UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS MUNOZ, et al.,	:	
Plaintiffs,	:	**ORDER DENYING DEFENDANT PKF NEW YORK'S MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT**
-against-	:	
CHINA EXPERT TECHNOLOGY, INC., et al.,	:	
Defendants.	:	07 Civ. 10531 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

One of the defendants in this lawsuit, Defendant PKF New York, moves to dismiss the Fourth Amended Complaint, relying on Janus Capital Group, Inc. v. First Deriv. Traders, 564 U.S. ___, 131 S.Ct. 2296 (2011). The motion is denied.

The Fourth Amended Complaint alleges a securities-fraud claim based on allegedly false and misleading financial statements of China Expert Technology, Inc. for the years 2003 and 2004, upon which its securities were sold in the United States. China Expert Technology is a company whose operations were in China. Defendant PKF Hong Kong claims that it signed the opinion attached to the accused financial statements, certifying to the fairness of the company's financial condition and results of operation. It concedes that it did so, in accordance with SEC requirements, with the assistance of its affiliated sister firm, PKF New York, but that PKF New York did not "perform, direct or control any audit procedures." (Aff't, Derek Wan, March 12, 2010). Its engagement letter engaged PKF New York, among other detailed tasks, to "ensure that these rules [the SEC requirements that audits be as extensive as required of American companies] have been followed." (It should be noted that though this engagement letter purports to govern the 2004 audit, it is dated July 5, 2005, months after the

2004 audit opinion was completed. On the present record, there is no engagement letter signed before the 2003 and 2004 audits took place.)

In these circumstances, Janus is distinguished and does not require dismissal. Janus determined what it means to be the "maker" of an untrue statement of a material fact in violation of securities laws: "the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it." 131 S. Ct. at 2303. The U.S. Supreme Court found that a mutual fund investment advisor that helped prepare a prospectus for an investment fund (that was a separate legal entity) could not be considered the "maker" of the prospectus because it offered only assistance, not control. "[A]ssistance, subject to the ultimate control of [the investment fund], does not mean that [the advisor] 'made' any statements in the prospectuses." Id. at 2305. The Court likened the relationship to one between a speechwriter, who assists, and a speechmaker, who possesses ultimate say. Id.

In the case at hand, the relationship is not so clear-cut. Plaintiffs have properly pleaded that PKF New York exercised more than assistance. According to their complaint, not only did PKF New York participate in the audits, but it also exercised authority over what was said in the audit opinion. Indeed, the PKF New York engagement letter specifically stated that PKF New York would "review the entire filings with the SEC for compliance." Furthermore, according to the complaint, PKF New York's Managing Director gave final approval of the opinions before they were signed, and then the audit documents were simply signed "PKF" with no indication as to which corporate entity issued them. These allegations, and others, create genuine issues of fact as to whether PKF New York explicitly or implicitly controlled sufficiently—and thus "made"—the statements in question. To determine such issue, discovery

is required. PKF New York may renew its motion after discovery closes to allow me to re-examine the issue upon all the relevant facts.

The motion to dismiss is denied. There are issues of fact that require further discovery, and perhaps trial.

SO ORDERED.

Dated: November 4, 2011
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge