, *1 [SDNY, Feb. 2, 2000] [citation and internal quotation marks omitted]).

Here, the complaint alleges that PWC specifically agreed “that if it were to encounter or discover any problem relating to the Convertibles Funds or any other investment fund, it would inform Mr. Lipper directly of such problems.” (Complaint, ¶¶ 64, 189). Plaintiffs argue that PWC’s engagement letters reflect PWC’s commitment to report any evidence that fraud may exist, as uncovered by PWC’s audits. Plaintiffs submit a PWC engagement letter, dated January 19, 2001, stating that PWC “will communicate to you, as appropriate, any illegal act, material errors, or evidence that fraud may exist identified during our audit.” (Abramowitz Aff., Ex. K).

However, the essence of this cause of action is that PWC failed to abide by general professional standards. Throughout the complaint, plaintiffs allege that PWC was required to report Strafaci’s fraud to management in order to comply with the professional standards governing audits. Plaintiffs claim that PWC’s failure to inform them of the improper conduct constituted a breach of the proper level of due professional care. Specifically, plaintiffs allege that, “[h]ad PWC adhered to standard accounting and auditing procedures, and if it had employed the proper level of due professional care, PWC would have informed Plaintiffs of Strafaci’s malfeasance” (Complaint, ¶¶ 84, 108, 120, 132, 144). The complaint also claims that “PWC became aware of significant differences between Strafaci’s valuations and those prices provided by independent third-party sources. PWC failed to inform Plaintiffs of these discrepancies in violation of its audit responsibilities under GAAS.” (*Id.*, ¶ 160.). Thus, plaintiffs’ own allegations assert that PWC was required to make these disclosures in order to comply with the

professional standards governing PWC's audits.

Moreover, the scope of the engagement letter relates to PWC's agreement to "audit the financial statements of the Companies," and, upon completion of the audit, "to provide [its] audit report on the financial statements" (Abramowitz Aff., Ex. K). PWC agreed to "be responsible for performing the audit in accordance with [GAAS]," and to:

consider the Companies' internal control over financial reporting solely for the purpose of determining the nature, timing and extent of auditing procedures necessary for expressing our opinion on the financial statements. This consideration will not be sufficient to enable us to provide assurance on the effectiveness of internal control over financial reporting. However, any significant deficiencies relating to internal control over financial reporting identified during our audit will be communicated to you.

Nothing in this language shows that PWC agreed to go beyond auditing the financial statements.

Citing *Common Fund for Non-profit Org.* (2000 WL 124819, *supra*), plaintiffs argue that PWC's promises were separate from general professional standards. *Common Fund for Non-profit Org.* was based upon an accountant's annual letters planning for each year's year-end audits. One of the letters stated that the accountant's "risk assessment is designed to go beyond the financial statements and to address the business risks that may adversely affect your organization." (*Id.* [citation omitted]). The client's accounting expert stated that "going beyond the financial statements is something more than an audit in accordance with Generally Accepted Auditing Standards." (*Id.* [citation omitted]).

Here, conversely, as discussed above, PWC's obligation to report material internal control deficiencies discovered during its audits is not distinct from its obligation to perform audit work. Thus, the language of the engagement letter did not obligate PWC "to go beyond a

typical audit” (*id.*), and, therefore, *Common Fund for Non-profit Org.* is distinguishable on its facts.

For the foregoing reasons, plaintiffs’ fourth cause of action for breach of contract is duplicative of their second cause of action for malpractice. Accordingly, PWC’s motion to dismiss the fourth cause of action is granted.

C. Negligent Misrepresentation

PWC next argues that plaintiffs’ fifth cause of action for negligent misrepresentation is duplicative of their malpractice cause of action.

A cause of action for negligent misrepresentation is duplicative of a malpractice cause of action if the two causes of action allege the same operative facts. (*See Sonnenschine v Giacomo*, 295 AD2d 287, 288 [1st Dept 2002]).

Here, plaintiffs’ claims rely on the same alleged misrepresentations and non-disclosure as plaintiffs’ malpractice claim and plaintiffs do not argue to the contrary. (*See Pl. Opp. Mem* at 19). Therefore, the court dismisses the claim of negligent misrepresentation as duplicative. The decision of this court in *Jones v PWC* (6 Misc 3d1014, 800 NYS 2d 3118) is distinguishable because there the plaintiffs argued that the malpractice claim was not entirely duplicative because it did not cover that part of plaintiffs’ claim arising from their initial investment.

Finally, PWC did argue that plaintiffs asserted their fraud, negligent misrepresentation and breach of fiduciary duty claims in order to revive their time-barred malpractice claim. However, this argument is moot, because, as discussed above, plaintiffs’ malpractice claim is not time-barred.

Failure to State a Cause of Action

PWC next moves to dismiss plaintiffs' third cause of action for breach of fiduciary duty, based upon this court's decision in *Williamson v PricewaterhouseCoopers LLP* (Sup Ct, NY County, March 18, 2005, Moskowitz, J., Index No. 602106/04) (*Williamson Decision*). In opposition, plaintiffs argue that their breach of fiduciary duty cause of action is distinguishable from the claim in *Williamson*, because they had a relationship with PWC beyond the accountant-client relationship.

As stated in the *Williamson Decision*, generally, the duty owed by an accountant to a client is not fiduciary in nature. (See *DG Liquidation, Inc. v Anchin, Block & Anchin, LLP*, 300 AD2d 70, 71 [1st Dept 2002]). 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 [1st Dept 1996]), 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/or 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 [1st Dept 1992]), 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, none of the allegations show that PWC's conduct went beyond the scope of the traditional accountant-client relationship. As in *Williamson*, the complaint alleges, at most, that

PWC knew of the misconduct of the general partner's employee that led to Lipper Convertibles' 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 plaintiffs fail to show that the claim for breach of fiduciary duty falls within the limited circumstances where the duty an accountant owes to a client is fiduciary in nature. Accordingly, PWC's motion to dismiss the third cause of action for breach of fiduciary duty is granted.

PWC next seeks dismissal of the fraud claims that plaintiff Jerome Services Corp. LDC (Jerome Services), the general partner of Lipper Offshore, asserts. PWC argues that PWC NA (not PWC) issued the audit reports from 1998 through 2000 and that any claim relating to audits performed from 1995 through 1997 are time-barred. In opposition, plaintiffs argue that PWC performed substantial audit work for Lipper Offshore from 1998 through 2002.

As discussed above, claims for fraud require a showing that there was a misrepresentation. (*See Pope*, 29 AD3d at 437, *supra*; *Grammar*, 271 AD2d 644, *supra*; *FAB Industries, Inc.*, 252 AD2d 367, *supra*). As documentary evidence, PWC submits "Reports of Independent Accountant" that PWC NA issued. (Fink Aff., Exs. K-M). These reports demonstrate that PWC NA issued audit opinions for Lipper Offshore in 1998, 1999 and 2000. These documents show that PWC NA performed audits in these years, and they support PWC's argument that, therefore, PWC could not have made any misrepresentations upon which Jerome

Services could have relied in connection with audits performed in these years.

In opposition, plaintiffs submit a PWC engagement letter, dated December 20, 2001. This letter relates to PWC's audit of Lipper Offshore, among other entities. However, this document relates to services PWC performed for Lipper Offshore in 2001, not 1998 through 2000. Therefore, this document fails to rebut PWC's showing that PWC NA performed audits for Lipper Offshore during this time period.

However, plaintiffs also refer to PWC NA's memorandum of law in support of motion sequence number 002 in the *Lipper* Action. That memorandum refers to "MUTUAL CONSENT LETTERS," dated February 25, 1999 and February 18, 2000, between the offices of PWC and PWC NA. These letters are printed on letterhead from PWC NA. They were sent by PWC NA to PWC, are signed by partners from each firm's office, and purport to "set out the professional responsibilities of [PWC and PWC NA's] respective offices and Firms in connection with the audit of the financial statements of [Lipper Offshore]," for the years ended December 31, 1998 and 1999, respectively. (Greilshaimer Aff., Exhs. A and B). The 1999 letter states, in pertinent part, that PWC NA:

will act as the performing office and will complete all audit work necessary for issuance of the audit report and financial statements, except for audit work necessary with respect to the matters referred to in the next paragraph. Our office will act as the signing office as well.

Your office will prepare the Net Capital Schedule of the partnership and perform all work necessary related to report/schedules which need to be prepared and filed with US regulatory agencies (SEC, NASD et. [sic]).

Our office accepts all responsibility for the engagement under International Policy Statement A-4100, except as related to the

matters for which your office is responsible.

Your office will indemnify our office and Firm for all costs and losses related to claims which may arise as a result of the performance of those elements of the audit work for which you have accepted responsibility.

(*Id.*, Exh. A).

The 2000 letter states that PWC “will act as the performing office and will complete all audit work necessary for issuance of the audit report and financial statements, except for audit work necessary with respect to the matters referred to in the next paragraph.” (*Id.*, Exh. B). PWC NA remained the signing office and agreed to complete audit work necessary to assess compliance with legal requirements of the Netherlands Antilles. PWC accepted “all responsibility for the engagement, as stipulated in the legacy Coopers & Lybrand International Policy Statement A-4100,” except as relating to compliance with legal requirements of the Netherlands Antilles. (*Id.*). In the 2000 letter, PWC NA also states that “[w]e would like to underline here that your office is responsible for assuring that [Lipper Offshore] is in compliance with all the necessary requirements to safeguard its off-shore tax status.” (*Id.*).

These letters clearly show that PWC did participate in the audits performed on behalf of Lipper Offshore in the years 1998 and 1999. Therefore, these documents refute PWC’s showing that it could not have made misrepresentations during the years in question. Accordingly, PWC’s motion to dismiss Jerome Services’ fraud and negligent misrepresentation claims, as asserted against PWC, is denied with respect to audits conducted in the years 1998, 1999 and 2000.

PWC argues that, in the event that plaintiffs’ fraud claims are not subject to the three-year malpractice statute of limitations, these claims are nevertheless time-barred with respect to

claims that arose more than six years before January 13, 2005 (the date that plaintiffs commenced this action), including claims arising out of the audits that PWC performed in 1995, 1996 and 1997. In opposition, plaintiffs argue that the continuous representation doctrine tolls the statute of limitations with respect to these claims.

Under CPLR 213 (8), a fraud cause of action must be commenced “the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.” However, “once fraud ... is discovered after the expiration of the six-year period provided in CPLR 213 (8), the client has two years in which to commence an action and no continuous representation after such discovery would toll this period.” (*See Endervelt v Slade*, 162 Misc 2d 975, 982-983 [Sup Ct, NY County 1994], *affd* 214 AD2d 456 [1st Dept 1995]).

Thus, plaintiffs’ argument that the continuous representation doctrine applies to their fraud claim is without merit. Plaintiffs do not argue that the discovery rule saves their fraud claim. Rather, the limitations period for plaintiffs’ fraud claim “expires six years from the date of the [alleged] fraud” (Alexander Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C213:8), that, here, was the date that “the accountant’s work product [was] received by the client since this [was] the first time the client [could] rely on the alleged [fraudulent] work product” (*Ackerman*, 84 NY2d at 538).

The complaint alleges that, in February 1998, PWC issued Lipper Convertibles and Lipper Offshore audit reports for the year ending December 31, 1997. Plaintiffs do not dispute PWC’s assertion that it did not issue an audit report for Lipper Series II for the years 1997 or

earlier. Therefore, the statute of limitations for plaintiffs' fraud claims based on these reports expired in February 2004, approximately 11 months before plaintiffs commenced this action. Accordingly, the court dismisses plaintiffs' fraud claim with respect to audits conducted for the years ended 1997 and earlier. Because the court dismissed plaintiffs' claims for negligent misrepresentation as duplicative, it will not address PWC'S argument for dismissal of that claim on the grounds that plaintiffs have failed to state a cause of action.

Finally, PWC argues that the claims of plaintiff Lipper & Company, L.P. (Lipper & Co.) should be dismissed, because it served as Lipper Convertibles' general partner only through 1997 and that, therefore, Lipper & Co.'s claims are time barred. Plaintiffs do not dispute PWC's contention that Lipper & Co. served as Lipper Convertibles' general partner only through 1997. As discussed above, plaintiffs' fraud claim is dismissed with respect to audits conduct for the years ended 1997 and earlier. Therefore, the court dismisses Lipper & Co.'s fraud claim in its entirety.

Standing

PWC argues that Lipper, as owner of the plaintiff entities, does not have standing to bring claims for malpractice, breach of contract, negligent misrepresentation and breach of fiduciary duty, because he is not in privity with PWC.

"When accountants conduct a traditional financial audit, they undertake a duty of due care in the performance of their engagement to the party which has contracted for their services." (See *Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, 702 [1992]). However, in certain circumstances, "accountants may also incur liability to injured third parties who rely on their work, even in the absence of a direct contractual relationship between the

accountants and the third party.” (*Id.*). These circumstances are as follows:

(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. The indicia, while distinct, are interrelated and collectively require a third party claiming harm to demonstrate a relationship or bond with the once-removed accountants sufficiently approaching privity based on some conduct on the part of the accountants.

(*Id.* at 702-03 [citations and internal quotation marks omitted]; *see also Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d 702, 711 [2001] [same]).

For example, in *Credit Alliance Corp. v Arthur Andersen & Co.* (65 NY2d 536, 554 [1985]), the complaint alleged that “the [defendant] accountants knew the identity of the specific nonprivity party [the plaintiff-lender] who would be relying upon the audit reports,” as well as “the accountants’ awareness of a particular purpose for their services and certain conduct on their part creating an unmistakable relationship with the reliant plaintiff.” The complaint averred that the lender and the accountant “remained in direct communication, both orally and in writing,” and met together throughout the course of the lender’s lending relationship with the borrower, “for the very purpose of discussing the latter’s financial condition and [lender’s] need for [the accountant’s] evaluation.” (*Id.*). Plaintiff also alleged that the accountant “made repeated representations personally to representatives of [the lender] ..., concerning the value of [the borrower’s] assets.” (*Id.*).

The Court of Appeals determined that the plaintiff-lender had made a showing that the accountant was aware “that a primary, if not the exclusive, *end and aim* of auditing its client ...

was to provide [the lender] with the financial information it required.” (*Id.* [emphasis in original]). The Court held that, because of the parties’ “direct communications and personal meetings,” the relationship between the accountant and the lender “was the practical equivalent of privity.” (*Id.*).

Here, Lipper does not claim any contractual relationship between himself and PWC. Rather, Lipper’s claims are based upon his allegations that he initially hired PWC to audit the funds after meeting with PWC representatives; that PWC knew that Lipper owned a majority of the plaintiff-entities; that, throughout the relationship, Lipper informed PWC of the assets he and his family had invested in the funds and the plaintiff-entities; and that Lipper told PWC to immediately bring to his attention any issues regarding the funds so that he could correct any problems in a timely fashion. (Complaint, ¶¶ 62-66; Lipper Aff., ¶¶ 7-12).

Lipper claims that PWC performed certain non-audit services for him personally, such as preparation of personal balance sheets, tax returns and valuations of the plaintiff-entities. (Complaint, ¶ 66; Lipper Aff., ¶ 10). Lipper alleges that this work “incorporated PWC’s audit work,” and that he relied upon this work “in making personal decisions.” (Complaint, ¶ 176).

