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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 602135/2006

SEGHERS, CONRAD P.

vs

DELOITTE & TOUCHE USA LLP

Sequence Number : 001

DISMISS ACTION

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

IOTION CAL. NO. _____

The following papers, ... otion 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 per attached memorandum decision.

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 8/13/07

EMILY JANE GOODMAN, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

CONRAD P. SEGHERS and
INTEGRAL HEDGING OFFSHORE, LTD.,

Plaintiffs,

-against-

Index No. 602135/06

DELOITTE & TOUCHE USA LLP, and
DELOITTE & TOUCHE, LLP,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

Plaintiffs, Integral Hedging Offshore, Ltd. (IHO), a hedge fund, and its founder, Conrad Seghers (Seghers), seek at least $40,000,000 in compensatory and punitive damages from defendants, accounting and auditing firms, due to defendants' alleged breach of an agreement and misrepresentations concerning an accounting method for valuing assets (the Valuation Methodology) used by two offshore funds in which IHO invested (the Galileo Funds).

Defendants move to dismiss the complaint or, in the alternative, to stay the action, arguing that plaintiffs' claims are barred by documentary evidence (CPLR 3211 [a] [1]), are time- barred (CPLR 3211 [a] [5]), and should be dismissed based on forum non conveniens grounds. Defendants also move for dismissal of plaintiffs' second cause of action, asserting that plaintiffs do not allege any facts or contractual relationship with defendant Deloitte & Touche USA, or identify a specific contract provision that defendants breached, and that plaintiffs have not alleged that Seghers entered into an agreement with either defendant.

The allegations of the complaint are as follows. Seghers is the founder, creator and

principal manager of "the Integral Funds" (the Integral Funds),[1] which plaintiffs describe as an enterprise of hedge funds that includes IHO (Complaint, ¶¶ 3, 23]). IHO is an international business company, organized and existing under the law of the British Virgin Islands, with a "registration address" at a law firm in the British Virgin Islands, and whose principal place of business is, and was New York, N.Y. (*id.*, ¶ 5). Presumably to support their contention concerning IHO's principal place of business, plaintiffs allege that IHO's broker, legal adviser, and the fund's administrator, where "most of IHO's activities, including marketing, documentation, valuations, shareholder letters, notifications and statements were created and distributed," are located in Manhattan (*id.*).

Plaintiffs state that Seghers, who is now, and was at all relevant times, a domiciliary and a resident of Texas, is the founder and sole director of IHO, and the managing partner of IHO's investment advisor (*id.*, ¶¶ 3-4). Seghers brings this action individually and on behalf of IHO (*id.*, ¶ 3). Plaintiffs further state that defendants are Delaware "limited liability companies," and that the principal place of business of each is New York (*id.*, ¶¶ 6-7).

This action is predicated on defendants' alleged "acceptance and approval" of the Valuation Methodology, which plaintiffs claim deceived Seghers, IHO, and the investors in the Integral Funds (*id.*, ¶ 1). In September 2000, IHO and the Integral Funds retained defendants to serve as their accountants and auditors (*id.*, ¶¶ 9, 27). From November 2000 to June 2001, defendants performed the 2000 year-end audit for the Integral Funds (*id.*, ¶ 11). Defendants certified to the Integral Funds, their investors and Seghers, that the Integral Funds' books and

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[1]The "Integral Funds" include Integral Investment Management, LP, Integral Arbitrage, LP, Integral Equity, LP, Integral Hedging, LP, and IHO.

records accurately stated its financial condition through December 31, 2000 (*id.*, ¶ 12).

Plaintiffs allege that defendants' statement included the certification that the Valuation Methodology for the portion of the Integral Funds' portfolio that was invested, controlled and traded through the Galileo Funds was satisfactory (Complaint, ¶ 13). In May, June and July 2001, three of defendants' employees, Gregory Brunsman, Andrew Kostas and Holley Mullins, all represented to Seghers, and through Seghers to IHO, orally and in writing, that the Valuation Methodology used by the Galileo Funds "truly and fairly valued (and, if anything, may have slightly understated) the Integral Fund assets in the [Galileo Funds] as of December 31, 2000 and thereafter" (*id.*). In addition, during 2001, defendants thoroughly reviewed, and approved, the offering memoranda for IHO, and another, non-party fund, both of which described the Valuation Methodology (*id.*).

