UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

MEMORANDUM OF LAW OF PRICEWATERHOUSECOOPERS LLP AND PRICEWATERHOUSECOOPERS ACCOUNTANTS N.V. IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Timothy A. Duffy
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Tel: 312-862-2000
tim.duffy@kirkland.com

Attorneys for PricewaterhouseCoopers LLP

William R. Maguire
Sarah L. Cave
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Tel: 212-837-6000
cave@hugheshubbard.com

Attorneys for PricewaterhouseCoopers Accountants N.V.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES AND RULES

As outlined in defendants' joint brief, class certification is not appropriate in this litigation. This is especially true of plaintiffs' claims against PricewaterhouseCoopers LLP ("PwC Canada") and PricewaterhouseCoopers Accountants N.V. ("PwC Netherlands"). The predominance inquiry must be conducted "by examining ***each cause of action*** independently of one another, not the entire lawsuit." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003) (collecting cases); *see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162-70 (2d Cir. 2001) (separately evaluating each claim to determine appropriateness of class treatment). There are significant individual issues of reliance, linking conduct, and affirmative defenses unique to the PwC firms that preclude the required finding that common issues predominate with respect to the claims against the PwC firms.

I. Individual Issues of Reliance Bar Certification Against the PwC Firms.

Plaintiffs' sole surviving claims against PwC Netherlands and PwC Canada are for negligence and negligent misrepresentation. *Anwar v. Fairfield Greenwich Ltd.* ("*Anwar II*"), 728 F. Supp. 2d 372, 449-61 (S.D.N.Y. 2010). The Court allowed these claims to proceed past the pleading stage because it found that the plaintiffs had alleged that the PwC firms knew that investors would rely on their reports. *Id.* at 455-56. But in order to prevail on these claims, plaintiffs will have to prove that they did, in fact, rely on the PwC reports. The requirement to prove reliance is fatal to plaintiffs' motion for class certification.

A. Plaintiffs Cannot Prove Reliance on a Class-Wide Basis.

As the Supreme Court recently reaffirmed, in the absence of an applicable presumption of reliance, individualized issues of proving actual reliance generally pose an "insuperable barrier" to class certification. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011). Plaintiffs assert that reliance can be proven through circumstantial, class-wide evidence because the PwC firms issued uniform statements to the entire class. (Pls. Mem. at 12-27.) But even if it

were true (and it is not) that each class member received the same statements from the PwC firms before investing, this does not establish reliance. "[P]roof of misrepresentation–even widespread and uniform misrepresentation–only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008); *see also Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 269 F.R.D. 252, 261-65 (S.D.N.Y. 2010) (denying certification of class of investors because reliance would have to be proved on an investor-by-investor basis).

Individual class members may have decided to invest in the Fairfield funds for any number of reasons, which may or may not have included reliance on a report from one of the PwC firms. In particular, plaintiffs detail their purported reliance on alleged misrepresentations contained in the offering materials for the funds (*see*, *e.g.*, Pls. Mem. at 1, 15), which were not statements by nor otherwise attributable to the PwC firms. Thus, the fact of each class member's reliance on the PwC firms' reports cannot be presumed or proven with generalities. *Abu Dhabi*, 269 F.R.D. at 265 (requirement to prove that specific investors relied upon specific information to make specific purchases made it "impossible" to accept "plaintiffs' theory of common, circumstantial, evidence of class-wide reliance"). Instead, as the Second Circuit recently held, "generalized proof" cannot be used where individuals may have relied on "alleged misrepresentations to different degrees, or not at all." *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 136 (2d Cir. 2010).[1]

1. Plaintiffs' alternative argument for the application of a "fraud-created-the-market" presumption (or more accurately a "negligence-created-the-market" presumption with respect to the PwC firms) fails. As explained in *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 756 (3d Cir. 2010), "[t]he fraud-created-the-market theory lacks a basis in common sense, probability, or any of the other reasons commonly provided for the creation of a presumption." It has been repeatedly rejected by district courts in this circuit. *See*, *e.g.*, *Abu Dhabi*, 269 F.R.D. at 260. Moreover, even if it were the law in this circuit, "the fraud-created-the-market doctrine appears to be applicable only in the context of *federal* securities fraud actions," and thus could not apply to the common law negligence claims against the PwC firms. *Id.*; *see also SIPC v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) ("[F]ederal courts repeatedly have refused to apply the fraud on the market theory to state common law cases despite