However, plaintiffs’ allegations fail to show that the “primary, if not the exclusive, end and aim of auditing” the funds at issue was to provide Lipper with information personally. (*See Credit Alliance Corp.*, 65 NY2d at 554; *Security Pacific Bus. Credit, Inc.*, 79 NY2d 695, *supra*). Moreover, Lipper does not claim that the work PWC performed for him personally was negligent, but rather, he claims that PWC’s audit work was “incorporated” into these personal services. However, because the audit work was not for Lipper’s personal benefit, this argument is unpersuasive. For the foregoing reasons, the pleading fails to show that Lipper has a

relationship with PWC sufficient to support claims for malpractice, breach of contract, negligent misrepresentation and breach of fiduciary duty. Accordingly, the court grants PWC's motion to dismiss Lipper's claims.

Ripe Contribution and Indemnification Claims

PWC argues that plaintiffs cannot assert contribution and indemnification claims as a separate action because plaintiffs have not alleged that they made any payments that could serve as a basis for such separate claims. In opposition, plaintiffs refer to their arguments asserted in opposition to PWC NA's motion to dismiss, in which plaintiffs claim that their claims are permitted under CPLR 1401 and under a theory of implied indemnification.

Under CPLR 1401, "two or more persons who are subject to liability for damages for the same ... injury ... may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

However, a claim in an action separate from the underlying tort is not viable until there is payment. (*See Stein v Whitehead*, 40 AD2d 89, 91 [2d Dept 1972] ["If all (defendants) have not been sued *and the one sued has paid the full amount of the plaintiff's damages* he can bring an *independent action* against the other tort-feasors to recover from them their fair shares of the damages and in that independent action the court or jury will determine the proportions of the parties' liability for the damages."] [emphasis added]; *see also* Siegel New York Practice § 173 [4th Ed. 2005] and *Berlin v Jones, Inc.* 85 Misc 2d 970 976 [Ct. Claims 1976] noting that "[when related to separate and independent actions for contribution" nothing has changed the general rule "that the action accrues not at the time of the commission of the tort for which indemnity is sought but at the time of payment"]).

Here, the complaint fails to allege that plaintiffs made payments that could provide a basis for their indemnification or contribution claims against PWC. While plaintiffs allege in their opposition brief that a judgment has been entered, and partially satisfied, against Lipper Holdings, plaintiffs fail to allege the amount paid by Lipper Holdings, or that any such payments exceed its portion of liability. Thus, this court dismisses plaintiffs' claim for contribution and indemnity.

Nor do plaintiffs allege that PWC contractually agreed to indemnify them. In addition, plaintiffs do not claim that any unique, special factors existed demonstrating the parties' intention that PWC was to bear the ultimate responsibility for the obligations of the funds. (*See Pennisi v Standard Fruit & S.S. Co.*, 206 AD2d 290 293 [1st Dept 1994] [internal citations and quotations marks omitted]). Nor have plaintiffs alleged facts supporting the existence of a special relationship or circumstances that might give rise to such a duty, as discussed above in the context of the dismissal of plaintiffs' claim for breach of fiduciary duty.

For the foregoing reasons, the allegations of the complaint fail to show valid contribution or indemnification claims. Accordingly, PWC's motion to dismiss the sixth cause of action is granted.

The court notes that PWC asserts contribution cross claims against these co-defendants in the *Serino* Action. Similarly, Lipper, Lipper Holdings, Lipper, Inc. and Biderman all assert contribution cross claims against PWC in the *Serino* Action, that PWC does not seek to dismiss. Therefore, these claims remain before the court in the *Serino* Action.