Plaintiffs claim that defendants' statements were false and deceptive, and that, as one of the world's premier accounting and auditing firms, defendants knew, or were "severely reckless" in disregarding, that the Valuation Methodology that they certified and approved was false, deceptive, and would both mislead investors and create a "severe" risk of destroying the business and reputations of the Integral Funds and Seghers (*id.*, ¶¶ 14-16). Defendants allegedly also knew and intended that Seghers would rely, and plaintiffs contend that he did rely, upon their certification of the Valuation Methodology when he authorized the distribution of IHO's 2000 audit report, issued by defendants in mid-2001 (the 2000 Audit Report), to the Integral Funds' investors (*id.*, ¶¶ 17, 19). Plaintiffs state that Seghers trusted and believed in the accuracy of the defendants' audit, and the Valuation Methodology accepted by defendants, and continued to believe in the truthfulness of defendants' representations through early 2006 (*id.*, ¶ 17-18).

Based upon the allegedly fraudulent audit, plaintiffs contend that defendants were sued in Texas (the Texas Case) by the receiver (the Texas Receiver) of the "defunct domestic Integral Funds," but that IHO is not subject to the Texas receivership (Complaint, ¶¶ 19, 23). Plaintiffs further contend that defendants continued to deny liability in the Texas Case, and stood by the truthfulness and accuracy of the audit (*id.*, ¶ 19).

In addition, Seghers was investigated and in 2004 sued, by the U.S. Securities and Exchange Commission (SEC), for overvaluation of the Integral Funds allegedly based on defendants' audit (*id.*, ¶ 20). In reliance upon defendants' representations, Seghers continued to stand by the truthfulness and accuracy of the audit and Audit Report, and did so until early 2006 (*id.*, ¶¶ 19, 20).

The trial in the SEC case, held in February 2006, was based substantially on the SEC's claim that the Valuation Methodology, approved by defendants and therefore accepted by Seghers, was false and fraudulent (*id.*, ¶ 21). The jury rendered a verdict, now the subject of post-trial motions, against Seghers for fraud due primarily to the Integral Funds' acceptance of the Valuation Methodology certified by defendants (*id.*). Also in 2006, the court in the Texas Case approved a settlement between defendants and the Texas receiver in excess of $500,000 (*id.*, ¶ 22).

Plaintiffs allege that the audits were a fraud upon Seghers, separate from the Texas Receiver's claims, and his hedge funds, which resulted in the destruction of the Integral Funds (*id.*, ¶¶ 23-24). Plaintiffs further allege that Seghers has claims in his own right, and on behalf of IHO, that are not subject to the Texas receivership, as defendants destroyed the Integral Funds enterprise that Seghers created, and Seghers personally suffered the destruction and loss of his

business, career, and reputation (*id.*).

Plaintiffs also contend that they have duly performed all of the terms and conditions of their agreement with defendants (the Agreement),[2] but that defendants have breached the Agreement by not performing their services as required (Complaint, ¶¶ 29-30). Plaintiffs state that defendants knew when they contracted with IHO, and the other Integral Funds controlled by Seghers, that Seghers and IHO's business and reputation in the highly competitive hedge fund industry were dependent upon their proper performance under the Agreement, and that defendants' failed performance could and would likely cause IHO's destruction, and consequential damages of tens of millions of dollars to Seghers and IHO (*id.*, ¶ 31).

Plaintiffs claim that their resultant compensatory damages are at least $30,000,000. They also demand punitive damages, and interest, attorneys' fees and costs.

In response to the defendants' dismissal motion, and based on defendants' representation that plaintiffs have not alleged that Deloitte & Touche USA LLP contracted with them, or provided any false information, plaintiffs have agreed to dismissal of the complaint as against Deloitte & Touche USA LLP. Accordingly, the complaint is dismissed as to that defendant.

Plaintiffs also state that they do not oppose dismissal of the second cause of action as to Seghers, and it is undisputed that Seghers did not enter into the Agreement with the remaining defendant, Deloitte & Touche LLP (Deloitte) in his individual capacity. Therefore, the second cause of action is dismissed as to Seghers, and what remains of the complaint are Seghers's and IHO's first cause of action, sounding in fraud, and the second cause of action, brought by IHO

[2]Plaintiffs and defendants have attached copies of the Agreement, dated January 20, 2001, to their papers (Kostas Aff., Exh. A; Manuel Aff., Exh. B). The Agreement was sent by Deloitte & Touche LLP to Conrad Seghers, who accepted and agreed to its terms on behalf of IHO.

alone, which sounds in breach of contract.