Accordingly, establishing reliance with respect to the negligence claims against the PwC firms necessarily requires an individual inquiry that would preclude a finding under Rule 23(b)(3) that common questions predominate. *See, e.g., Levitt v. PricewaterhouseCoopers, LLP*, No. 04 Civ. 5179, 2007 WL 2106309, at *2-3 (S.D.N.Y. July 19, 2007) (predominance was not met in case brought by investors in limited partnerships against accounting firm).[2]

B. The Claims of the Proposed Class Representatives Are Not Typical of Those of the Proposed Class.

Even if it were possible to conclude that individual issues of reliance do not foreclose on plaintiffs' motion for class certification, the motion would still fail because the specific facts elicited in discovery demonstrate that the proposed class representatives cannot establish reliance on an individual basis (let alone on behalf of others), and that their claims therefore cannot be typical of those of the proposed class. In order to satisfy the typicality requirement of Rule 23(a)(3), the class representatives' and the class members' claims must "'arise[ ] from the same course of events'" and all must "'make[ ] similar legal arguments to prove the defendant's liability.'" *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir. 1992)). Typicality cannot exist where the class representatives are "'subject to unique defenses which threaten to become the focus of the litigation.'" *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 508 (S.D.N.Y. 2011) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 59 (2d Cir. 2000)). The documents produced and testimony given by the proposed class representatives plainly show that

---

its wide acceptance in the federal securities fraud context."). Nor can reliance be presumed under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), because plaintiffs' claims against the PwC firms are explicitly based on alleged affirmative misstatements, not an alleged failure to disclose. *See Starr v. Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005) (rejecting application of doctrine where primary allegation was misstatement).

2. As detailed in Section III of the Citco Defendants' Memorandum of Law, which is incorporated herein, significant individual issues are similarly raised by plaintiffs' "holder claims."

their claims do not arise from "the same course of events" when it comes to reliance on the reports of the PwC firms, and that their claims against the PwC firms are subject to a variety of arguments as to how they did not, in fact, rely on any PwC reports.

For example, Michael Wind, the trustee of the Dawson Bypass Trust, testified as follows:

> Q: In making your investment in Greenwich Sentry Partners, did you rely on anything from PricewaterhouseCoopers (Netherlands)?
>
> A: No.
>
> ***
>
> Q: So you didn't rely on anything that PwC (Canada) did to – in making the decision to invest?
>
> A: No at that – not back then, no. Before I made the investment.

(Ex. A (Wind Dep.) at 296:7-10; 268:4-8.)[3]

The testimony of the other proposed class representatives was similar:

- Martin Bach testified that he did not receive any audited financial statements prior to making the first investment for his family trust and did not even think the auditor was PwC. (Ex. B (Bach Dep.) at 375:11-21; *see also id.* at 401:4-24.)

- Two individuals testified for St. Stephen's School. Both admitted they did not rely on any information or reports from a PwC firm. (Ex. C (Pollock Dep.) at 284:3-9, 285:18-25 (no reliance on any representations by PwC Netherlands); *id.* at 290:19-291:4 (no recollection of seeing any documents from PwC Canada or reading an audit report for any of the funds); Ex. D (Routhier Dep.) at 144:9-15 (no reliance on audit reports).)

- None of the individuals who testified in connection with the investment by plaintiff Natalia Hatgis could say there was any reliance on the work of either PwC entity. (Ex. E (Natalia Hatgis Dep.) at 377:13-18 (agreeing she "didn't rely on anything that PricewaterhouseCoopers (Netherlands) did … in making [her] investment"); *id.* at 361:5-20 (does not recall relying on anything that PwC Canada did); Ex. F (Nicholas Hatgis Dep.) at 188:8-18 ("nothing from PricewaterhouseCoopers factored into the family decision to invest"); Ex. G (Kessell Dep.) at 298:4-299:4; 308:9-309:8 (does not know what information Hatgis used to decide to invest; did not review audited financials for the fund in which Hatgis invested).)

3. References to "Ex. __" are to exhibits to the accompanying Declaration of Savvas A. Foukas.

- Laurence Weiner, testifying for the Pacific West Health Medical Center Employees Retirement Trust, likewise admitted he did not see any audited financial statements prior to investing and also failed to identify any information from a PwC entity among the materials he reviewed and relied upon in making an investment. (Ex. H (Weiner Dep.) at 271:22-272:11; 298:4-15.)

- Alon Kaufman, testifying on behalf of plaintiff Harel Insurance Company, admitted that he had never received anything from PwC Canada (Ex. I (Kaufman Dep.) at 302:17-307:20), and although he claimed that he "might have" seen a financial statement audited by PwC Netherlands prior to making his firm's initial investment, he could not testify as to any reliance on this work beyond the fact that the funds had audited financial statements. (*Id.* at 283:2-297:17; *see also* Ex. J (Hessel Dep.) at 244:12-245:4 (fact of audit by reputable firm important).)

- Individuals who testified for the remaining proposed class representative, Securities & Investment Company Bahrain ("SICO"), did claim to have seen and relied upon financial statements audited by both PwC Netherlands and PwC Canada prior to making investments in Fairfield Sentry, but the SICO representatives also reviewed the Offering Memorandum for Fairfield Sentry (Ex. K (Saif Dep.) at 196:16-18; Ex. L (Al-Shirawi Dep.) at 80:13-25; Ex. M (Mallis Dep.) at 105:4-14; Ex. N (Marshad Dep.) at 57:8-12; 58:8-21), which expressly tells investors not to rely on any information not contained therein. (Ex. O.) In addition, despite what they describe as an extensive and thorough due diligence process, no one affiliated with SICO ever had any contact, communication, or other interaction with either of the PwC firms. (Ex. M (Mallis Dep.) at 274:5-16; 275:10-25; 292:5-294:5; Ex. N (Marshad Dep.) at 239:15-19; 240:8-23; 241:15-242:25; 247:22-251:15; Ex. K (Saif Dep.) at 262:19-263:11; 272:5-273:11; Ex. L (Al-Shirawi Dep.) at 247:25-248:16; 249:6-25; 250:9-13; 258:5-261:10.)

The point here is not only that the evidence shows that most, and likely all, of the proposed class representatives will be unable to establish reliance on a report by a PwC firm, but also simply that this is an issue that will have to be litigated on a plaintiff-by-plaintiff basis. This either renders the claims of these individuals atypical of the claims of the class as a whole, or it underscores that reliance is inherently an individual inquiry and, in the words of the Supreme Court, an "insuperable barrier" to class certification.

II. Individual Issues Will Also Preclude Plaintiffs from Satisfying the *Credit Alliance* Test on a Class-Wide Basis.

In order to satisfy the test set out in *Credit Alliance Corp. v. Arthur Anderson & Co.*, 65 N.Y.2d 536, 551 (1985), plaintiffs will have to show that they were parties known to a PwC firm,

whose reliance on a PwC report the PwC firm intended, and as to whom there is linking conduct with the PwC firm. This showing will require an individualized inquiry into the course of conduct between the PwC firms and each plaintiff.

Each plaintiff must prove that he, she, or it was individually known to the PwC Firms. "The words 'known party or parties' in the *Credit Alliance* test mean what they say." *Sykes v. RFD Third Ave. 1 Assocs., LLC*, 15 N.Y.3d 370, 373 (2010). "[T]he accountant must have known when preparing the audit that the *particular plaintiffs* bringing the action would rely on its representations." *SIPC*, 222 F.3d at 75. Thus, as courts evaluating other negligence claims against auditors of funds that invested with Madoff have concluded, it is not enough that an auditor "knew" that investors generally would receive and rely on audit reports. *See Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 83-84 (S.D.N.Y. 2010); *CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (1st Dep't 2011).

The linking-conduct requirement is likewise a bar to class certification. Where "direct contact between the accountant and the plaintiff is minimal or nonexistent, the plaintiff cannot recover for the accountant's negligence." *CRT Invs.*, 85 A.D.3d at 472; *see SIPC*, 222 F.3d at 75 (same).[4] Indeed, as this Court has held, even instances in which auditors have had direct contact with plaintiffs regarding their audit work may not constitute linking conduct. *Hous. Works, Inc. v. Turner*, 179 F. Supp. 2d 177, 219 (S.D.N.Y. 2001) ("Courts have uniformly required more than phone calls, general communications or unacknowledged assertions of reliance in order to establish 'linking conduct'"); *SIPC*, 222 F.3d at 75 ("[A] plaintiff generally must show some form of direct contact between the accountant and the plaintiff, such as a face-to-face

4. Merely addressing audit reports to shareholders generally is not linking conduct. *See CRT Invs.*, 85 A.D.3d at 472 (fact that investors as a group "were entitled to and received a copy of the audited financial statements" does not establish linking conduct). In both *CRT Invs.* and *Saltz*, where the court held there was no linking conduct, the audit reports were addressed to the investors in the funds (in those cases, the funds' partners). (Ex. P (*Saltz* Report) and Ex. Q (*CRT Invs.* Report).)

conversation, the sharing of documents, or other 'substantive communication' between the parties."). Because linking conduct must be shown on a plaintiff-by-plaintiff basis, predominance cannot be shown. Further, because, as the testimony cited above shows, none of the proposed class representatives had any direct contact or communication with either PwC firm, they cannot represent a class of plaintiffs who must fulfill this requirement.

III. Individualized Inquiry Is Also Necessary With Respect to Affirmative Defenses.

While defenses that implicate class members differently do not necessarily require denial of class certification, courts consider potential defenses when assessing predominance. *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 286 (2011). Here, the negligence claims against the PwC Firms are subject to the defense of comparative negligence. *See Windsong Lane Farms v. Telmark, LLC*, 77 A.D.3d 1395, 1397 (4th Dep't 2010). By necessity, the application of this defense involves a highly individualized inquiry into each class member's knowledge, sophistication, and behavior. Further, for the non-New York class members (who constitute the majority of the proposed class), the Court will have to determine whether each plaintiff's claims are timely under the law of both New York and their respective jurisdiction.[5] This requires ascertaining the limitations period in each of the dozens of relevant jurisdictions, and then applying the relevant statute to each class member, including determining and applying any relevant tolls or extensions that each jurisdiction's statute may contain.[6]

5. Under New York's borrowing statute, an action by a non-resident must be timely under the statutes of limitations of New York and the jurisdiction where the cause of action accrued. N.Y. C.P.L.R. § 202. Accrual of a tort cause of action for economic injuries occurs where the plaintiff resides. *See Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999). The statute of limitations question is of particular significance to PwC Netherlands as it was not named in this litigation until April 24, 2009 and issued its last report in mid-2006.

6. Even among the relevant U.S. jurisdictions, there is considerable variation in the statutes of limitations. New York has a three-year statute, which may be extended if plaintiffs can prove that they are entitled to the so-called continuous representation exception, *Anwar II*, 728 F. Supp. 2d at 461, while Connecticut has a three year statute without any tolling or extension. *See Piteo v. Gottier*, 963 A.2d 83, 86-88 (Conn. App. 2009).

Dated: January 13, 2012

KIRKLAND & ELLIS LLP

/s/ Timothy A. Duffy
Timothy A. Duffy

300 North LaSalle
Chicago, Illinois 60654
Tel: 312-862-2000
tim.duffy@kirkland.com

Attorneys for PricewaterhouseCoopers LLP

HUGHES HUBBARD & REED LLP

/s/ William R. Maguire
William R. Maguire
Sarah L. Cave
One Battery Park Plaza
New York, New York 10004
Tel: 212-837-6000
cave@hugheshubbard.com

Attorneys for PricewaterhouseCoopers Accountants N.V.