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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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2  
3 GEOFFREY VARGA, et al.,

3  
4 Plaintiffs,

4  
5 v. 09 Cv. 4936 (AKH)

5  
6 DELOITTE & TOUCHE LLP, et al.,

6  
7 Defendants.

7  
8 -----x

8  
9 June 24, 2010  
9 10:30 a.m.

10  
10 Before:

11  
11 HON. ALVIN K. HELLERSTEIN

12  
12 District Judge

13  
13 APPEARANCES

14  
14 REED SMITH LLP  
15 Attorneys for Varga Plaintiffs  
15 BY: THOMAS L. ALLEN  
16 JORDAN W. SIEV  
16 JAMES C. McCARROLL  
17 JOHN SCOTT

17  
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18 Attorneys for Plaintiff Navigator  
19 BY: STEPHEN D. OESTREICH  
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21 Attorneys for Plaintiff FIC  
21 BY: JAMES S. NOTIS

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22 GRANT & EISENHOFER P.A.  
23 Attorneys for Plaintiff FIC

23 BY: JAMES J. SABELLA  
24  
25

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- 1 APPEARANCES (CONT'D)
- 2 CRAVATH, SWAINE & MOORE LLP
- 2 Attorneys for Defendant Deloitte & Touche LLP
- 3 BY: MAX R. SHULMAN
- 3 STEPHEN V. POTENZA
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- 16 BY: LISA A. CAHILL
- 17
- 18
- 19
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1 (Case called)

2 THE COURT: I have all the appearances on Varga  
3 against Deloitte.

4 Who is going to speak for the plaintiffs?

5 MR. ALLEN: Tom Allen for the Varga plaintiffs.

6 THE COURT: Mr. Allen, I would like to run over the  
7 causes of action with you.

8 Count One alleges a derivative breach of contract  
9 against Deloitte; Count Two, a derivative claim for  
10 professional malpractice and negligence; Count Three, a  
11 derivative claim for gross negligence; Count Four, a derivative  
12 claim for aiding and abetting breaches of fraud; and Count  
13 Five, a derivative claim for unjust enrichment.

14 Let's look at Counts One, Two and Three. Aren't those  
15 duplicative?

16 MR. ALLEN: Your Honor, with respect to Counts One,  
17 Two and Three, I don't think they are duplicative. What we  
18 have seen in this case and in the briefing, your Honor, is that  
19 the defendants, in essence, are arguing that there are  
20 additional elements that have to be alleged.

21 THE COURT: I think you ought to go to the podium  
22 because otherwise you block the back table.

23 MR. ALLEN: I will be glad to.

24 THE COURT: Defendants can argue from their places.  
25 Go ahead, Mr. Allen.

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1 MR. ALLEN: Your Honor, with respect to Counts One,  
2 Two and Three, I don't believe they are duplicative. As you  
3 know, the defendants are arguing, in essence, they are arguing  
4 that we have to plead the elements of common law fraud.

5 THE COURT: These are not fraud counts.

6 MR. ALLEN: I understand they are not common law  
7 fraud.

8 THE COURT: They are based on the engagements each  
9 year of Deloitte by the company.

10 MR. ALLEN: That's correct, your Honor. That is  
11 certainly our contention.

12 THE COURT: That's how I am going to interpret them.  
13 These are three claims for negligence, in one sense gross  
14 negligence, but nevertheless negligence. In other words, a  
15 professional who performs an engagement in a negligent manner,  
16 without exercising due care, breaches the engagement. And New  
17 York law carefully bridges a question whether it's a tort or  
18 contract action, which amounts to the same thing.

19 I hold that these are three counts stating the same  
20 thing. These are claims for breach of the engagement  
21 agreement, by reason of negligent performance in the agreement,  
22 and I will interpret it as one. There is no fraud claim in  
23 Counts One through Three, and therefore there is no obligation  
24 to satisfy the special pleading obligations relating to fraud.

25 Count Four alleges that Deloitte has aided and abetted  
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1 the breaches of fiduciary duty owed by the officers and  
2 directors of the two companies who, as I understand, is  
3 liquidators. Do I have that right?

4 MR. ALLEN: Yes.

5 THE COURT: There you do need special allegations of  
6 scienter, and I don't see them in the complaint. Nor do I see  
7 how an accountant performing an audit can thereby aid and abet  
8 breaches of fiduciary duty.

9 MR. ALLEN: If I may.

10 THE COURT: You certainly may. That's the whole point  
11 of my putting the question to you.

12 MR. ALLEN: First of all, I believe that the cases  
13 that have been cited by the defendants don't support the  
14 requirement that we would need to allege scienter with respect  
15 to that claim.

16 Your Honor, the defendants are, in essence, arguing  
17 that if Rule 9 applies, we have to allege with particularity.  
18 Then they are also claiming that we have to allege scienter.  
19 But the elements of aiding and abetting a breach of fiduciary  
20 duty do not require scienter. Now, they do require that we  
21 allege actual knowledge of the breach of fiduciary duty, and we  
22 have alleged actual knowledge of the breach.

23 THE COURT: A breach of an obligation is not a breach  
24 of a fiduciary duty. You need more.

25 MR. ALLEN: Your Honor, what we have alleged in terms  
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1 of actual knowledge is that -- let's start, first of all, with  
2 the related party transactions. We have alleged that there  
3 were a huge number of related party transactions that were  
4 going on over a number of years. We have also alleged that the  
5 defendants knew that those related party transactions were  
6 going on. In fact, they disclosed in the notes to the  
7 financial statements that related party transactions were going  
8 on. In addition, it was in the offering memorandum that they  
9 were going to be related party transactions.

10 THE COURT: And the accountants were not looking for  
11 records of acceptance by the independent directors.

12 MR. ALLEN: Under the relevant accounting standard,  
13 which we have cited in the complaint, it is AU 334 with respect  
14 to related party transactions, one of the specific requirements  
15 of AU 334 -- that's the auditing standard that relates to  
16 related party transactions and sets out the kind of scrutiny  
17 that the auditor needs to make a related party transaction.  
18 One of the requirements there is that the auditor must examine  
19 the related party transactions and determine, among other  
20 things, "whether the transaction has been approved by those  
21 charged with governance."

22 So it is in the accounting standards that this is  
23 what --

24 THE COURT: The Investment Advisers Act requires, does  
25 it not, approval by the independent directors.

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1 MR. ALLEN: The Investment Advisers Act requires  
2 approval by --

3 THE COURT: So the omissions of the accountants were  
4 failing to see if there had been approval by the outside  
5 directors. Am I right?

6 MR. ALLEN: Given the huge number of transactions that  
7 occurred and that are disclosed, clearly, Deloitte knew that  
8 because those are in the notes to the accounting statements,  
9 and given that they had an obligation to look as to whether the  
10 transactions had been approved, I think given that evidence,  
11 there are really two different, at least two different fair  
12 inferences from that evidence. One is, at a minimum, Deloitte  
13 was negligent because we now know, of course, that these  
14 approvals were not obtained in advance of the transactions  
15 being executed. But I think another fair inference is, given  
16 the volume of the transactions, that it appeared over such a  
17 period of time, that there is a basis to infer that Deloitte  
18 knew that these approvals were not being obtained in a timely  
19 fashion.

20 THE COURT: Merely because they didn't look.

21 MR. ALLEN: What I am saying, your Honor, is given  
22 that they were required to look, and given this is a very  
23 prominent --

24 THE COURT: Where is the allegation that they knew,  
25 that Deloitte knew?

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1 MR. ALLEN: We have alleged actual knowledge, your  
2 Honor. I know we allege it in the --

3 THE COURT: In conclusory fashion.

4 MR. ALLEN: We allege it, but we also allege all these  
5 facts that I just recounted, your Honor, with respect to the  
6 number of related party transactions that were occurring, that  
7 they were occurring year in, year out. We allege that the  
8 accounting standard AU 334 requires that this examination be  
9 done. And of course we allege that the approvals were not  
10 being obtained in advance of the transactions being settled.

11 THE COURT: So it's the fact that there are a large  
12 number of failures to approve that you argue constitutes an  
13 aiding and abetting of a breach of fiduciary duty?

14 MR. ALLEN: That's correct.

15 THE COURT: A fiduciary duty is owed by the  
16 independent directors to approve. They didn't approve. They  
17 failed and omitted to approve. But there is no allegation that  
18 it was tended to them and they said, no, I don't want to  
19 bother; they just didn't do it. There is a difference between  
20 negligence and breach.

21 MR. ALLEN: There is also a claim for breach of  
22 fiduciary duty against Bear.

23 In any event, your Honor, I think also I want to  
24 emphasize that with respect to the actual knowledge requirement  
25 for aiding and abetting, we have other allegations with respect

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1 to other work that Deloitte was doing, and the complaint needs  
2 to be read as a whole. So if you look at, for example, the  
3 valuation --

4 THE COURT: Unfortunately, one has to read the whole  
5 complaint and it's, how many allegations, 650 allegations.

6 MR. ALLEN: It is lengthy, your Honor. The situation  
7 we were in is that, particularly with respect to this aiding  
8 and abetting claim, as you know, one element is we have to  
9 allege the breach of fiduciary duty. So we have to allege a  
10 breach of fiduciary duty by, in essence, enough facts that  
11 would show a breach of fiduciary duty by Bear and enough facts  
12 that would show a breach of fiduciary by Walkers.

13 THE COURT: I hold, Mr. Allen, that you satisfactorily  
14 alleged claims of negligence, but not claims of aiding and  
15 abetting a breach of fiduciary duty, and I grant the motion to  
16 dismiss the fourth cause of action.

17 As to the first three I read them as one cause of  
18 action.

19 Now, the next question I want to ask you is about the  
20 statute of limitations. Under Section 202 of the New York  
21 CPLR, there is a borrowing statute, if I have the number  
22 correctly. There is a borrowing statute, which is the shorter  
23 of the New York limitations or some other applicable statute of  
24 limitations. You agree?

25 MR. ALLEN: Yes, your Honor, we acknowledge that.

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1 THE COURT: So the New York statute of limitations is  
2 three years, which is the binding rule. The complaint was  
3 filed when?

4 MR. ALLEN: Your Honor, this particular complaint was  
5 filed in state court.

6 THE COURT: When the lawsuit was filed.

7 MR. ALLEN: The original claim was on April 4, 2008.

8 THE COURT: April 4, 2008. That's when you first  
9 stated a claim against Deloitte?

10 MR. ALLEN: Correct.

11 MR. MARTIN: Not against my client.

12 THE COURT: Your client is?

13 MR. MARTIN: Deloitte Cayman.

14 THE COURT: Would you clear that up, Mr. Allen?

15 MR. ALLEN: Deloitte Cayman was joined as a defendant  
16 by an amended complaint on June 30, 2008.

17 THE COURT: I am going to deal first with the April 4  
18 date as applicable to both Deloitte. That means that  
19 everything is in starting with April 5, 2005.

20 Do you agree, Mr. Allen?

21 MR. ALLEN: We argue, your Honor, that the continuous  
22 representation doctrine should apply to --

23 THE COURT: I don't think so. I think each year is a  
24 separate engagement. Now, the engagement for the year, let's  
25 say the calendar year ending -- was the company on a calendar

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1 year, Mr. Allen?

2 MR. MARTIN: Yes.

3 THE COURT: The first issue has to do with any report  
4 that comes after April 5, 2005. I expect that what that means  
5 is that the calendar year ending December 31, 2004 is the first  
6 one at issue.

7 Defendants, do you agree?

8 MR. MARTIN: No, your Honor.

9 THE COURT: Your name, sir?

10 MR. MARTIN: Richard Martin for Deloitte Cayman.

11 As Mr. Allen has just acknowledged, and I don't want  
12 to interrupt the argument, but we were brought into the case  
13 for the first time in June of 2008.

14 THE COURT: I said before that I want to use the April  
15 4 date, and then I will make distinctions if necessary later  
16 on.

17 Let me get the one that speaks for Deloitte, the New  
18 York entity.

19 MR. SHULMAN: Deloitte U.S. Max Shulman from Cravath.

20 We don't agree that the operative date is the date of  
21 the filing of the original complaint either, your Honor. That  
22 complaint was voluntarily dismissed and any tolling that  
23 resulted from that complaint being brought ended before the now  
24 operative complaint was filed.

25 THE COURT: What is the operative complaint?

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1 MR. SHULMAN: The operative complaint was filed on  
2 April 24, 2009. And three years back from that is April 24,  
3 2006, which means that only the audit report for the 2006 year  
4 is at issue in our view.

5 MR. ALLEN: Your Honor, if I may.

6 THE COURT: One minute. The complaint alleges  
7 complaints against two Deloitte entities, Deloitte & Touche LLP  
8 and Deloitte & Touche Cayman Islands. Mr. Shulman represents  
9 Deloitte & Touche?

10 MR. SHULMAN: LLP.

11 THE COURT: And Mr. Martin represents Deloitte &  
12 Touche Cayman Islands.

13 Mr. Shulman says that I should start with the  
14 complaint that was reinstated, not the one that was withdrawn.

15 MR. SHULMAN: That's correct.

16 THE COURT: That puts the filing date as April 24,  
17 2009.

18 Is that your date too, Mr. Martin?

19 MR. MARTIN: Absolutely, your Honor. And really, this  
20 is not a close question.

21 THE COURT: I agree with you. I do not relate back to  
22 a complaint that was withdrawn, unless there is something  
23 special that's alleged.

24 MR. ALLEN: If I may, there is something special,  
25 which is the supplemental jurisdiction statute, 28 U.S.C.

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1 Section 1367(d). What that statute provides is tolling that's  
2 applicable to this situation.

3 THE COURT: Let me understand the facts first.

4 You filed originally when, the first filing, state  
5 court complaint?

6 MR. ALLEN: The first complaint that was filed was  
7 filed, as we discussed before, on April 4, 2008.

8 THE COURT: That was in the state court or was it in  
9 this court?

10 MR. ALLEN: That was in federal court.

11 THE COURT: Then what happened to it?

12 MR. ALLEN: Your Honor, there were motions to dismiss  
13 that were filed. That complaint was subsequently amended on  
14 June 30, 2008 to, among other things, add a claim under the  
15 federal securities laws. There were motions to dismiss filed  
16 as to a number of the claims, including the federal securities  
17 claim.

18 There was an argument on the federal securities claim  
19 on February 24, 2009. At that argument, your Honor, one of the  
20 central issues was whether we, the plaintiffs, had stated a  
21 claim under the federal securities law. That was the basis for  
22 federal jurisdiction.

23 During that argument there was a fairly vigorous  
24 argument, and your Honor made a number of comments about  
25 raising a serious question as to whether a claim under the

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1 federal securities laws had been stated. The plaintiffs made  
2 the decision, given that your Honor had expressed a great deal  
3 of skepticism, and I think actually said at one point during  
4 the transcript that if there is really not a federal cause of  
5 action here you ought to fess up and not file it, and the  
6 decision that was made, based on the comments that had been  
7 made at the hearing, was that rather than refile the case in  
8 federal court and press forward on this federal claim, where  
9 your Honor had already expressed a lot of skepticism about it,  
10 a decision was made to just refile the state law claims in  
11 state court.

12 In our view, given those circumstances, the  
13 supplemental jurisdiction statute should apply. Basically,  
14 what the supplemental --

15 THE COURT: You withdrew the complaint, you dismissed  
16 the complaint in the federal court?

17 MR. ALLEN: We dismissed the complaint in the federal  
18 court because of the issues with respect to the federal claim  
19 that was the basis for federal jurisdiction.

20 THE COURT: And you started again in state court?

21 MR. ALLEN: We filed in state court.

22 THE COURT: That was the complaint that was filed  
23 April 24, 2009?

24 MR. ALLEN: Correct.

25 THE COURT: Why isn't Mr. Shulman correct that the  
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1 withdrawal of the complaint and dismissal of an action and the  
2 filing of the new action does not relate back to the first  
3 lawsuit?

4 MR. ALLEN: Because under the supplemental  
5 jurisdiction statute, what is provided is that there is a  
6 tolling provision, and states that the period of limitations  
7 for any claims, and it goes on to say --

8 THE COURT: Where, in the CPLR?

9 MR. ALLEN: This is in 28 U.S.C., Section 1367, the  
10 supplemental jurisdiction statute. Section 1367(d). In  
11 essence, your Honor, it provides for tolling in a situation  
12 like this, where federal claims have been asserted, there are  
13 pendent state law claims over which federal jurisdiction is  
14 based on the fact that there is a federal claim that's been  
15 alleged. What the statute contemplates is that if the federal  
16 claim is dismissed, and then the state law claims go away  
17 because of lack of jurisdiction, that the plaintiffs shouldn't  
18 be penalized because the plaintiff after all filed the state  
19 law claims, should be able to get the date when the claims were  
20 actually filed in court.

21 THE COURT: So when did you dismiss your lawsuit, the  
22 first lawsuit?

23 MR. ALLEN: There was a voluntary dismissal that was  
24 filed.

25 THE COURT: When was it filed?

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- 1 MR. ALLEN: I'm sorry. They are trying to clarify  
2 that question for me.
- 3 THE COURT: Mr. Martin, what is the date?
- 4 MR. MARTIN: I have it here. It was filed on March  
5 26, 2009.
- 6 THE COURT: March 26, 2009.
- 7 MR. ALLEN: There was notice of voluntary dismissal  
8 filed March 26, 2009, which your Honor endorsed as so ordered  
9 on March 30, 2009.
- 10 THE COURT: My so ordered doesn't mean anything in a  
11 Rule 41 dismissal. It was by stipulation.
- 12 So March 26, 2009 is the effective date. When was the  
13 new complaint filed in the state court?
- 14 MR. ALLEN: It was filed on February 24, 2009 -- I'm  
15 sorry. April 24, 2009. So it was within the 30 days that this  
16 statute, Section 1367(d), contemplates.
- 17 THE COURT: Mr. Shulman, why shouldn't I toll?
- 18 MR. MARTIN: May I address that, your Honor?
- 19 THE COURT: Yes.
- 20 MR. MARTIN: 1367(d), as the cases that we cited in  
21 our brief make unmistakably clear, applies only when the  
22 dismissal is under 1367(c), that is, when the court dismisses  
23 the claim for lack of jurisdiction. Here, we have a voluntary  
24 dismissal, plaintiffs chose to dismiss their case voluntarily  
25 and refile in state court. It was not dismissed under 1367(c).

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1 In fact, the court denied our motion to dismiss. That's the  
2 record.

3 We cited three cases in our brief which all hold that  
4 under these circumstances, where the party voluntarily  
5 withdraws under Rule 41(a)(1), which is what I have and what  
6 the Court has in the record, 1367(d) tolling doesn't apply.

7 Since the time we have filed our briefs, your Honor,  
8 Judge Gardephe of this court made precisely that finding in a  
9 case called Malone and he said explicitly that when there is a  
10 dismissal under Rule 41(a)(1), as we have here, the tolling of  
11 1367(d) doesn't apply. And plaintiffs, they don't have a  
12 single case that supports their interpretation. All of their  
13 cases are those that were actually dismissed under 1367(c).  
14 They don't get the benefit of this. They waited too long, your  
15 Honor.

16 THE COURT: Let me see if I can parse the statute.

17 So this is a claim that was voluntarily dismissed at  
18 the same time as or after the dismissal of the federal claim.  
19 Your argument, Mr. Martin, is that since --

20 MR. MARTIN: Your Honor --

21 THE COURT: Excuse me, Mr. Martin. I am trying to  
22 restate your point so I understand it.

23 This claim was voluntarily dismissed at the same time  
24 as or after the dismissal of the federal claim. Mr. Allen's  
25 argument is that their decision to withdraw in face of my

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1 disparagement of the legal sufficiency of the federal claim  
2 should be considered the same thing.

3 I think I agree with Mr. Martin and not with Mr.  
4 Allen. There could be any one of a number of reasons for the  
5 decision to withdraw a federal claim. This issue of  
6 limitations, if it was a troubling point, should have been  
7 raised at that time. I hold that there is no relation back.

8 MR. ALLEN: If I may, I just want to correct one  
9 statement that was made by counsel for Deloitte Cayman. Our  
10 argument is under the circumstances it would have been  
11 unreasonable to require us to pursue this federal claim -- in  
12 order to preserve our tolling, to pursue a federal claim so  
13 that the court would dismiss it, even when the court had  
14 indicated from the bench that it had a great deal of skepticism  
15 about the claim.

16 With respect to the case law --

17 THE COURT: I understand your point. I think it could  
18 have been done differently. It's a technical point. The  
19 statute of limitations can be technical.

20 MR. ALLEN: If I might just add one thing. There  
21 actually is a case that supports our position. It's from the  
22 Court of Appeals in Florida. The case is Blinn v. Florida  
23 Department of Transportation. And in a very similar situation  
24 the court made this exact point, that why should you force the  
25 plaintiff to assert a claim when it is apparent that the claim

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1 is not going to proceed and press that claim to dismissal, just  
2 in terms of judicial economy. The entire philosophy behind  
3 this statute applies to a voluntary dismissal as well as to a  
4 dismissal by the court, when it's under the circumstances like  
5 this.

6 MR. MARTIN: Your Honor, we don't have that case. It  
7 wasn't cited in the papers.

8 THE COURT: It's not binding on me, and I think Judge  
9 Gardephe has got the better ruling.

10 So I am following that rule. I am not relating back.  
11 The relation back goes from the filing date of April 24, 2009  
12 three years back. So the first audit that's in play is the  
13 first opinion delivered after April 25, 2006.

14 MR. ALLEN: Your Honor, can I add one thing? And that  
15 is that there was an audit that was received on April 11,  
16 2006 -- not received, but was dated April 11, 2006.

17 One of the things that we have seen and we allege in  
18 our complaint is that in some cases these audits were dated a  
19 certain date but were not received until some date later. So  
20 we think it's premature at this point --

21 THE COURT: It has to do with the opinion, not the  
22 audit. What was the first opinion that was delivered after  
23 April 25, 2006?

24 MR. MARTIN: That would be the April 24, 2007. It's  
25 the last audit opinion. That's the only opinion that can

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1 possibly be at issue here.

2 THE COURT: That relates back to the calendar year  
3 December 31, 2006. And usually it is the previous year as  
4 well.

5 MR. MARTIN: No. Each one of them was one year audit  
6 reports.

7 THE COURT: It did not report a two year?

8 MR. MARTIN: No.

9 THE COURT: So that would be the first opinion?

10 MR. MARTIN: Yes.

11 MR. ALLEN: If I may.

12 MR. MARTIN: As to that point, in any case, New York  
13 law couldn't be clearer.

14 THE COURT: I have got it.

15 MR. ALLEN: Your Honor, as I said before, there is  
16 evidence here that in some cases the audits and opinions had  
17 certain dates and then were not delivered until a later date.  
18 And so here we think that it's premature to say that the 2005  
19 audit is no longer in the case --

20 THE COURT: It depends on your allegation, Mr. Allen.

21 MR. ALLEN: -- because of the potential that it could  
22 have been delivered after.

23 THE COURT: If you have a basis for saying that an  
24 earlier opinion is in play, you will have to make that  
25 allegation. But I hold at this point that the cause of action

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1 must have arisen on or after April 25, 2006. And that relates  
2 to the issue of the breach of the engagement for the calendar  
3 year reported in that first opinion.

4 The next thing I want to ask you is, how do you allege  
5 damage here? What is the damage from the negligent performance  
6 of the audit?

7 MR. ALLEN: We allege the damage, for example, in  
8 paragraphs 275, 296, 298 and 299. For example, in paragraph  
9 296, we say that had Deloitte fulfilled their duties, they  
10 would have either caused the overseas funds to report their  
11 true financial condition, issued a qualified adverse opinion,  
12 or resigned as auditor. Had the Deloitte defendants done so,  
13 investors would have known they could not rely on the financial  
14 statements.

15 THE COURT: We are not dealing with investors. We are  
16 dealing with a company.

17 MR. ALLEN: In 275, the allegation is that investors  
18 reasonably relied on Deloitte defendants' audit reports in  
19 deciding to invest.

20 THE COURT: You're not suing on behalf of the  
21 investors, you're suing on behalf of the company.

22 MR. ALLEN: But to go on, your Honor, it also alleges  
23 that the funds did not take action.

24 THE COURT: Which funds?

25 MR. ALLEN: The overseas funds.

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- 1 THE COURT: Which ones? The feeder funds or the funds  
2 on behalf of which the liquidators acted?  
3 MR. ALLEN: The feeder funds.  
4 THE COURT: The feeder funds are not in play. They  
5 are the investors.  
6 MR. ALLEN: The funds --  
7 THE COURT: The liquidators act on behalf of which  
8 funds? Give me the names.  
9 MR. ALLEN: Act on behalf of the High-Grade.  
10 THE COURT: Domestic and overseas?  
11 MR. ALLEN: Just overseas, your Honor.  
12 THE COURT: The overseas H-G fund and the overseas E-L  
13 fund.  
14 MR. ALLEN: And the enhanced leverage fund.  
15 THE COURT: So the argument is what? How were they  
16 damaged?  
17 MR. ALLEN: The liquidators are bringing the claims on  
18 behalf of the funds. It's the funds that contracted with  
19 Deloitte for these services, and it's the funds to whom  
20 Deloitte owes a duty to perform the services in a professional  
21 manner.  
22 THE COURT: Weren't they already committed by the  
23 first audit in play? It's not a matter of placing an  
24 investment, it's a matter of selling an investment.  
25 This is not something I am going to deal with on a

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1 motion to dismiss. I am just raising this issue because it  
2 seems to me that your damage theory needs a better analysis.  
3 Since you're going to amend again on the basis of this, I think  
4 you have got to straighten it out.

5 I hold as follows:

6 Counts One through Three can be restated as a single  
7 count starting from the first audit opinion delivered after  
8 April 25, 2006.

9 Count Four is dismissed.

10 Counts Five through Nine are not involved in this  
11 motion.

12 Count Ten is also duplicative of Count One, Two and  
13 Three consolidated. So Count Ten is dismissed.

14 How much time do you want to replead?

15 MR. ALLEN: 30 days, your Honor.

16 THE COURT: Sure.

17 MR. SHULMAN: There are two other issues that relate  
18 to the professional negligence claim that we briefed.

19 THE COURT: Remind me of them.

20 MR. SHULMAN: The Martin Act, where I think there are  
21 very recent cases cited in our brief, one arising out of the  
22 collapse of these very funds.

23 THE COURT: Also, the release language in there.

24 You're going to have raise the release language as a defense.

25 MR. SHULMAN: And the Martin Act?

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1 THE COURT: I do not believe that the Martin Act  
2 preempts claims by a client against the auditor. So I deny  
3 those aspects of the motion.

4 MR. SHULMAN: There is a recent decision by Judge  
5 Holwell that you might want to take a look at in Stephenson v.  
6 Citco Group Ltd.

7 THE COURT: I will review it again. When I change my  
8 mind I will let you know. As of now, I do not believe the  
9 Martin Act preempts claims based on an engagement of an  
10 auditor.

11 MR. SHULMAN: Judge Holwell did rule on that very  
12 issue, if you take a look at that.

13 THE COURT: July 26 is the date for the new amendment.

14 Thank you, folks.

15 MR. OESTREICH: Can we get a date for another  
16 conference, Judge?

17 THE COURT: I need your complaint first.

18 Where are you now?

19 MR. OESTREICH: I was looking at my calendar, and I  
20 thought maybe the week of September 13, unless we need  
21 something before that. That would be just before depositions  
22 start.

23 THE COURT: Sure. I will do that. September 14,  
24 4:00. OK, folks. Thank you.

25 (Adjourned)

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