Pursuant to CPLR 3211 (a) (1), Deloitte argues for dismissal of both of IHO's causes of action based on an "Agreed Order" dated September 2005 and modified on June 28, 2006 (the Agreed Order) (Davidson Aff., Exhs. A, C.). The Agreed Order was signed and agreed to by counsel for Seghers, and signed and entered by Texas District Court Judge Adolph Canales, in *Art Institute of Chicago v Integral Hedging, L.P.* (Dist Ct, Dallas County, Texas, 298th Jud Dist, Cause No. 01-10623). The relevant portion of the Agreed Order provides:

> " Finding that the parties have agreed to entry of this Agreed Order to Amend the September 30, 2005 Order Approving the [Deloitte] Settlement, THE COURT HEREBY ORDERS THAT:
>
> 1. Paragraph 3 of the Order Approving Settlement entered on September 30, 2005 by this Court shall be modified to read:
>
> Any claims against Deloitte & Touche LLP . . . by any other defendant in this action or any third party arising from or related to any loss, harm, or injury for which the recovery of damages was sought in this action by the Receiver . . . are barred. None of the investors in the Integral Entities . . . nor any other third party, may file any suit against Deloitte & Touche LLP . . . for any alleged conduct or services relating to the Integral Entities, except that Deloitte & Touche LLP will not assert this bar order as a defense . . . to claims that may be asserted by Conrad Seghers or Integral Hedging Offshore, Ltd. (provided that Conrad Seghers obtains a judgment that he has authority act on behalf of Integral Hedging Offshore, Ltd.)"

(Davidson Aff., Exh. C, at 3). Deloitte argues that IHO's causes of action should be dismissed because plaintiffs have not provided the judgment referenced in the Agreed Order.

Deloitte also submits a complaint filed by Seghers in the United States District Court, for the Southern District of New York (The Thompson Case),[3] in January 2006. In that complaint, Seghers alleges that he was improperly removed as director of IHO in May 2002, and that

[3]The index number for the Thompson Case is 06 CV 0308 (Davidson Aff., Exh. D).

insurgent directors improperly gave de facto control of IHO to the Texas Receiver. Also therein, plaintiffs seek a declaration that Seghers has "at all times since at least the second quarter of 2002 been the sole manager, officer and director of IHO with exclusive . . . authority to act" on its behalf (Davidson Aff., Exh D, at 28). Deloitte argues that Seghers's commencement of the Thompson Case demonstrates that he does not have authority to act on behalf of IHO.

Plaintiffs seek a stay and oppose the motion stating that the Agreed Order does not bar the action. Plaintiffs also argue that Deloitte's contention that Seghers concedes that he does not have authority to act on behalf of IHO is wrong; that plaintiffs are vigorously working to get a judgment; and that "what [Seghers] needs pursuant to the Texas settlement agreement is a judgment confirming the authority he has always had" (Pl. Memo. of Law in Op., at 6, n 5). Plaintiffs state that Seghers's claims for a declaration that he has authority to act on behalf of IHO will be determined in the Thompson Case, and that they will advise this court of the disposition of Seghers's claim therein.

Pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder and Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001] ["the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"]). Documentary evidence is "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which

the motion is based " (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). Deloitte has not shown that the Agreed Order bars plaintiff from bringing this action on behalf of IHO because it has not submitted documentary evidence that conclusively demonstrates that IHO's claims in this action are for "loss, harm, or injury for which the recovery of damages was sought in [the Texas] action by the Receiver" (Davidson Aff., Exh., C, at 3).[4]

Deloitte also moves to dismiss the contract and fraud claims as time-barred pursuant to CPLR 202. The burden of pleading and proving that a particular statute of limitations has expired falls on the party invoking the statute's protections (*LaRocca v DeRicco*, 39 AD3d 486, 486-487 [2d Dept 2007] ["'(a) defendant who seeks dismissal of a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired'" (citation omitted)]; *cf. Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951 [1984]).

CPLR 202 requires that a nonresident plaintiff's claim that accrued outside of the state be timely under the statute of limitations of New York, and the state where the claim accrued; that is, the claim must be timely under the shorter of the two statutes of limitations (*Global Financial Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). CPLR 202 is intended to prevent nonresidents from forum shopping to take advantage of a longer New York limitations period (*ibid.; see also Antone v General Motors Corp., Buick Motor Div.*, 64 NY2d 20, 27 [1984]). For purposes of a CPLR 202 analysis, a cause of action accrues where the injury is sustained, and where an "injury

[4]While Deloitte may be able to remedy unresolved factual issues with other documents, such as affidavits, evidence of such a nature is properly submitted in support of a motion for summary judgment, and not on a 3211(a)(1) motion to dismiss.

is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*Global Financial Corp.*, 93 NY2d at 529).

Deloitte contends that plaintiffs' claims are barred pursuant to Texas and New York law. Deloitte argues that the four-year Texas statute of limitations for breach of contract and fraud claims has expired, as plaintiffs filed their lawsuit more than five years after Deloitte allegedly provided services to plaintiffs. Deloitte further argues that plaintiffs' claims are disguised accounting malpractice claims time-barred pursuant to CPLR 214 (6)–a three-year statute of limitations.

Despite that the complaint states that IHO's principal place of business is New York, Deloitte contends that both plaintiffs are residents of Texas where the claim accrued. Deloitte argues that plaintiffs' allegation that IHO's principal place of business operations was and is New York is contradicted by complaints plaintiffs have filed in other cases in which they describe IHO as "doing business" in Dallas, Texas, and in which Seghers alleged that he, a Texas resident, is IHO's sole director.[5] To support its assertion concerning IHO's residency, Deloitte appends copies of pleadings and briefs filed in other cases, and discusses factors courts consider in determining whether a party is doing business in New York. Deloitte concludes that such factors dictate that IHO, like Seghers, is a Texas resident.

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[5]Deloitte notes the defendants in the Thompson Case are challenging Seghers's allegations about IHO's residency and principal place of business. In that case, on a motion to dismiss, the court accepted as true plaintiffs' allegations that "IHO's business operations were conducted principally in New York" and "that most of IHO's activities, including marketing, documentation, valuations, [and the creation of] shareholder letters, notification and statements occurred in New York" (Manuel Aff., Exh. A, at 3 [internal quotation marks and citation omitted, addition or modification in original]).

Deloitte has not met its burden on the CPLR 3211 (a) (5) motion.[6] The pleadings and unrebutted arguments made in other cases that IHO is, or was, *doing business* in Texas, coupled with the fact that Seghers, a Texas resident, alleges in another case that he is the sole director of IHO, are not sufficient to demonstrate that the Texas statute of limitations applies. These documents simply do not demonstrate that *IHO* is a *resident* of Texas, and thus that its claim accrued in Texas.

The fraud claim brought by Seghers individually is another matter, however. As Deloitte points out, in the complaint, plaintiffs allege that Seghers was at all relevant times a Texas resident and that his damages include "the destruction and loss of his business, career and reputation . . ." and the loss of the value of the Integral Funds, which he created "starting from zero" (Complaint, ¶¶ 23-24). Consequently, Texas is where the economic injury accrued, and the court must apply the shorter limitations period of either New York or Texas to Seghers, a non-resident (*see Global Financial Corp.*, 93 NY2d at 529).

The Texas statute of limitations for fraud is four years (Tex Civ Prac & Rem Code § 16.004 [a] [4]) and the claim normally accrues when the allegedly false representations are made (*Hoover v Gregory*, 835 SW2d 668 [Tex App-Dallas 1992]). The complaint was filed in June 2006. Plaintiffs did not file the complaint within four years after the issuance of the Audit Report in mid-2001, and do not allege that work was done for them, or representations were made to them, by Deloitte after July 2001. Seghers in fact concedes that the first cause of action

[6]Although defendants assert that plaintiffs allege that Seghers "lost the value of the Integral Funds, which he 'created starting from zero' in Texas" (Def. Mov. Memo. of Law, at 8), the complaint does not state that Seghers created the Integral Funds in Texas.

is time-barred as to him, and therefore, it is dismissed.[7]

Deloitte argues that plaintiffs' claims are also time-barred pursuant to CPLR 214 (6) because they are disguised accounting malpractice claims, subject to the three-year statute of limitations of CPLR 214 (6) for non-medical professional malpractice. Plaintiffs do not dispute that their claims are time-barred pursuant to Texas law, but argue that the New York's six-year statute of limitations for fraud and breach of contract applies here.