PWC NA's Motion to Dismiss Complaint in the *Lipper* Action

In motion sequence number 002 in the *Lipper* Action, PWC NA argues that the court

should dismiss the complaint for its failure to allege PWC NA's wrongdoing with sufficient particularity, pursuant to CPLR 3013. PWC NA claims that the complaint does not distinguish between PWC and PWC NA, and that it fails to identify which plaintiffs relied upon PWC NA's reports (as opposed to PWC's reports).

CPLR 3013 provides that, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The complaint must "enable the defendant to determine the nature of the plaintiff's grievances and the relief he seeks in consequence of the alleged wrongs." *Shapolsky v Shapolsky*, 22 AD2d 91 (1st Dept 1964).

The complaint avers that PWC NA performed audit work for Lipper Offshore from 1998 through 2002. (Complaint, ¶ 15). There is no allegation that PWC NA performed audit work, or issued any reports, for the onshore funds, Lipper Convertibles or Lipper Series II. Yet, the first paragraph of the complaint states that PWC and PWC NA will be referred to together as "PWC." (Complaint, ¶ 1). The complaint then claims that "PWC" knew of, disregarded, or negligently failed to ascertain the impact of significant discrepancies between values that Strafaci assigned to securities in the various funds and prices that "PWC" obtained during its audits.

According to the mutual consent letters, discussed above, both PWC and PWC NA performed work for Lipper Offshore. However, because the complaint refers to these entities together as "PWC," it is not clear what part of PWC NA's work plaintiffs are questioning. Plaintiffs must provide "specific factual averments ... as to when and what wrongful acts are attributed to each defendant" that the complaint fails to do. (*See DiPace v Figueroa*, 128 AD2d

942, 943 [3d Dept 1987]; *see also Shapolsky*, 22 AD2d at 92-93 [complaint dismissed under CPLR 3013 where plaintiff failed to specify which allegation referred to each corporation at issue and how the plaintiff acquired the right to bring suit]; *Megna v Becton Dickinson & Co.*, 215 AD2d 542, 542 [2d Dept 1995] [complaint dismissed where “it was devoid of specific factual allegations”]).

By way of illustration, with respect to PWC’s 1999 audit of Lipper Convertibles, the complaint alleges specific details concerning Strafaci’s overvaluation of that fund’s total net market value, net income and total partners’ capital. (Complaint, ¶¶ 122-28). The complaint identifies specific securities that Lipper Convertibles held and the percentage difference between Strafaci’s valuation and each security’s market value. Plaintiffs assert similar, specific allegations concerning the 1998 and 2000 audits of Lipper Convertibles. (Complaint, ¶¶ 110-21 and ¶¶ 134-45). These allegations “give the court and parties notice of the ... series of transactions or occurrences, intended to be proved and the material elements” of plaintiffs’ claims concerning the audit of Lipper Convertibles. (CPLR 3013).

By contrast, however, the complaint does not identify a single security held in the investment portfolio of Lipper Offshore, the amount by which that security was allegedly overvalued, or any alleged impact on Lipper Offshore’s financial statements. Rather, immediately following plaintiffs’ detailed analyses of the securities Lipper Convertibles held and the resulting overvaluations of those securities, the complaint summarily states that “PWC also issued unqualified audit opinions with respect to [Lipper Offshore and Lipper Series II]. In auditing these funds, PWC failed to report differences between the values Strafaci ascribed to securities in the portfolios of those funds, and the actual market values of those securities.”

(Complaint, ¶ 129; *see also* Complaint, ¶¶ 81, 91, 103, 117, 141 [same]). This allegation fails to give PWC NA notice of the transactions that plaintiffs intend to prove and the material elements of each cause of action.

Plaintiffs argue that, “because the Complaint makes clear that PWC NA started to perform work in connection with the 1998 audit, it is clear that Plaintiffs are only alleging misconduct by PWC NA beginning with that audit, and Plaintiffs only seek to recover against PWC NA for damages suffered starting with that audit.” (Plaintiffs’ Opp. Mem. of Law, at 10). However, plaintiffs fail to identify a single, specific instance of PWC NA’s improper conduct. Instead, the complaint asserts the vague, blanket allegation that plaintiffs “learned that Strafaci had overvalued the securities held by [Lipper Convertibles] and [Lipper Offshore] beginning in 1995.” (Complaint, ¶¶ 3, 50). Such “vague, general allegations of wrongdoing ... do not meet the minimum requirements of CPLR 3013.” (*DiPace*, 128 AD2d at 943). Plaintiffs apparently seek to attribute damages to PWC NA resulting from Strafaci’s oversight, but they fail to allege any details concerning PWC NA’s involvement in their claims.

Plaintiffs argue that PWC acted as PWC NA’s agent, and that, therefore, PWC’s wrongful conduct should be imputed to PWC NA. Plaintiffs’ argument is based upon the “MUTUAL CONSENT LETTERS,” discussed above.

Agency ... is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. The agent is a party who acts on behalf of the principal with the latter’s express, implied, or apparent authority.

(*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1993]).

Here, however, the complaint fails to allege that PWC NA controlled PWC, or that PWC

acted at PWC NA's request or for PWC NA's benefit. To the contrary, the complaint expressly claims that plaintiffs, not PWC NA, retained PWC to conduct the audits. (Complaint, ¶¶ 1, 14, 56, 73, 169; Plaintiffs' Opp. Mem. of Law, at 2, 3, 5). The mutual consent letters explain the division of labor and responsibility between PWC NA and PWC, but plaintiffs fail to show how these letters establish a principal-agent relationship between PWC NA and PWC.

Moreover, plaintiffs allege that they paid PWC for auditing Lipper Offshore, not PWC NA. (Lipper Complaint, ¶ 73). Plaintiffs concede that "[a]lthough PWC NA issued audit opinions for [Lipper Offshore's] financial statements ..., Plaintiffs never specifically retained PWC NA." (Plaintiffs' Opp. Mem. of Law, at 3). Thus, based on the papers before the court, it appears that, if anything, PWC NA was working at the direction of PWC, not vice versa, and, therefore, PWC was not PWC NA's agent. Therefore, plaintiffs have not shown that PWC was the agent of PWC NA. (*See Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000] ["where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law"]).

For the foregoing reasons, with respect to PWC NA, the allegations of the complaint are not "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences." (CPLR 3013). Accordingly, the court grants PWC NA's motion to dismiss, with leave to replead.

Accordingly, it is hereby

ORDERED that the court grants motion sequence number 017 (in *Serino v Lipper, et al.*, [Index No. 604396/02]) to the extent that the first, second, third, fourth and fifth cross claims of defendants Kenneth Lipper, Lipper Holdings, LLC and Lipper & Company, Inc., asserted against

defendant PricewaterhouseCoopers LLP, are severed and dismissed and the court otherwise denies the motion; and it is further

ORDERED that the court grants motion sequence number 001 (in *Lipper Holdings, LLC, et al. v PricewaterhouseCoopers LLP, et al.* [Index No. 600150/05]) to the extent that the third, fourth and fifth causes of action are severed and dismissed; the court dismisses the first cause of action as time-barred with respect to audits conducted in the years ended 1997 and earlier and the court severs and dismisses the first cause of action with respect to plaintiff Lipper & Company, L.P.; the court severs and dismisses the second, fourth and fifth causes of action with respect to plaintiff Kenneth Lipper; the court severs and dismisses the sixth cause of action; and the court otherwise denies the motion; and it is further

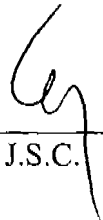
ORDERED that the court grants motion sequence number 002 (in *Lipper Holdings, LLC, et al. v PricewaterhouseCoopers LLP, et al.* [Index No. 600150/05]) and the court dismisses the complaint, as to defendant PricewaterhouseCoopers LLP (Netherlands Antilles), with leave to replead; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Dated: September ²⁸ 2006

ENTER:



J.S.C.

FILED

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