

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0664

Kevin W. Gibson, Esquire
Gibson & Perkins P.C.
1326 King Street
Wilmington, Delaware 19801
Attorney for Plaintiffs

Gregory V. Varallo, Esquire
Lisa M. Zwally, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
Attorneys for Defendant

Re: *Coleman et al. v. PricewaterhouseCoopers LLC*
C.A. No. 03C-02-137 RRC

Submitted: May 3, 2005
Decision Announced in Court: May 3, 2005
Written Decision: July 29, 2005

Upon Defendant's Motion for Summary Judgment.
GRANTED.

Dear Counsel:

Defendant PricewaterhouseCoopers LLP (“PwC”) has moved for Summary Judgment on Plaintiffs’ claim in this alleged accounting negligence action based on Plaintiffs’ failure to have presented any admissible evidence of material misstatements allegedly relied upon by Plaintiffs and contained in the 1997 financial statements of Lason, Inc., which were audited by PwC. Plaintiffs oppose the motion for summary judgment based on their assertion that their accounting expert Bennett Goldstein did, in fact, discover material misstatements in the 1997 financial statements audited by PwC for Lason. This Court holds (as was announced orally to the parties immediately after oral argument on May 3) that PwC is entitled to summary judgment as a matter of law because Plaintiffs have not adduced evidence of any material misstatement, upon which Plaintiffs relied, that was contained in the 1997 financial statements of Lason that were audited by PwC. The trial that was scheduled to begin on May 9, 2005 was cancelled.

I. FACTS

Plaintiffs’ claim against PwC is for negligent misrepresentation, specifically the alleged negligence of a public accountant to a third party

with whom there was no privity of contract and where the only harm suffered was economic in nature.¹ Plaintiffs were the primary shareholders of DIT, a company whose purpose was to “provid[e] data/image capture for firms in the United States and Europe[]” and whose primary clients were involved in “transportation, health care[,] and publishing.”² Plaintiffs sold DIT to Lason through a transaction that closed in November 1998 and which involved a complicated deferred “Earn Out” formula that was apparently engineered to partly compensate Plaintiffs *in futuro*. Plaintiffs allege that in deciding to sell their business to Lason, they in part relied “on [a] review...of...statements [relating to Lason’s financial health] and [PwC’s] assessment of the financial condition of Lason as represented by such audited financial statements....”³ Specifically, Plaintiffs allege that, as part of their decision, they “reviewed and relied on Lason’s Annual Report,

¹ This Court has earlier decided in a related case that the applicable standard for the tort of negligent misrepresentation in an accounting malpractice action lies in section 552 of the Restatement (Second) of Torts and that for an accounting firm to be held liable to plaintiffs who had no direct contractual relation to the accounting firm, “at the time [the accounting firm] was auditing [its client’s] financial statements, [the accounting firm] would have had to have known (or have had reason to have known) that [its client] would share those statements with [a] class [of similarly-situated business owners who had sold their businesses to the client] or with [those] [p]laintiffs as part of a potential business transaction.” *Carello v. PricewaterhouseCoopers LLP*, 2002 WL 1454111, at *4 (Del. Super.).

² Compl. ¶ 9.

³ *Id.* at ¶ 57.

10-K[,] and the audited financial statements accompanying such report for the period[] ending December 31, 1997...together with Lason's Quarterly Report on Form 10-Q, and the unaudited financial statements accompanying such report, for the period[] ending September 30, 1998.”⁴

A further chronology drawn from the Complaint follows: “On December 9, 1999, in reaction to Lason's falling stock price, [Lason's C.E.O. Monroe]...announce[d] ‘[w]e are not aware of any reason for Lason's share price decline[]’”;⁵ “Approximately one week later...Lason announced that fourth-quarter earnings w[ould] be between 31% and 38% lower than expected[]”;⁶ “On...the next trading day, Lason's common stock fell to \$11 7/8ths, from a high for the year of \$64.94...”;⁷ “On or about May 1, 2000, Plaintiffs...became aware...of the possibility that Lason earnings as reported...for fiscal years 1997, 1998, and 1999, and the 10Ks and 10Qs for such periods, may have been misstated by reason of accounting system deficiencies and accounting irregularities”;⁸ “On March 26, 2001, Lason

⁴ *Id.* at ¶ 41.

⁵ Compl. ¶ 63.

⁶ *Id.* at ¶ 64.

⁷ *Id.* at ¶ 66.

⁸ *Id.* at ¶ 67.

announced that it had informed the U.S. Securities and Exchange Commission and the US [sic] Attorney for the Eastern District of Michigan of certain accounting irregularities...”;⁹ “Plaintiffs subsequently learned [after DIT was acquired by Lason] that Lason’s reported revenues on its audited financial statements, and its 10Ks, and 10Qs, for the reporting fiscal years 1997, 1998, and 1999, which were prepared by...[PwC], were not based upon an accounting method which was in conformity with...GAAP....”¹⁰

On December 5, 2001, Lason filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code.¹¹ As a result of the accounting irregularities that Plaintiffs allege existed in Lason’s audited financial statements and (presumably) because of Lason’s subsequent filing for bankruptcy protection, Plaintiffs aver that Lason “cannot and will not be able to” pay the “Earn Out” Plaintiffs argue is now due them as part of the DIT acquisition.¹² Plaintiffs assert that PwC is liable to them “in that had [PwC] not misstated the income of Lason contrary to [Generally Accepted

⁹ Compl. ¶ 75.

¹⁰ Compl. ¶ 77.

¹¹ *Id.* at ¶ 89.

¹² *Id.* at ¶ 92.

Accounting Principles], Plaintiffs never would have agreed to sell DIT to Lason.”¹³

II. THE PARTIES’ CONTENTIONS

A. PwC’s Argument

PwC summary judgment upon three grounds: 1) that Plaintiffs have “failed to identify a single material misstatement in the financial statements of Lason on which [Plaintiffs] claim to have relied,” that 2) there is no genuine issue for trial on the Restatement (Second) of Torts §552 requirement that PwC owed a pecuniary duty to the Plaintiffs, and that 3) Plaintiffs, in their individual capacity, cannot establish the element of justifiable reliance.¹⁴ As to the first claim that Plaintiffs have failed to identify a single material misstatement in the financial statements of Lason, PwC argues that “[t]he thrust of Plaintiffs’ action is that they entered into the Purchase Agreement [to sell their company, DIT, to Lason] to their pecuniary detriment because [Plaintiffs] justifiably relied on the 1997 financial statements” of Lason, which statements were audited by PwC.¹⁵

¹³ Compl. ¶ 103.

¹⁴ PwC’s Opening Brief at 1.

¹⁵ *Id.* at at 6.

PwC contends that “[d]iscovery has revealed that Plaintiffs, through their proffered auditing and accounting expert, acknowledge that they can[not] identify the existence of . . . [any] such material misrepresentation.”¹⁶

Because Plaintiffs cannot identify any material misstatements in the financial statements audited by PwC, PwC asserts that summary judgment should be granted and the Amended Complaint dismissed.¹⁷

B. Plaintiffs’ Response

Plaintiffs respond that their expert has established that there were factual misrepresentations in the 1997 Lason financial statements.¹⁸

Plaintiffs contend that PwC has mistakenly relied upon “one answer given by [Plaintiffs’ expert] in his deposition” and that “the answer was taken out of context in that defense counsel’s follow up questions did not afford [Plaintiffs’ expert] an opportunity to complete his response.”¹⁹ Plaintiffs rely on an “Errata sheet” to their expert’s deposition that would change his deposition testimony to state that Lason’s 1997 financial statements were misstated by at least \$8.5 million representing an overstatement of net

¹⁶ *Id.* at at 6.

¹⁷ *Id.* at at 8.

¹⁸ Plaintiffs’ Response Brief at 3.

¹⁹ *Id.*

income attributable to the understatement of goodwill amortization expense, improper purchase price allocation and understated amortization expense of other intangible assets.²⁰

Plaintiff Richard Coleman, said by Plaintiffs to be a trained accountant and auditor, has filed an affidavit in response to the instant motion in which he asserts that “hav[ing] come to read the deposition of James Reynolds²¹ . . . [that Mr. Reynolds] stated on page 58 of his deposition testimony that, Lason had misstated its 1997 income by \$5,583,000,” Mr. Coleman “duplicated” Mr. Reynolds’ analysis and Mr. Coleman states that he agrees with Mr. Reynolds’ conclusion.²²

C. PwC’s Reply

PwC replies that this Court should not consider the affidavit of Plaintiffs’ expert, which is characterized as an errata sheet, because it is “patently obvious that . . . [the] eleventh hour affidavit is a ‘sham,’ designed to create a factual dispute where none exists.”²³ PwC argues that even if the

²⁰ *Id.*

²¹ James Reynolds was a former PwC audit manager for the Lason audit in 2000 and was a consultant to the Lason special investigation team, which investigated the financial collapse of Lason.

²² Plaintiffs’ Response Brief at 4.

²³ PwC’s Reply Brief at 2.

Court accepts the affidavit on its merits, that Plaintiffs' expert still has not identified a material factual misstatement in the 1997 financial reports.²⁴ The misstatements alleged by Plaintiffs' expert, PwC contends, are actually hypothetical adjustments created by the expert to illustrate a point.²⁵ PwC also replies that Mr. Coleman's affidavit should not be considered by this Court because Mr. Coleman was not identified as an expert during discovery and was never deposed by PwC as an expert. PwC contends that the testimony Coleman proffers in his affidavit is either expert testimony based on his expertise as an accountant and auditor, which testimony should be disallowed as Coleman was not timely identified as an expert. PwC argues that if Coleman's affidavit testimony is not expert testimony then the testimony is lay testimony, which should be disallowed under Delaware Uniform Rules of Evidence 701 as not being proper testimony by a lay witness.²⁶

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ PwC's Reply Brief at 4.

III. STANDARD OF PROOF

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.²⁷ The Court must view the facts in a light most favorable to the non-moving party,²⁸ and all reasonable inferences must be drawn in favor of the non-moving party.²⁹ In resisting a motion for summary judgment, the non-movant's evidence of material facts in dispute "must be sufficient to withstand a motion for directed verdict [*i.e.*, a motion for judgment as a matter of law] and support the verdict of a reasonable jury."³⁰

IV. DISCUSSION

A. Plaintiffs have failed to identify any material misstatements in Lason's 1997 financial statements audited by PwC.

The gravamen of Plaintiffs' action against PwC is a claim for

²⁷ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56 (Del. 1991).

²⁸ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

²⁹ *Liberty Mutual Ins. Co. v. Devlin*, 1998 Del. Super. LEXIS 109 at 9 (Del. Super. Ct) (quoting *Sweetman v. Strescon Indus.*, 389 A.2d 1319, 1324 (Del. Super. Ct. 1978)).

³⁰ James W. Moore et. al., *Moore's Federal Practice* § 56.03[3], at 56-35 (3d ed. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986)); *see also Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1148-1149 (Del. 2002) (en banc) (adopting *Liberty Lobby's* "main holding" that the substantive standard of proof required at trial should also be the substantive standard of proof at the summary judgment stage).

negligent misrepresentation. Specifically, Plaintiffs' claim relies on Restatement (Second) of Torts §552 - *Information Negligently Supplied for the Guidance of Others*. Section 552 states in part

[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.³¹

Plaintiffs must prove all the elements of their claim for negligent misrepresentation or the claim fails.

As stated by PwC, “[t]he thrust of Plaintiffs’ action is that they entered into the Purchase Agreement to their detriment because they justifiably relied on the 1997 financial statements, as a result of PwC’s audit report.”³² This Court has held that a plaintiff “cannot sustain a claim of negligent misrepresentation when it has failed to produce any evidence that the defendant . . . supplied false information.”³³ All of the other elements of an action for negligently supplied information flow from this first element.

³¹ Restatement (Second) Torts §552.

³² PwC’s Opening Brief at 6.

³³ *Outdoor Technologies, Inc. v. Allfirst Financial, Inc.*, 2001 Del. Super. LEXIS 166 *19.

For the reasons stated *infra*, this Court finds that Plaintiffs have not identified a material false statement in the 1997 financial statements audited by PwC such as to sustain a claim for negligent misrepresentation; therefore, PwC is entitled to summary judgment in its favor and dismissal of Plaintiffs' claim. The Court thus need not reach PwC's other bases for its motion for summary judgment.

Plaintiffs rely upon the testimony of their expert, Bennett H. Goldstein, to support their allegation that there were false statements in Lason's 1997 financial statements, which were audited by PwC. However, as pointed out by PwC, Mr. Goldstein was unable to identify any material misstatements in the 1997 financial statements. When Mr. Goldstein was asked at his deposition, "other than what was in the Reynolds related supplemental report (which this Court would not allow as it was untimely filed), are you aware of any material errors in the 1997 financial statements?"³⁴ Mr. Goldstein replied, "Exclusively of the hypothetical items I'm not aware of any."³⁵ Mr. Goldstein was further asked, if he had been unable to identify any material errors in the 1997 financial statements, Mr.

³⁴ Goldstein 4/8/05 Tr. 234, lines 7-9, Perschetz Aff., Ex. 12.

³⁵ Goldstein 4/8/05 Tr. 234, lines 10-11, Perschetz Aff., Ex. 12.

Goldstein replied, “That’s correct.”³⁶ The 1997 financial statements were the only such audited reports that Plaintiffs could have relied upon prior to selling their shares of DIT to Lason in November 1998 because the next audit report by PwC on Lason’s consolidated financial statements for 1998 was issued in March 1999.

Plaintiffs have tried to remedy the deficiency in their claim by filing an “Errata sheet”/affidavit by Mr. Goldstein.³⁷ The affidavit purports to provide Mr. Goldstein with “an opportunity to complete his response to PwC’s counsel’s question” of April 8, 2005 when Mr. Goldstein acknowledged that he was unable to identify any material misstatements in the 1997 financial statements.³⁸ Mr. Goldstein, in his affidavit, claims that his answer on page 234, line 10 “requires further clarification” because “defense counsel’s follow up question was lodged so quickly that I did not have a chance to complete my answer.”³⁹ Mr. Goldstein states that the

³⁶ Goldstein 4/8/05 Tr. 234, line 23, Perschetz Aff., Ex. 12.

³⁷ The document is listed on the cover sheet of the Affidavit of Kevin Gibson as “Exhibit ‘5’ [] a true and correct copy of the Errata Sheet sent by Bennett Goldstein to correct testimony he gave on April 8, 2005. However, Exhibit 5 is titled “Affidavit” and it contains the expanded answer plus a revised “Exhibit 1,” presumably to Mr. Goldstein’s expert report. The Court will refer to this document as “Goldstein’s affidavit.”

³⁸ Plaintiffs’ Response Brief at 3.

³⁹ Goldstein Aff., Gibson Aff., Exhibit 5.

complete answer should have read:

[n]onetheless it is my professional opinion that the 1997 financial statements were misstated by at least \$8.5 million representing an overstatement of net income attributable to understatement of goodwill amortization expense, improper purchase price allocation and understated amortization expense of other intangible assets. Additionally, the total assets reported in the financial statements are overstated by at least the same amount.⁴⁰

PwC responds to Mr. Goldstein’s submission by asserting that “[u]nable to find [evidence of material misrepresentations] *in* the record, they simply seek to *change* the record.”⁴¹ However, even if this Court were to allow the affidavit to stand as an “errata sheet” to Mr. Goldstein’s deposition testimony and an amendment to his expert report, Plaintiffs’ have still not identified a material misstatement in the 1997 financial statements.⁴² Additionally, Mr. Goldstein did not retract his answer to the question; he

⁴⁰ *Id.*

⁴¹ PwC’s Reply Brief at 1.

⁴² PwC argues that under the “sham affidavit” doctrine this Court should not even consider the Goldstein affidavit. The Delaware Supreme Court has explained that the “sham affidavit”

doctrine refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant’s prior sworn deposition testimony. The core of the doctrine is that where a witness at a deposition has previously responded to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact, that witness can not thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without an adequate explanation. An affidavit of that kind, in those circumstances, is deemed to create sham issues, and will not be considered by the trial court as evidence on a motion for summary judgment.” *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003).

However, this Court does not reach the question whether Mr. Goldstein’s affidavit

only attempted to add to it by putting forth his “hypothetical.” The assertions made by Mr. Goldstein in the affidavit are, as Plaintiffs have noted, “nothing new.”⁴³

Mr. Goldstein opined, in his expert report and deposition that PwC should have applied additional audit procedures in evaluating Lason’s use of a 30-year period to amortized “goodwill” booked as part of the purchase accounting associated with Lason’s acquisitions.⁴⁴ Mr. Goldstein also questioned whether other acquisition-related intangible assets should have been identified, valued, and amortized.⁴⁵ However, Mr. Goldstein was unable to identify and quantify how Lason’s amortization constituted a material error in the financial statement.⁴⁶ In order to support his opinion that there was a problem with the 1997 financial statements, Mr. Goldstein relied upon a “hypothetical” in which he theorized that Lason, by not following his “hypothetical” model, overstated reported net income. Mr. Goldstein constructed the “hypothetical” based on assumptions about how

was in effect a “sham affidavit.”

⁴³ Plaintiffs’ Response Brief at 3.

⁴⁴ PwC’s Reply Brief at n.4; Goldstein 4/1/05 Tr. 109-110, Arnold Aff., Ex.2.

⁴⁵ PwC’s Reply Brief at n.4; Goldstein 4/1/05 Tr. 110-112, Arnold Aff., Ex.2.

⁴⁶ Mr. Goldstein acknowledged that GAAP allowed for an amortization of goodwill of up to 40 years. PwC’s Reply Brief at n.4; Goldstein 4/1/05 Tr. 148, Arnold Aff., Ex.2.

other supposedly comparable companies to Lason had reported amortization on their 10Ks. In short, under Mr. Goldstein’s “hypothetical,” if Lason had used a shorter amortization period, based on the average of the goodwill amortization periods of the comparable companies Mr. Goldstein selected, the decrease in the amortization period would have resulted in a decrease in Lason’s net income after amortization cost.

This Court does not disagree, nor apparently does PwC, with Mr. Goldstein’s hypotheses, that a shorter amortization period would increase the annual amortization expense and result in a decrease in net income. However, Mr. Goldstein’s “hypothetical” is nothing more than assumptions that do not reflect the actual numbers used by Lason and audited by PwC. The bottom line is that Mr. Goldstein was not able to identify any material misstatements in the actual financial statements audited by PwC and acknowledged that fact. Mr. Goldstein raised several questions as to whether Lason could have used a different amortization period, however, he did not assert that his “hypothetical” numbers were required to be included in Lason’s financial statements according to GAAP.⁴⁷ Mr. Goldstein further acknowledged that filing financial statements with the Securities and Exchange Commission that included “hypothetical” numbers would be a

⁴⁷ Goldstein 4/1/0 Tr. 166, Arnold Aff., Ex.4.

violation of GAAP.⁴⁸

Without having expert testimony that Lason's 1997 financial statements contained material misstatements and that PwC's audit should have caught those errors, Plaintiffs cannot succeed on their claim.

B. Richard Coleman's affidavit, proffered by Plaintiffs to defeat PwC's motion for summary judgement, will not be considered by this Court as it is untimely.

This Court will not accept the affidavit of plaintiff Richard Coleman ("Coleman") because the testimony that Mr. Coleman would provide at trial pertaining to alleged material misstatements in the 1997 financial statements is either expert testimony proffered under Delaware Uniform Rules of Evidence 703 or lay testimony proffered under D.R.E. 701 and Mr. Coleman is not qualified under either rule to testify as such. In his affidavit, Mr. Coleman asserts that "hav[ing] come to read the deposition of James Reynolds . . . [that Mr. Reynolds] stated on page 58 of his deposition testimony that, Lason had misstated its 1997 income by \$5,583,000," Mr. Coleman conducted his own "investigation" based on the Reynolds' deposition.⁴⁹ Mr. Coleman asserts that "using his skills as a trained auditor and accountant" he "duplicated Mr. Reynolds' analysis and [he] agrees with

⁴⁸ Goldstein 4/1/05 Tr. 166, Arnold Aff., Ex.2.

⁴⁹ Coleman Aff. at ¶33, Gibson Aff., Ex. 2.

[Mr. Reynolds'] conclusion.”⁵⁰

If Mr. Coleman’s testimony is expert testimony, and this Court finds that it is (based on Mr. Coleman’s own words), then the designation of Mr. Coleman as an expert is untimely. Plaintiffs have failed to designate Mr. Coleman as an expert witnesses in pre-trial discovery, thereby depriving PwC of an opportunity to cross-examine Mr. Coleman on his expert opinion.⁵¹ Further, Plaintiffs have failed to satisfy Rule 702’s requirements that

a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵²

Mr. Coleman purports to have “duplicated” Mr. Reynolds’ analysis; however, Mr. Reynolds testified that he relied on memos written by Lason’s controller, which Mr. Reynolds does not identify further, and he relied on the books and records of Lason.⁵³ Not only did Mr. Coleman presumably not have the memos relied upon by Mr. Reynolds, Mr. Coleman had testified

⁵⁰ *Id.*

⁵¹ *Duphily v. Delaware Electric Co-op.*, 662 A.2d 821, 835 (Del. 1995) (holding that “[t]he rendering of . . . expert testimony require[s] that [the expert witness] be designated as such in pre-trial discovery and appropriately qualified at trial”).

⁵² D.R.E. 702.

⁵³ PwC’s Reply Brief at n. 7.

that he did not have access to Lason's books and records.⁵⁴

Even assuming that the Court would find Mr. Coleman's affidavit testimony constituted lay testimony, Mr. Coleman would still not be allowed to testify about the alleged misrepresentations purported to be contained in the Reynolds' deposition. Under D.R.E. 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."⁵⁵ Further, under D.R.E. 701, "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness."⁵⁶ As Mr. Coleman stated in his affidavit, his opinion is based on "read[ing] the deposition of James Reynolds."⁵⁷ Therefore, Mr. Coleman's opinion is not based on either "personal knowledge of the matter" or "based on the perception of the witness" and, as such, his opinion is not qualified as proper lay opinion.

⁵⁴ Coleman 6/20/03 Tr. 10, 100, 121, Arnold Aff., Ex. 8).

⁵⁵ D.R.E. 602.

⁵⁶ D.R.E. 701.

⁵⁷ Coleman Aff. at ¶33, Gibson Aff., Ex. 2.

V. CONCLUSION

For the foregoing reason, PwC's motion for summary judgment is **GRANTED.**⁵⁸

IT IS SO ORDERED.

Very truly yours,

cc: Prothonotary

⁵⁸ There are several additional motions before the Court concurrent with PwC's motion for summary judgment: 1) PwC's motion *in limine* to exclude expert opinion on damages, 2) PwC's motion *in limine* to exclude evidence concerning Lason 1998 and 1999 financial statements 3) PwC's second motion to strike Plaintiffs' late submitted expert report 4) Plaintiffs' motion to amend paragraph 34 of the pre-trial stipulation, and 5) Plaintiffs' motion for summary judgment on PwC's counterclaim. As announced at oral argument, the first four motions are denied as moot. As for Plaintiffs' motion for summary judgment on PwC's counterclaim, PwC represented at oral argument that if summary judgment was granted in its favor, then the counterclaim would not be pursued; therefore the Court deems PwC's counterclaim dismissed.

This Court has decided PwC's motion for summary judgment upon the record developed up to the date of oral argument. The Court, however, notes that counsel for Plaintiffs in a letter of June 20 asked that the case be "re-opened" for the reasons stated therein.