In their memorandum of law, clarifying their second cause of action, plaintiffs assert that Deloitte promised that it would conduct the audit in accordance with generally accepted auditing standards (GAAS), and would plan and perform the audit to obtain reasonable assurance about whether the financial statements were free of material misstatements, whether caused by error or fraud (Pl. Op. Memo. of Law, at 3).[8] They also argue that Deloitte promised it would provide "the expression of an opinion on the fairness of the presentation of [IHO's] financial statements in conformity with accounting principles generally accepted in the United States of America . . . in all material respects" (Pl. Memo. of Law in Op., at 3, quoting Kostas Aff., Exh. A, at 1-2 [the Agreement]).[9]

"'A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury'"

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[7]In their opposition memorandum plaintiffs state that "the applicable statutes of limitation [in Texas] have expired, that jurisdiction is, in reality, closed to plaintiffs. Thus the only potential alternative jurisdiction is, in fact, not available to plaintiffs" (Pl. Memo. of Law in Op., at 14). Thus, plaintiffs concede that Seghers' claim is time-barred under Texas law. As previously discussed, however, Deloitte, the movant on the motion, did not meet its burden to demonstrate that IHO's fraud claim accrued in Texas and therefore, is time barred.

[8]In their memorandum of law and complaint, plaintiffs quote from the Agreement.

[9]The court will refer to "accounting principles generally accepted in the United States of America" as "GAAP."

(*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214 [1st Dept 1996], quoting *Georgetti v United Hospital Med. Ctr.*, 204 AD2d 271, 272 [2d Dept 1994]). New York law is settled that it is only where a professional promises and fails to obtain a specific result that a breach of contract claim may result (*see Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 151 [1st Dept 1998] ["a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim"]; *Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffen*, 303 AD2d 561, 562 [2d Dept], *lv denied* 100 NY2d 511 [2003]). Furthermore, "[i]n 1996, the Legislature amended CPLR 214 (6) to provide that the limitations period in nonmedical malpractice claims is three years, whether the complaint is cast in contract or in tort" (*see Matter of R.M. Kliment & Frances Halsband, Architects* (*McKinsey & Co., Inc.*), 3 NY3d 538, 539 [2004]).

"[W]hen applying a Statute of Limitations, courts look to the essence of the stated claim and not the label by which a plaintiff chooses to identify it" (*Meyer v Shearson Lehman Bros., Inc.*, 211 AD2d 541, 542 [1st Dept 1995]; *Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937]).[10] "Accounting malpractice . . . contemplates a failure to exercise due care and proof of a material deviation from the recognized and accepted professional standards for accountants and auditors, generally measured by GAAP and GAAS promulgated by the American Institute of Certified Public Accountants, which proximately causes damage to plaintiff" (*Cumis Insurance Socy. Inc. v Tooke,* 293 AD2d 794, 797-798 [3d Dept 2002]; *see Ackerman v Price Waterhouse*,

[10]Plaintiffs argue that they are not, as were the plaintiffs in *Rosenbach v Diversified Group, Inc.* (12 Misc 3d 1152[A] [Sup Ct, NY County 2006]), merely attempting to amend their complaint to include a breach of contract claim to avoid a shorter statute of limitations, as plaintiffs have included the contract claim from the outset. This argument misses the point that whether cast as contract or tort, if the allegations speak to malpractice, the three-year statute of limitations applies.

84 NY2d 535, 541 [1994]; *Fred Smith Plumbing and Heating Co., Inc. v Christensen*, 233 AD2d 207 [1st Dept 1996]).

Plaintiffs argue that Deloitte, in the context of their alleged certification that the Valuation Methodology was satisfactory, did not employ GAAS, or fulfill their promise to provide an expression of an opinion on the fairness of the presentation of IHO's financial statements in conformity with GAAP. Consequently, plaintiffs' claim concerning their allegedly bargained-for result is not inconsistent with a claim that an accountant did not meet his or her ordinary professional obligations (*see Matter of R.M. Kliment & Frances Halsband, Architects*, 3 NY3d at 542-543 ["'where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care . . . the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214 (6), regardless of whether the theory is based in tort or in a breach of contract'" (citation omitted)]). Accordingly, the second cause of action of the complaint is for malpractice.

Professional malpractice claims accrue upon receipt of an audit report or other work product (*Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, --- NY2d ----, 2007 WL 1624759 [2007]; *see Ackerman*, 84 NY2d at 541). As plaintiffs base their claims on the audit and the Audit Report that Deloitte issued in "mid-2001" (Complaint, ¶¶ 11, 19), and do not claim that Deloitte did any work for them after 2001, the second cause of action is time-barred and dismissed pursuant to CPLR 214 (6).[11] Accordingly, the court need not reach Deloitte's assertion that plaintiffs have failed to identify any specific contract provision

[11]As previously discussed, in order to prevent forum shopping, CPLR 202 requires that the claim of a nonresident plaintiff that accrued outside of the state be timely under the shorter of the New York statute of limitations or the statute of limitations for the state where the claim accrued. IHO's second cause of action is time-barred under New York's three-year statute of limitations for malpractice.

breached.

Deloitte also argues that plaintiffs should not be permitted to surmount the three-year New York limitations period (CPLR 214 [6]) by asserting a fraud claim instead of one for professional malpractice. The elements of a prima facie case of fraud are "that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations" (*Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2d Dept 2001]; *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]; *Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006]).

Accountants may be liable to a client for fraud if they certify a financial statement, but fail to discover the client's true financial condition, as an accountant's certification regarding an aspect of a statement that the accountant knows is not truthful (*Rich v Touche Ross & Co.*, 69 AD2d 778 [1st Dept 1979]; *see Serio v PricewaterhouseCoopers, LLP*, 9 AD3d 330, 330-331 [1st Dept 2004]). Moreover, in a fraud case against an auditor, a showing of gross negligence or recklessness will permit the trier of fact to draw the inference that a fraud was, in fact, perpetrated (*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302 [1st Dept 2005]).

Plaintiffs take exception to defendant's characterization of their claims as malpractice, relying on their allegations that the Valuation Methodology was false and deceptive, and that Deloitte knew or should have know that this deceptive methodology would mislead investors. Although actual facts from which the court could infer the knowledge and scienter elements of fraud are absent from the complaint, plaintiffs do allege that Deloitte "'made those statements

knowing of their falsity or in severely reckless disregard of the truth'" (Def. Reply Memo. of Law, at 5, quoting Complaint, ¶ 15). Such allegations do not constitute mere assertions of negligence,[12] and as Deloitte raises the CPLR 3016 argument for the first time only in its reply papers, its argument is not properly considered where plaintiffs have not been granted the opportunity to address its contention (*see Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851 [4th Dept 2005]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Furthermore, Deloitte's argument that IHO's fraud claim is not supported by the evidence is more properly made on summary judgment.

As previously mentioned, Deloitte, as an alternative to dismissal, requested a stay of the action. A court may grant a stay of proceedings in a proper case (CPLR 2201), and as plaintiffs have also requested a stay, the court grants the request, and this action, which now consists solely of IHO's first cause of action, is stayed pending the outcome of the Thompson Case, and an appropriate request for relief by either of the parties. Finally, because all of the causes of action of the complaint, except one, have been dismissed, and the remaining cause of action is stayed, the court need not reach the forum non conveniens issue and IHO's discussion concerning obtaining authority to conduct business in New York at this time (*see* Pl. Memo. of Law in Op., at 2 n 3).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted as stated herein; and it is further

ORDERED that upon service of a copy of this Decision and Order, with Notice of Entry,

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[12]In a footnote in their moving papers (Def. Mov. Memo. of Law, at 12 n 5), Deloitte does cite to CPLR 3016, but argues only that plaintiffs' claims, other than those based on the Audit Report, should be dismissed for lack of particularity.

the Clerk of the Court is directed to sever and dismiss the complaint with prejudice against defendant Deloitte & Touche USA LLP; dismiss with prejudice the Second Cause Of Action, in its entirety; and dismiss with prejudice only that portion of the First Cause of Action as it relates to plaintiff Conrad P. Seghers, individually; and it is further

ORDERED that the portion of the First Cause Of Action relating to plaintiff Integral Hedging Offshore, Ltd. is stayed, and, upon issuance of a decision in the lawsuit entitled *Seghers v Thompson* (Docket No.: 06 CV 0308 [Richard M. Berman, U.S.D.J.]), currently pending in the United States District Court of the Southern District of New York, either Deloitte & Touche, LLP or Integral Hedging Offshore, Ltd. may restore this action for appropriate relief.

This Constitutes the Decision and Order of the Court.

Dated: ~~September 5~~ August 13, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK