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June 29, 2017

625 N. Flagler Drive, 7th Floor  
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**Via E-Mail: [cmessersmith@broward.org](mailto:cmessersmith@broward.org)**

Carolyn Messersmith, Purchasing Agent  
Broward County Purchasing Division  
115 S. Andrews Avenue, Room 212  
Fort Lauderdale, FL 33301

***Re: RFP R2112554P2 - External Audit Services - Response to 6/26/17 Request***

Dear Ms. Messersmith:

The undersigned law firm represents RSM US LLP (“RSM”) in regard to the above captioned Request for Proposals (the “RFP”). Please accept this correspondence in response to your request to RSM on June 26, 2017. In that request, you specifically sought additional information regarding two lawsuits filed against RSM, cited in the Protest filed by S. Davis & Associates, P.A.

The first legal matter referenced in your request was filed by RS Investments Limited, et al., in the Circuit Court of Cook County, Illinois. In that case, which concerns allegations that go back ten years or more, Plaintiffs are foreign investment funds which allege that they lost money through investments in Lancelot Cayman, an entity established primarily to fund loans to an entity controlled by Thomas Petters. It was later revealed that Petters – not Lancelot Cayman - was perpetrating a massive Ponzi scheme. RSM had no relationship with Petters and the Plaintiffs freely admit that the auditor defendants were unaware of the Ponzi scheme. RSM is vigorously defending this action and has filed its Motion to Dismiss which is fully briefed and pending before the court. Copies of the briefing documents are attached for your review.

The second lawsuit referenced in your request was filed by MVC Capital, Inc. in Westchester County, New York. The Plaintiff is a business development company which primarily invests in small to midsize companies. The Plaintiff invested \$6M in G3K Displays, Inc. (“G3K”) Unbeknownst to the Plaintiff and RSM, G3K and its principals perpetrated an extensive fraud, fooling numerous parties into believing it had much more revenue than it claimed. Three G3K principals and a former G3K customer’s employee each admitted to their role in the fraud, and were convicted of various crimes. MVC likely cannot recover its investment from G3K or its principals. MVC’s relationship with RSM is attenuated - it had no direct relationship with RSM, thus RSM has filed a Motion to Dismiss based on MVC’s lack of privity with RSM. Copies of Motion to Dismiss are attached for your review.

Carolyn Messersmith, Purchasing Agent  
June 29, 2017  
Page 2

RSM denies any liability or wrongdoing and is vigorously defending these claims. Further, these cases do not have any bearing on the service to be performed for Broward County. Neither case involves auditing services for a governmental agency. Neither case involves anyone from the government auditing division of RSM. Neither case involves any RSM personnel that will be providing services for Broward County. For these reasons, and those stated below, RSM believes these cases are immaterial to its response to this RFP.

We hope that you can appreciate that due to the ongoing nature of the litigation, RSM is not able to provide additional details beyond what is in the public record. If additional documents that have been filed with the courts are needed from either of the cases, please let us know and we will seek to provide them.

RSM has never been named in a lawsuit regarding the auditing of a government agency locally, or nationally. In addition, none of the proposed RSM personnel for this RFP have ever been involved in any litigation related to the audits of government agencies. As described more fully in the RFP Response, RSM currently serves or has served dozens of public governmental agencies in Florida, including other large counties like Broward County.

RSM is a national audit, tax and consulting services firm. It operates in more than 80 cities in nearly 30 states across this country, and employs approximately 8,000 people. RSM has been in business for more than 90 years. Like any large national professional services firms, RSM is subject to various forms of litigation, like these two cases, in the standard course of business. For this reason, RSM maintains significant insurance coverage to insulate itself from the potential impacts of litigation. RSM does not consider these lawsuits to be material to its financial condition as a whole and does not expect that they will in any way impact its ability to perform the services contemplated in its proposal for Broward County or its clients generally.

Carolyn Messersmith, Purchasing Agent  
June 29, 2017  
Page 3

Thank you for your consideration of the foregoing. As the recommended awardee, RSM stands ready, willing and able to perform Broward County's auditing services. RSM is a responsible proposer and is fully capable and qualified in all respects to perform the contract requirements with the integrity and reliability which will assure good faith performance. If you have any additional questions, or need additional information, please do not hesitate to contact the undersigned.

Sincerely,



Mark J. Stempler  
For the Firm

MJS2/lb

cc: Brenda Billingsley (via e-mail w/ enclosures: [bbillingsley@broward.org](mailto:bbillingsley@broward.org))  
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ACTIVE: E24387/384583:9890161\_1

Firm #59917

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

RS INVESTMENTS LTD.; CORRADO	)
INVESTMENTS LTD.; EDEN ROCK	)
FINANCE MASTER LTD.; EDEN ROCK	)
ASSET BASED LENDING MASTER LTD.;	)
EDEN ROCK UNLEVERAGED FINANCE	)
MASTER LTD.; SOLID ROCK SPECIAL	)
SITUATIONS 2 LTD.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
RSM US LLP; RSM CAYMAN LTD.; and	)
SIMON LESSER,	)
	)
Defendants.	)

Case No. 16-L-11459

Judge Raymond W. Mitchell

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 DOROTHY BREIDEN  
 CLERK OF CIRCUIT COURT  
 LAW DIVISION

**NOTICE OF FILING**

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on **February 27, 2017**, we caused to be filed with the Clerk of the Circuit Court of Cook County, Law Division, **(1) RSM US LLP and Simon Lesser's Motion to Dismiss Plaintiffs' Complaint, (2) Memorandum In Support of RSM US LLP and Simon Lesser's Motion to Dismiss Plaintiffs' Complaint, and (3) Affidavit of Aristotelis Alexandros Galatopoulos**, copies of which are attached hereto and hereby served upon you.

Dated: February 27, 2017

Respectfully submitted,

By: 

Robert Palmersheim

Anand Mathew

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**CERTIFICATE OF SERVICE**

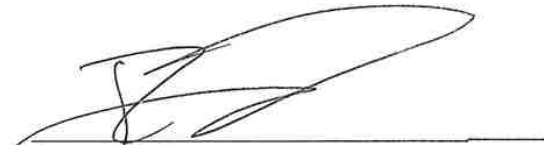
I, Anand Mathew, an attorney, hereby certify that I caused a copy of the foregoing **Notice of Filing** to be served by First Class U.S. Mail, postage prepaid, and e-mail, on the individuals listed below this 27th day of February, 2017:

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
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MASTER LTD.; SOLID ROCK SPECIAL	)
SITUATIONS 2 LTD.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
RSM US LLP; RSM CAYMAN LTD.; and	)
SIMON LESSER,	)
	)
Defendants.	)

Case No. 16-L-11459

Judge Raymond W. Mitchell

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 DOROTHY BRUNN  
 CLERK OF CIRCUIT COURT  
 U.S. DISTRICT COURT

**RSM US LLP AND SIMON LESSER’S MOTION TO DISMISS THE COMPLAINT**

Pursuant to 735 ILCS 5/2-619.1, and for the reasons set forth in the accompanying memorandum, Defendants RSM US LLP and Simon Lesser (collectively, “the McGladrey US Defendants”) hereby move the Court to dismiss Plaintiffs’ Complaint under 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(9) for the following reasons:

(1) Pursuant to 735 ILCS 5/2-619(a)(9), Plaintiffs’ action is barred because they lack standing to assert claims based on losses suffered by Lancelot Investors Fund, Ltd. (“Lancelot Cayman”). Cayman law governs whether Plaintiffs have standing and bars shareholders from bringing a direct cause of action against a third-party for losses that are reflective of an injury suffered by the company, as Plaintiffs seek to do here. In addition, the U.S. Bankruptcy Court for the Northern District of Illinois has already held that these very claims are the property of Lancelot Cayman, not its shareholders.

(2) Pursuant to 735 ILCS 5/2-615, Plaintiffs fail to state a claim for negligent misrepresentation or professional negligence because the McGladrey US Defendants did not owe Plaintiffs a legal duty, whether under the laws of Illinois or the Cayman Islands.

(3) Pursuant to 735 ILCS 5/2-615, Plaintiffs fail to state a claim for common law fraud/fraudulent inducement, whether under the laws of Illinois or the Cayman Islands, because they fail to plead that the McGladrey US Defendants acted with the requisite intent.

WHEREFORE, the McGladrey US Defendants respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice and grant such other and further relief as justice may require.

Dated: February 27, 2017

Respectfully submitted,

By: 

Robert Palmersheim

Anand Mathew

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**CERTIFICATE OF SERVICE**

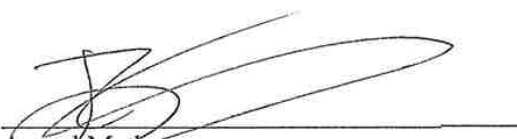
I, Anand Mathew, an attorney, hereby certify that I caused a copy of the foregoing **RSM US LLP and Simon Lesser's Motion to Dismiss Plaintiffs' Complaint**, to be served by First Class U.S. Mail, postage prepaid, and e-mail, on the individuals listed below this 27th day of February 2017:

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

RS INVESTMENTS LTD.; CORRADO  
INVESTMENTS LTD.; EDEN ROCK  
FINANCE MASTER LTD.; EDEN ROCK  
ASSET BASED LENDING MASTER LTD.;  
EDEN ROCK UNLEVERAGED FINANCE  
MASTER LTD.; SOLID ROCK SPECIAL  
SITUATIONS 2 LTD.,

Plaintiffs,

v.

RSM US LLP; RSM CAYMAN LTD.; and  
SIMON LESSER,

Defendants.

Case No. 16-L-11459

Judge Raymond W. Mitchell

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**MEMORANDUM IN SUPPORT OF RSM US LLP  
AND SIMON LESSER'S MOTION TO DISMISS THE COMPLAINT**

**TABLE OF CONTENTS**

INTRODUCTION .....	1
BACKGROUND .....	2
STANDARD OF REVIEW .....	5
ARGUMENT.....	6
I. THE COMPLAINT MUST BE DISMISSED PURSUANT TO 735 ILCS 5/2-619(a)(9) FOR LACK OF STANDING .....	6
A. Cayman Law Bars Claims Seeking To Recover Reflective Losses .....	6
B. Plaintiffs’ Own Allegations Establish that They Impermissibly Seek To Recover Reflective Losses .....	8
C. The Outcome of the Lancelot Cayman Trustee’s Suits Does Not Impact the Reflective Loss Analysis .....	10
II. THE COMPLAINT MUST BE DISMISSED PURSUANT TO 735 ILCS 5/2-615 FOR FAILURE TO STATE A CAUSE OF ACTION.....	12
A. Plaintiffs Fail To State a Cause of Action for Negligent Misrepresentation or Professional Malpractice .....	13
1. The McGladrey US Defendants Owed Plaintiffs No Duty under Illinois Law .....	13
2. The McGladrey US Defendants Owed Plaintiffs No Duty under Cayman Law .....	17
B. Plaintiffs Fail To State a Cause of Action for Fraud/Fraudulent Inducement .....	18
1. Fraud Claims Must Allege Requisite Knowledge and Intent to Deceive .....	19
2. Plaintiffs Concede that the McGladrey US Defendants Were Unaware of the Ponzi Scheme and Allege No Facts to Support the Inference that the McGladrey US Defendants Intended to Deceive Plaintiffs.....	20
CONCLUSION.....	25

**TABLE OF AUTHORITIES**

**STATE CASES**

*Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45 (2007).....12

*Bd. of Educ. v. A, C, & S, Inc.*, 131 Ill. 2d 428 (1989) .....5

*Brumley v. Touche, Ross & Co.*, 123 Ill. App. 3d 636 (2d Dist. 1984)..... 14

*Builders Bank v. Barry Finkel & Assocs.*, 339 Ill. App. 3d 1 (1st Dist. 2003)..... 14, 16

*Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*,  
356 Ill. App. 3d 795 (1st Dist. 2005).....5

*Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*,  
281 Ill. App. 3d 719, 721 (1st Dist. 1996)..... 15

*Fox v. Heimann*, 375 Ill. App. 3d 35 (1st Dist. 2007) ..... 19

*Gordon v. Buntrock*, No. 99 CH 18378,  
2001 WL 35832322 (Ill. Cir. Ct., Cook Cty. June 1, 2001) ..... 14

*Greenpond South, LLC v. G.E. Capital Corp.*,  
886 N.W.2d 649 (Minn. Ct. App. 2016)..... 11

*Housman v. Albright*, 368 Ill. App. 3d 214 (5th Dist. 2006) ..... 6

*Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39 (2001).....19

*Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930 (1st Dist. 2004) ..... 14

*Lipman v. Batterson*, 316 Ill. App. 3d 1211 (1st Dist. 2000) ..... 6

*Navistar Int’l Corp. v. Deloitte & Touche LLP*,  
2012 WL 4043283 (Ill. Cir. Ct., Cook Cty. July 25, 2012).....20, 21

*Park v. Sohn*, 89 Ill. 2d 453 (1982)..... 19

*Patrick Eng’g, Inc. v. City of Naperville*, 2012 IL 113148 ..... 5

*Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147 (2007).....12, 13

*Weis v. State Farm Mut. Auto. Ins.*, 333 Ill. App. 3d 402 (2d Dist. 2002) .....5

**FEDERAL CASES**

*ABF Capital Management v. Askin Capital Management, LP*,  
957 F. Supp. 1308 (S.D.N.Y. 1997) .....10

*Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379 (7th Cir. 1990) .....6

*Bank of Am., N.A. v. Knight*, 725 F.3d 815 (7th Cir. 2013)..... 14

*Bank of Am. v. Knight*, 875 F. Supp. 2d 837 (N.D. Ill. 2012)..... 14, 15

*DeLollis v. Friedberg, Smith & Co.*, 600 F. App’x 792 (2d Cir. 2015) ..... 23

*In re Adv. Battery Tech., Inc.*, 781 F.3d 638 (2d Cir. 2015)..... 19

*In re Bally Total Fitness Sec. Litig.*,  
2006 U.S. Dist. LEXIS 93986 (N.D. Ill. July 12, 2006)..... 20

*In re Lancelot Inv’rs Fund, LP*, 408 B.R. 167 (Bankr. N.D. Ill. 2009).....9

*In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383 (S.D.N.Y. 2011) ..... 10

*In re Palm Beach Fin. Partners, L.P.*, 488 B.R. 758 (Bankr. S.D. Fla. 2013) ..... 24

*In re Tremont Sec. Law, State Law, & Ins. Litig.*,  
703 F. Supp. 2d 362 (S.D.N.Y. 2010) ..... 22, 23, 25

*Meridian Horizon Fund, LP v. KPMG (Cayman)*,  
487 F. App’x 636 (2d Cir. 2012) ..... 22, 23, 25

*Peterson v. McGladrey LLP*, 792 F.3d 785 (7th Cir. 2015) ..... 4, 11

*Primavera Familienstiftung v. Askin*,  
1996 WL 494904 (S.D.N.Y. Aug. 30, 1996)..... 10

*SEC v. Cohmad Sec. Corp.*, No. 09 Civ. 5680,  
2010 U.S. Dist. LEXIS 8597 (S.D.N.Y. Feb. 2, 2010)..... 25

*Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*,  
475 F.3d 824 (7th Cir. 2007) ..... 15

**OTHER AUTHORITIES**

Illinois Public Accounting Act, 225 ILCS 450/30.1(2) (West 2016) ..... 13

## INTRODUCTION

This is a lawsuit brought both by certain shareholders who invested in Lancelot Investors Fund, Ltd. (“Lancelot Cayman”) prior to its collapse and others who purchased those shares after the collapse for the purpose of pursuing litigation against third parties including the Defendants.

Plaintiffs seek to recover their proportionate share of investment losses that Lancelot Cayman suffered directly, and Plaintiffs suffered only derivatively, when it was revealed that Lancelot Cayman had invested nearly all of its cash in a Ponzi scheme orchestrated by Thomas Petters. Plaintiffs fault Lancelot Cayman’s outside auditor, McGladrey & Pullen, Cayman (“McGladrey Cayman”) for failing to uncover the Petters Ponzi scheme and bring claims against RSM Cayman Ltd. (“RSM Cayman”), the alleged successor to McGladrey Cayman. Plaintiffs sue RSM US LLP f/k/a McGladrey LLP (“RSM”) and Simon Lesser (collectively, the “McGladrey US Defendants”) for the assistance they allegedly provided in connection with the audits.

The McGladrey US Defendants now move to dismiss the Complaint pursuant to Sections 2-619 and 2-615, on the grounds that Plaintiffs lack standing to assert these claims and that the facts alleged fail, as a matter of law, to establish two critical elements of a cause of action for negligence and fraud: duty and an intent to deceive.

First, Plaintiffs lack standing because their losses are merely derivative or reflective of Lancelot Cayman’s losses. As such, under the Cayman Island doctrine of “reflective loss” applicable here, Plaintiffs have no standing to assert their claims individually. Indeed, the bankruptcy court for the Northern District of Illinois, in analyzing a related legal issue, already concluded that claims against the auditors belong to Lancelot Cayman, not its shareholders. Dismissal is required under 735 ILCS 5/2-619(a)(9).

Second, because no relationship existed between Plaintiffs and the McGladrey US Defendants that gave rise to a duty, Plaintiffs’ claims for negligent misrepresentation and

professional malpractice fail under 735 ILCS 5/2-615. The McGladrey US Defendants were not retained by Plaintiffs and never spoke with them about the audits. Nothing in the allegations suggest that there existed the type of relationship necessary to impose a duty to non-clients such as Plaintiffs.

Third, Plaintiffs fail to allege facts sufficient to establish the core element of a fraud claim: an intent to deceive. They freely admit that the McGladrey US Defendants were unaware of the Petters Ponzi scheme and therefore cannot establish the requisite intent, their allegations of negligence by hindsight and missed “red flags” notwithstanding. The fraud claim therefore must be dismissed under 735 ILCS 5/2-615.

#### **BACKGROUND**

With one exception,<sup>1</sup> Plaintiffs are foreign investment funds organized under the laws of undisclosed jurisdictions that either invested in Lancelot Cayman at unspecified times between November 2004 and July 2008 or, at some point after October 2008, purchased the shares—and with them the purported claims—of undisclosed parties who were Lancelot Cayman shareholders prior to the revelation of the Petters Ponzi scheme. Compl. ¶¶ 11, 26–37.

Lancelot Cayman was a fund established primarily to fund loans made to an entity controlled by Thomas Petters (“Petters SPV”). Compl. ¶¶ 75, 77. To do so, one of Lancelot Cayman’s domestic affiliates would make loans to the Petters SPV in exchange for a promissory note; Lancelot Cayman, in turn, would purchase the promissory note and the right to repayment. *Id.* ¶ 77. Petters claimed to use the loan proceeds to purchase merchandise from two vendors and resell it to retailers such as Costco. *Id.* ¶ 13. Once the merchandise was purportedly resold, the

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<sup>1</sup> It is unclear whether Plaintiff ERFML is the beneficial owner of any Lancelot Cayman shares as Paragraph 37 does not include ERFML in its list of beneficial owners. Compl. ¶¶ 36–37.

Petters SPV would then repay Lancelot Cayman for the amount of the loan along with accrued interest. *Id.*

In September 2008, after one of Petters's co-conspirators went to the FBI, it was publicly revealed that Petters was operating a Ponzi scheme and had not, in fact, used the loan proceeds to purchase merchandise. *Id.* ¶ 19 & Ex. D ¶ 7. Instead, Petters and his co-conspirators used the proceeds to repay earlier investors, to enrich themselves, and to support their other business ventures. *Id.* ¶ 63. To avoid detection, the conspirators created bogus transaction documents including “phony purchase orders and invoices” and also had third parties pose as the vendors from which Petters purportedly purchased inventory. *Id.* ¶¶ 64, 66, 80–81. The Complaint does not allege that Lancelot Cayman itself was a Ponzi scheme, but rather that Lancelot Cayman was fleeced by Petters. *See, e.g., id.* ¶¶ 12, 14, 15, 25, 27. After the fraud was revealed, Lancelot Cayman went into bankruptcy and liquidation proceedings. *Id.* ¶ 187.

The McGladrey US Defendants did not serve as the auditor for any Petters entity. Nor did the McGladrey US Defendants have any direct contractual relationship with Plaintiffs. It was McGladrey Cayman—RSM Cayman's alleged predecessor—that acted as the outside auditor for Lancelot Cayman. There are no allegations that McGladrey Cayman or any of the McGladrey US Defendants spoke with any of the Plaintiffs specifically. Indeed, there is no allegation that any of the Plaintiffs or their alleged predecessors in interest had any direct contact whatsoever with any of the Defendants prior to their investments in Lancelot Cayman. Although the Complaint alleges that McGladrey Cayman sent the audit opinions directly to Lancelot Cayman's shareholders after they had invested (an allegation that the McGladrey US Defendants deny but accept as true solely for purposes of this motion to dismiss), the Complaint does not allege that any of the McGladrey US Defendants were even aware of any of the Plaintiffs' existence prior to their initial investments,



were ever informed that Plaintiffs intended to rely on the audit reports in deciding whether to invest in Lancelot Cayman, or ever vouched for the quality of the audits. *Id.* ¶¶ 103, 176.

Prior to filing this suit, Plaintiffs, or their alleged predecessors-in-interest, were named plaintiffs and/or purportedly members of the putative class of plaintiffs in two other Illinois suits against McGladrey Cayman and/or the McGladrey US Defendants, styled *Northwater Five-Year Market-Neutral Fund Ltd. et al. v. McGladrey & Pullen, Cayman*, Case No. 2015-L-11102 (Cook Cnty., Ill.) (“*Northwater*”) and *Tradex Global Master Fund SPC Ltd. et ano., on behalf of themselves and all others similarly situated v. McGladrey & Pullen, Cayman et al.*, Case No. 10-CH-13264 (Cook Cnty., Ill.) (“*Tradex*”), which asserted claims on behalf of Lancelot Cayman’s shareholders similar to those asserted here. Compl. ¶¶ 8, 193. More than six years ago, Lancelot Cayman’s bankruptcy trustee sought to stay both the *Tradex* and *Northwater* suits, contending that the shareholders’ claims against the Lancelot Cayman’s auditors were actually property of Lancelot Cayman’s bankruptcy estate. Compl. ¶ 188. In granting the trustee’s request, the court overseeing Lancelot Cayman’s bankruptcy found that the claims “***belong to the bankruptcy estate [of Lancelot Cayman].***” Order & Prelim. Injunc., *In re Lancelot Investors Fund, LP et al.*, Case No. 09-ap-00413 (Bankr. N.D. Ill. filed Aug. 24, 2010) (attached hereto as Exhibit 1) (emphasis added).

The cases remained stayed for five years while Lancelot Cayman’s bankruptcy trustee litigated against McGladrey Cayman and the McGladrey US Defendants, ultimately losing those claims on summary judgment based on the defense of *in pari delicto*. *Peterson v. McGladrey LLP*, 792 F.3d 785 (7th Cir. 2015). Following the conclusion of the trustee suit, the stays of the *Tradex* and *Northwater* actions, as well as two other shareholder suits filed in Minnesota, were lifted. McGladrey Cayman and/or the McGladrey US Defendants filed motions to dismiss in all cases.

Dismissal was granted in two of those cases, with the court finding that the auditor owed no duty to the Lancelot plaintiff shareholders under either Illinois or Minnesota law. *See McKinley Lancelot One, LLC, McKinley Associates, Inc. et al. v. McGladrey & Pullen, LLP*, No. 27-cv-09-16412 and *Belmont Strategic Income Fund, LP v. McGladrey & Pullen, LLP*, No. 27-cv-15-16851 (Minn. Dist. Ct. May 25, 2016), available at 2016 WL 4958223 (“*McKinley Op.*”) (attached hereto as Exhibit 2). And, just recently, Judge McGrath dismissed the *Northwater* action on *forum non conveniens* grounds, and stated at oral argument that she otherwise would have dismissed on standing grounds.<sup>2</sup> In the *Tradex* class action, Judge Atkins allowed the case to proceed, but in so ruling placed a heavy emphasis on allegations that are notably not present here. The remainder of that ruling is currently the subject of a motion for reconsideration based upon Cayman law.

#### **STANDARD OF REVIEW**

“A motion to dismiss under sections 2-615 and 2-619 admits well-pleaded facts, but . . . conclusions of law and conclusory factual allegations not supported by allegations of specific facts are not deemed admitted.” *Patrick Eng’g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31 (internal quotation marks omitted). “If, after the legal and factual conclusions have been disregarded, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss must be granted.” *Weis v. State Farm Mut. Auto. Ins.*, 333 Ill. App. 3d 402, 406 (2d Dist. 2002) (affirming section 2-615 dismissal of fraud claims).

Claims for fraud must satisfy a “high standard of specificity.” *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 356 Ill. App. 3d 795, 803 (1st Dist. 2005). Plaintiffs must set forth “specific allegations of facts from which fraud is the necessary or probable inference.” *Bd. of*

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<sup>2</sup> Plaintiff Corrado’s alleged predecessors-in-interest filed motions for voluntary dismissal in the *Northwater* action, which were granted just two days before the court ruled on the motion to dismiss, and thereby escaped judgment in that case.

*Educ. v. A, C, & S, Inc.*, 131 Ill. 2d 428, 457 (1989). This standard is even more stringent than the heightened pleading requirements for fraud under the federal rules. *Id.* (referring to Federal Rule of Civil Procedure 9(b) as “more lenient”).

### ARGUMENT

#### **I. THE COMPLAINT MUST BE DISMISSED PURSUANT TO 735 ILCS 5/2-619(a)(9) FOR LACK OF STANDING**

Plaintiffs seek to recover their alleged investment losses arising out of Lancelot Cayman’s investment in the Petters Ponzi scheme. That effort is barred by the controlling Cayman Island doctrine of “reflective loss.” Under that doctrine, where a shareholder’s alleged losses could be recouped through a successful action by the corporation itself—here an action by Lancelot Cayman against McGladrey Cayman, the McGladrey US Defendants, and/or other third parties allegedly responsible for Lancelot Cayman’s Ponzi-scheme related losses—any suit by the shareholders themselves is deemed to be reflective of the corporation’s losses and thus barred.

##### **A. Cayman Law Bars Claims Seeking To Recover Reflective Losses**

The question of whether Lancelot Cayman’s shareholders have standing to sue individually or whether the claim must be pursued by the company is a threshold choice-of-law issue that implicates the internal affairs doctrine. *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382–83 (7th Cir. 1990). Illinois follows the widely accepted rule that the law of the place of incorporation of Lancelot Cayman governs that issue. *E.g., Housman v. Albright*, 368 Ill. App. 3d 214, 218 (5th Dist. 2006) (“To determine whether the plaintiffs have standing to sue . . . Illinois courts apply the law of the state of incorporation.”); *Lipman v. Batterson*, 316 Ill. App. 3d 1211, 1215 (1st Dist. 2000). Because Lancelot Cayman is a Cayman company, Compl. ¶ 59, Cayman law governs. Mem. Op. & Order, *Tradex Global Master Fund SPC Ltd. v. Lancelot Inv. Mgmt, LLC*, Case No. 2010-CH-13264, op. at 5 (filed Jan. 12, 2016) (attached hereto as Exhibit 3)

(“*Tradex Op.*”).

Cayman law strictly forbids shareholders from bringing claims against third parties for losses that are derivative of an injury suffered by the company, following the English common law doctrine of “reflective loss.” Affidavit of Aristotelis Alexandros Galatopoulos (Feb. 24, 2017) ¶¶ 13–26 (“Galatopoulos Aff.”).<sup>3</sup> The reflective loss doctrine holds that a shareholder has no right to sue directly “to make good a diminution in the value of the shareholder’s shareholding where that merely reflects the loss suffered by the company.” Galatopoulos Aff. ¶ 19 n.5 (quoting Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1). As Lord Bingham explained in *Johnson*:

A claim will not lie by a shareholder to make good a loss which would be made good if the company’s assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss . . . .

Put another way, Plaintiffs have no standing to assert a claim for damages that merely reflects losses suffered in the first instance by Lancelot Cayman and that Lancelot Cayman’s trustee could have recovered had it succeeded in a suit against McGladrey Cayman, the McGladrey US Defendants and/or any other third parties “responsible for the loss.” This is true even if there is a successful defense to the company’s claim. *See Galatopoulos Aff.* ¶ 20 (“It is not simply the case that . . . [if] there is some defence to the company’s claim, the shareholder can pursue his claim.”) (quoting judgment of Arden, LJ, *Day v. Cook* [2001] EWCA (Civ) 592)). But as explained below, that is precisely what Plaintiffs seek to do.

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<sup>3</sup> The McGladrey US Defendants stand ready to provide copies of the foreign cases cited in the Galatopoulos affidavit, if the Court so desires.

**B. Plaintiffs' Own Allegations Establish that They Impermissibly Seek To Recover Reflective Losses**

The allegations of the Complaint make clear that Plaintiffs impermissibly seek to recover losses that reflect Lancelot Cayman's losses. Because suits brought by Lancelot Cayman against McGladrey Cayman, the McGladrey US Defendants and/or other third parties could have made good the same losses sought by Plaintiffs here, *Johnson* and Cayman law forbid Plaintiffs from bringing individual claims.

Lancelot Cayman's bankruptcy trustee already brought suit against McGladrey Cayman and the McGladrey US Defendants in 2009 seeking to recover all of the losses Lancelot Cayman suffered in connection with its investments in the Petters Ponzi scheme. The trustee likewise brought suit against various other parties—including Lancelot Cayman's management, its third-party administrator, its lawyers, and the third-party auditor of the Petters SPV.<sup>4</sup> Over the years of litigation that followed, the trustee settled some of those cases, lost some based on the *in pari delicto* defense, and continues to litigate others. If the trustee had prevailed (or prevails) in any of those cases and recovered the full amount of Lancelot Cayman's investment losses in the Petters Ponzi scheme, those recoveries would have been distributed to Lancelot Cayman's shareholders, including Plaintiffs, and eliminated the losses Plaintiffs seek to recover here. *See* Compl. ¶ 195 (noting that Plaintiffs had filed claims against Lancelot Cayman's bankruptcy estate to recover their alleged losses). It is under precisely these circumstances—where the “loss . . . would be made good if the company's assets were replenished through action against the party responsible

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<sup>4</sup> *See Peterson v. McGladrey & Pullen LLP et al.*, Case No. 10-c-00274 (N.D. Ill.); *Peterson v. Bell et al.*, Case No. 09-1252 (N.D. Ill.); *Peterson v. Katten Muchin Rosenman LLP*, Case No. 12-cv-3393 (N.D. Ill.); *Peterson v. Winston & Strawn LLP*, Case No. 11-c-02601 (N.D. Ill.); *Peterson v. Swiss Financial Services (Bahamas) Ltd.*, Case No. 09-ap-01283 (Bankr. N.D. Ill.); *Peterson v. Eide Bailly LLP*, Case No. 10-c-8038 (N.D. Ill.).

for the loss,” Galatopoulos Aff. ¶¶ 15, 19 n.5—that the doctrine of reflective loss bars the shareholder claim.

Indeed, the bankruptcy court for the Northern District of Illinois has already found that the claims belong to Lancelot Cayman. The bankruptcy court examined the complaint in the *Tradex* class action brought on behalf of Lancelot Cayman’s shareholders, and held that allowing the shareholders’ claims to proceed would “***improperly permit creditors to litigate claims that belong to the bankruptcy estate.***” Ex. 1, *In re Lancelot Investors Fund, LP*, Case No. 09-ap-00413 (emphasis added). In so ruling, the bankruptcy court reaffirmed its prior holding in a related investor suit that claims against the McGladrey US Defendants are “***general claims that rightfully belong to the bankruptcy estate.***” *Id.* (emphasis added) (quoting *In re Lancelot Inv’rs Fund, LP*, 408 B.R. 167, 172 (Bankr. N.D. Ill. 2009)). As the court explained in that decision:

The alleged professional negligence and misrepresentations were suffered by many creditors, not just [the individual Lancelot investor]. The financial information [the individual Lancelot investor] relied upon was distributed to all investors, not individually to [the individual Lancelot investor]. This puts [the individual Lancelot investor] in the same shoes as other investors who relied upon the financial reports. This is apparent based on the multitude of other lawsuits filed by other creditors of the estate against McGladrey alleging claims sounding in misrepresentation and professional negligence. All parties that invested in the [Lancelot Funds], including [the individual Lancelot investor], lost their investments because of Petters’ alleged fraudulent conduct which may have been facilitated by McGladrey’s alleged negligence and misrepresentations regarding the [Lancelot Funds’] financial condition. [The individual Lancelot investor’s] claims are no different than those claims.

*In re Lancelot Inv’rs Fund*, 408 B.R. at 172. Although the question at issue in the bankruptcy court was a matter of federal bankruptcy, rather than Cayman, law, the court’s reasoning compels the same answer here: the claims asserted by Plaintiffs are not theirs to bring.

**C. The Outcome of the Lancelot Cayman Trustee’s Suits Does Not Impact the Reflective Loss Analysis**

Plaintiffs do not—and cannot—deny that, had the bankruptcy trustee prevailed in his suits against the auditors and other third parties, Plaintiffs would have no remaining damages in this case. That fact alone is dispositive as to the reflective loss doctrine, regardless of the ultimate outcome of those suits.

First, the fact that McGladrey Cayman and the McGladrey US Defendants defeated the trustee’s claim based on *in pari delicto* on summary judgment after years of litigating on the merits does not displace the reflective loss doctrine. Cayman law does not and would not recognize an *in pari delicto* exception to the reflective loss doctrine. *See Galatopoulos Aff.* ¶ 20.<sup>5</sup> Indeed, in *Barings plc (in liquidation) v. Coopers & Lybrand* [2002] 2 BCLC 364, the company’s shareholder alleged that the auditors failed to discover the illegal acts of the company’s manager. *Galatopoulos Aff.* ¶ 23. The auditors, however, had a “complete defence” to the company’s claim very similar to *in pari delicto*, namely a “claim in deceit based on the directors’ representation letter” that had been provided to the auditors. *Id.* ¶ 24. Justice Lombe-Evans nevertheless held that this “complete defence” to the company’s claim did not “permit [the shareholder] to sue for reflective loss.” *Id.* ¶ 25 (quoting paragraph 138 of the judgment); *see also, e.g., Day v. Cook* [2002 1 BCLC 1] (“It is

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<sup>5</sup> Courts in the United States likewise reject such an exception. *ABF Capital Management v. Askin Capital Management, LP*, 957 F. Supp. 1308, 1332–33 (S.D.N.Y. 1997) (holding that “[s]tanding is a constitutional requirement” and the “application of *in pari delicto* to bar the trustee can neither confer constitutional standing upon Plaintiffs nor transform the nature of its alleged injury from a derivative one into a direct and personal one”); *Primavera Familienstiftung v. Askin*, 1996 WL 494904, at \*12 (S.D.N.Y. Aug. 30, 1996) (“At the outset, it is necessary to address the Bankruptcy Court’s finding that the Funds’ trustee was barred from asserting certain claims by the doctrine of *in pari delicto*. Although Primavera asserts that that finding confers standing on it to pursue certain derivative claims, that is not so.”); *In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383, 397 (S.D.N.Y. 2011) (rejecting the “notion that a corporation’s unclean hands—potentially barring derivative claims—will yet allow the corporation’s *shareholders* to sue directly”)

not simply the case [under the reflective loss doctrine] that double recovery will not be allowed so that, for instance, if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder. Accordingly the court has no discretion. The claim cannot be entertained." (cited at Galatopoulos Aff. ¶ 20).<sup>6</sup>

Second, several of the cases brought by the trustee against other third parties allegedly responsible for the loss were not dismissed based on *in pari delicto*. Rather, the trustee settled certain claims, including his claim against Lancelot Cayman's management and continues to litigate others. See, e.g., Settlement Agreement (attached hereto as Exhibit 4). Cayman cases specifically recognize that the reflective loss doctrine applies in full in such cases, regardless of the amount of the settlement. See, e.g., Galatopoulos Aff. ¶ 22 ("The reflective loss principle . . . 'includes the case where the company has settled for less than it might . . . .'" (quoting *Giles v. Rhind* [2002] EWCA Civ 1428); *Johnson v. Gore Wood & Co.* [2000] UKHL 65 (holding that the reflective loss doctrine applies "even if the company . . . has declined or failed to make good that loss"); see also *Greenpond South, LLC v. G.E. Capital Corp.*, 886 N.W.2d 649, 658 (Minn. Ct. App. 2016) (holding, under Minnesota law, that a claim by a Petters investor was derivative where

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<sup>6</sup> Contrary to Plaintiffs' suggestion, Compl. ¶ 29, the Seventh Circuit decision in *Peterson v. McGladrey LLP*, 792 F.3d 785 (7th Cir. 2015), which affirmed the dismissal of the trustee's claims against McGladrey Cayman and the McGladrey US Defendants did not create some kind of *in pari delicto* exception to standing. The Seventh Circuit did not address or otherwise consider Cayman law or the reflective loss doctrine and never reviewed any complaint filed by a shareholder. The Seventh Circuit's *dicta* regarding shareholder claims was simply an observation that its *in pari delicto* ruling against the trustee did not similarly bar investor claims and that, in some circumstances, non-clients can bring claims against auditors. The Seventh Circuit never purported to hold that Plaintiffs here (in a case outside the Seventh Circuit's jurisdiction) actually had standing to pursue claims.



the Petters's bankruptcy trustee had filed suit against the same alleged wrongdoer and settled that case).<sup>7</sup>

As these authorities make clear, the reflective loss doctrine is not an outcome-based inquiry. It is indisputable that Lancelot Cayman possessed and pursued claims against various third parties to recover all of the monies it, and reflectively its shareholders, lost in the Petters Ponzi scheme. If successful, those suits would have satisfied Plaintiffs alleged losses here. Nothing else is required for application of the reflective loss doctrine here. Plaintiffs' claims must be dismissed.

## **II. THE COMPLAINT MUST BE DISMISSED PURSUANT TO 735 ILCS 5/2-615 FOR FAILURE TO STATE A CAUSE OF ACTION**

The Complaint also fails for the separate and independent reason that Plaintiffs—who were not clients of the McGladrey US Defendants—have no viable cause of action for negligence or fraud.

Although the threshold standing issue is governed by the law of Lancelot Cayman's state of incorporation, Illinois's process of *dépeçage* requires a separate choice-of-law analysis for the merits of Plaintiffs' claims. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 161 (2007). That choice-of-law analysis is guided by Restatement (Second) of Conflicts of Law § 148 (1971) and requires application of the law of the jurisdiction with the “most significant relationship” to the alleged tort and the parties. *See, e.g., Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 61, 66

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<sup>7</sup> In *Tradex*, Judge Atkins erroneously found that the reflective loss doctrine did not bar the shareholders' claims, concluding that Lancelot Cayman could not “make good” the loss given its management's involvement in the underlying fraud. Ex. 3 (*Tradex* Op. at 7). But, as McGladrey Cayman and the McGladrey US Defendants highlighted in their pending motion for reconsideration, that fails to take into account the trustee's suit against Lancelot Cayman's management (of which Judge Atkins was previously unaware) and also is directly contrary to the holding in *Barings* and other authorities binding under Cayman law.

(2007); *Townsend*, 227 Ill. 2d at 163–64 & n.4. Although Plaintiffs curiously fail to identify the jurisdictions in which they are incorporated, making a full choice-of-law analysis impossible, the Complaint implicates two jurisdictions on its face:

(1) Illinois, where Mr. Lesser resides, where McGladrey has its principal place of business, and where the Complaint alleges that the “vast majority” of the audit work was performed, *id.* ¶¶ 32, 46, 47, 59;

(2) the Cayman Islands, where Lancelot Cayman, RSM Cayman, and McGladrey Cayman are located and registered, and where final approval of the audit opinion was given, *id.* ¶¶ 41, 44.

At this stage, however, a choice of law analysis is unnecessary because the Complaint fails to state a claim regardless of whether it is evaluated under Illinois or Cayman law.

**A. Plaintiffs Fail To State a Cause of Action for Negligent Misrepresentation or Professional Malpractice**

**1. The McGladrey US Defendants Owed Plaintiffs No Duty under Illinois Law**

The Illinois legislature enacted a statute strictly limiting the circumstances in which an auditor is liable to a non-client, like Plaintiffs here. Under the Illinois Public Accounting Act, 225 ILCS 450/30.1(2) (West 2016) (“IPAA”), a claim for negligent misrepresentation or professional malpractice may be brought by a non-client only where the complaint alleges that the auditor “was aware that a *primary intent* of the client was for the professional services to benefit or influence the *particular person* bringing the action,” *id.* (emphases added). Although Plaintiffs pay lip service to this standard by parroting the language of the statute, Compl. ¶ 202, they allege no facts sufficient to support such a contention. Rather, the Complaint alleges only that the McGladrey US Defendants “undoubtedly knew” and that it was “reasonably foreseeable” that potential and existing shareholders like them generally would rely on the audit reports and invest in Lancelot Cayman. *Id.* ¶¶ 101, 102, 204. That is wholly insufficient under the IPAA.

In enacting the IPAA, Illinois repudiated the standard followed in some other jurisdictions that would make auditors liable to all those who might foreseeably rely on their audits. *E.g.*, *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 938 (1st Dist. 2004) (rejecting assertion that the accountant “owed a duty of due care to all persons who would foreseeably rely on its statements, as this is not the law in Illinois”); *Builders Bank v. Barry Finkel & Assocs.*, 339 Ill. App. 3d 1, 7 (1st Dist. 2003) (same). Illinois courts have made abundantly clear that it is insufficient to allege merely that the auditor knew that its audit reports were being provided to investors or other third parties. *See, e.g.*, *Brumley v. Touche, Ross & Co.*, 123 Ill. App. 3d 636, 637 (2d Dist. 1984) (affirming dismissal pre-IPAA despite allegations that the auditor “knew and foresaw that its audit report would be circulated by [the company] in carrying on its business, including its submission to potential investors in the company”); *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 816 (7th Cir. 2013) (holding that the IPAA “would be ineffectual if knowledge that clients show financial statements to third parties were enough”). Similarly, an auditor’s awareness that its audit reports were being provided to a particular type or class of persons, such as shareholders, is insufficient to satisfy the IPAA’s “particular person” requirement. *See, e.g.*, *Gordon v. Buntrock*, No. 99 CH 18378, 2001 WL 35832322 (Ill. Cir. Ct., Cook Cty. June 1, 2001) (allegations “concerning [auditor’s] knowledge of shareholders in general is insufficient to satisfy the more particular requirements of [the IPAA]”); *see also Builders Bank*, 339 Ill. App. 3d at 9–10 (“[T]here is no ambiguity in the requirement of the statute that the third party be ‘the particular person bringing the action.’”). Critical under the IPAA is some evidence that the auditor either provided “independent verification” of the contents of the audit to the plaintiff or else took some other “affirmative action” towards the plaintiff. *Bank of Am. v. Knight*, 875 F. Supp. 2d 837, 846 (N.D. Ill. 2012).

The strenuous requirements of the IPAA are highlighted in *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007). There, the Seventh Circuit found that the plaintiffs did *not* satisfy the IPAA despite the Complaint’s allegations that the auditor:

- knew “that Plaintiffs were negotiating to sell significant assets to [the audit client]”;
- knew that the plaintiffs “received and were relying on . . . [the auditor’s] unqualified audit report, and that [the audit client] intended that Plaintiffs rely on the . . . audit report”; and
- “participated in the negotiations” between the plaintiff and the audit client.

*Id.* at 838–39 n.9. Likewise, in *Bank of America, N.A. v. Knight*, the court dismissed the claim despite allegations that (1) the audit engagement letter expressly acknowledged that the audit reports would “be distributed to lenders” like plaintiff; and (2) the audit workpapers included copies of the plaintiffs’ loan agreement, which required the audit client to provide the plaintiff with the audit report. 875 F. Supp. 837, 846–47 (N.D. Ill. 2012) (internal quotation marks omitted).

In response to the high hurdle imposed by the IPAA, Plaintiffs offer only the allegations that the audit reports were generally addressed to “Shareholders of Lancelot Investors, Ltd.,” whose identities the McGladrey US Defendants allegedly knew and which, at certain undisclosed points, included certain of the Plaintiffs; that the McGladrey US Defendants sent the audit reports directly to Plaintiffs (an allegation that the McGladrey US Defendants deny and accept as true only for purposes of this motion); and that the McGladrey US Defendants had conversations with certain, undisclosed shareholders about certain, undisclosed matters at undisclosed times. *E.g.*, Compl. ¶¶ 103, 109, 204, 216.

These thin allegations are wholly insufficient under the authority cited above and stand in sharp contrast to the type of allegations that Illinois courts have found to be sufficient under the IPAA. For example, in *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, the court allowed the claim to proceed only because the plaintiffs specifically told the auditor defendant that they were

contemplating an investment in the audit client and the auditor told the plaintiffs directly “that the audit was accurately performed according to generally accepted auditing standards” and gave them “work papers in support of the information in the [audit].” 281 Ill. App. 3d 719, 721 (1st Dist. 1996). Similarly, in *Builders Bank*, the plaintiff was permitted to proceed where the auditor was told that its client was applying for a loan from the plaintiff, went with his client and “personally met with plaintiff’s president,” and personally “reviewed the[] [financial] statements with plaintiff’s president and senior vice-president.” 339 Ill. App. 3d at 4. And in *Tradex*, the Court found that the IPAA was satisfied only because the plaintiffs pleaded that they had a specific conversation with Mr. Lesser about the audits. Ex. 3 (*Tradex Op.* at 10–11).

Here, of course, there are no allegations that the McGladrey US Defendants spoke with any of the Plaintiffs at all, let alone any allegations that the McGladrey US Defendants were told that Plaintiffs were relying on the audits to make investment decisions, that they discussed the specifics of the audits with the McGladrey US Defendants, or that the McGladrey US Defendants affirmed the accuracy of the audited financial statements. The McGladrey US Defendants owed no duty to Plaintiffs simply by virtue that some of them were shareholders in Lancelot Cayman and the audit reports were generally addressed and sent to the shareholders.

Indeed, one court has already found that claims nearly identical to those here and brought by the limited partners of Lancelot Cayman’s domestic affiliate failed under Illinois law because the auditor owed the limited partners no legal duty. Ex. 2, *McKinley Op.* at 8–9 (rejecting plaintiffs’ allegations that the audit reports were addressed to the limited partners as insufficient under both Illinois and Minnesota law). The same result should obtain here.

## 2. The McGladrey US Defendants Owed Plaintiffs No Duty under Cayman Law

Plaintiffs' claims likewise fail under Cayman law where there is "*no reported case* in which shareholders individually or as a body have succeeded in recovering damages" for a breach of the duty of care owed by auditors. Galatopoulos Aff. ¶ 60 (quoting the decision of Lord Justice Moore-Bick in *MAN Nutzfahrzeuge AG v. Freightliner Ltd* [2005] EWHC 2347 (emphasis added)). The absence of any such successful claim reflects Cayman's stringent requirement that the plaintiff establish the existence of a special relationship with the auditor, in which the auditor knew its work would be relied upon by the "claimant for the purpose of a particular transaction or class of transaction," Galatopoulos Aff. ¶ 61 (citing *Barings plc (In liquidation) v Coopers & Lybrand* [2002] 2 BCLC 364); as well as the general recognition that "[n]o duty is owed directly to the individual shareholders," *id.* ¶ 65 (quoting the opinion of Lord Phillips in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391); *see also id.* ¶ 62.

Indeed, Plaintiffs' claims here are precluded by the holding in the seminal case of *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605. In *Caparo*, the plaintiffs sued the corporation's outside auditor, alleging—just like Plaintiffs here—that they initially purchased shares based upon audit reports that failed to detect management fraud and subsequently continued to purchase shares also in reliance on the audit reports. The opinion of Lord Bridge held that the auditor owed no duty to plaintiffs and explaining that "auditors of a public company's accounts owe no duty of care to members of the public at large who rely upon the accounts [i.e., the audit reports] in deciding to buy shares of the company." Galatopoulos Aff. ¶ 54. Similarly, applying *Caparo*, Lord Moore-Bick stated that auditors do not owe current shareholders an individual duty of care, explaining in *MAN Nutzfahrzeuge* that "[t]he duty of care owed by auditors . . . is not owed to shareholders as individuals . . . . The damage from which the auditors must take care to protect shareholders is a

diminution in the value of their interest in the company . . . . It follows that neither individual shareholders, nor for that matter the shareholders as a body, can bring an action in their own names to recover that loss” because the cause of action belongs instead to the company itself. *Id.* ¶ 60 (emphasis added).

*Caparo* mandates dismissal of the negligent misrepresentation and accounting malpractice claims here. Neither of the McGladrey US Defendants were retained by Plaintiffs; McGladrey Cayman was retained by Lancelot Cayman. Just as in *Caparo*, Plaintiffs claim they made an initial investment in 2004 and then made additional investments between November 2004 and July 2008 (though they do not specify which Plaintiffs made which investments or at which times). Compl. ¶¶ 11, 175–80. Plaintiffs allege nothing to suggest that they fall outside of the category of general investing members of the public to whom the auditor owes no duty under Cayman law. The Complaint offers no factual allegations that the McGladrey US Defendants knew of Plaintiffs’ existence prior to their initial investments or that the McGladrey US Defendants knew Plaintiffs would rely on the audits in making any particular investment decisions. Although the Complaint alleges that the audit opinions were addressed and sent to “Shareholders of Lancelot Investors Fund, Ltd.,” which at some point included certain of the Plaintiffs, *e.g.*, Compl. ¶¶ 103, 109, the audit reports in *Caparo* were presented at the company’s annual shareholders’ meeting and Lord Bridge nevertheless found there was no duty, *see Galatopoulos Aff.* ¶¶ 53–55. Plaintiffs therefore cannot state a cause of action for negligent misrepresentation or malpractice under Cayman law.

**B. Plaintiffs Fail To State a Cause of Action for Fraud/Fraudulent Inducement**

Plaintiffs freely admit that the McGladrey US Defendants did not know about the Petters fraud, and instead fault the McGladrey US Defendants for “manag[ing] to miss the massive Ponzi scheme.” Compl. ¶ 7; *see also id.* ¶¶ 4, 133. In light of that concession, the fraud claim fails because there is no way for Plaintiffs to establish that the McGladrey US Defendants intentionally

made false statements or intended to deceive Plaintiffs. Although allegations of reckless conduct, in appropriate circumstances, can serve as a *proxy* for allegations of actual knowledge, those allegations cannot save a fraud claim when the plaintiff admits the defendant was unaware of the fraud. *See, e.g., Park v. Sohn*, 89 Ill. 2d 453, 459 (1982) (affirming dismissal of fraud claim where “there was no evidence that the defendants made any representation to the plaintiffs that they knew to be false, nor was there any evidence that they knowingly concealed defects from the plaintiffs”); *In re Adv. Battery Tech., Inc.*, 781 F.3d 638, 644 (2d Cir. 2015) (holding that, under a theory of recklessness, the auditor’s conduct must “approximate an actual intent to aid in the fraud”); Galatopoulos Aff. ¶ 29 (quoting *Derry v. Peek* for the proposition that “recklessness” is tantamount to making a statement “without belief in its truth”). Allegations that the McGladrey US Defendants “should have known” or should have discovered the Ponzi scheme sound only in negligence. In any event, Plaintiffs’ allegations would be insufficient to support their fraud claim even if they did not directly allege that the McGladrey US Defendants were unaware of the Ponzi scheme.

**1. Fraud Claims Must Allege Requisite Knowledge and Intent to Deceive**

Illinois and the Cayman Islands follow the universal rule that a plaintiff asserting fraud must adequately allege facts establishing that the defendant acted with knowledge of falsity and an intent to deceive. *See, e.g., Park*, 89 Ill. 2d at 459; *Fox v. Heimann*, 375 Ill. App. 3d 35, 47 (1st Dist. 2007) (“The defendants’ knowledge of the falsity of the statement, or a deliberate concealment with the intent to deceive, is an essential element of common law fraud.”); *Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39, 52 (2001) (affirming dismissal of consumer fraud claim because there were “no specific factual allegations that . . . Chrysler directly participated in a scheme with the dealership to misrepresent the facts to the plaintiff” despite the “conclusory allegations of ‘actual knowledge’”); Galatopoulos Aff. ¶ 39; *see also, e.g., id.* ¶¶ 35, 37.



Allegations that an auditor violated professional auditing standards (GAAP and GAAS) are insufficient to establish the scienter necessary for a fraud claim. *Navistar Int'l Corp. v. Deloitte & Touche LLP*, 2012 WL 4043283, at \*12 (Ill. Cir. Ct., Cook Cty. July 25, 2012) (“[A]llegations of GAAP and GAAS violations alone generally are not enough to satisfy the pleading requirements for scienter. . . . GAAP and GAAS violations provide no specific facts upon which a court can infer the state of mind of the accountant.” (internal quotation marks omitted)). It is similarly insufficient to label conduct as “reckless.” Rather, the recklessness sufficient to support a fraud claim must be such an “extreme departure” from the standard of care as to “approximate an intent to aid in the fraud.” *E.g.*, Ex. 3 (*Tradex Op.* at 13); *In re Bally Total Fitness Sec. Litig.*, 2006 U.S. Dist. LEXIS 93986, at \*16, \*40 (N.D. Ill. July 12, 2006). For allegations that the defendant overlooked “red flags” to support a fraud claim, the red flags “must be closer to ‘smoking guns’ than mere warning signs.” *E.g.*, *In re Bally*, 2006 U.S. Dist. LEXIS 93986, at \*40; *see also Galatopoulos Aff.* ¶¶ 34–38.

**2. Plaintiffs Concede that the McGladrey US Defendants Were Unaware of the Ponzi Scheme and Allege No Facts to Support the Inference that the McGladrey US Defendants Intended to Deceive Plaintiffs**

The Complaint correctly alleges that the McGladrey US Defendants had no knowledge of the Petters Ponzi scheme before it was publicly revealed. Compl. ¶¶ 4, 7, 133. That concession is dispositive because Plaintiffs therefore cannot establish that the McGladrey US Defendants knew that any statements in the audit opinions were false or that they had any intent to deceive plaintiffs. But even if there was any ambiguity regarding the McGladrey US Defendants’ awareness of the scheme, Plaintiffs’ allegations of recklessness are nevertheless insufficient to establish the “necessary or probable” inference that the McGladrey US Defendants were aware of Petters’ fraud.

Plaintiffs' allegations of recklessness fall into one of two categories: (1) that the McGladrey US Defendants *would have* learned certain facts had they performed audit procedures on Petters, a non-client, and (2) that the McGladrey US Defendants missed certain "red flags" that, in hindsight, should have alerted them to the fraud. *See, e.g.*, Compl. ¶¶ 161–62. These are, at best, allegations that the McGladrey US Defendants did a poor job performing the audit work (which the McGladrey US Defendants strenuously deny), but none establishes the "necessary or probable" inference that the McGladrey US Defendants knew of the Ponzi scheme and intended to deceive Plaintiffs.

*First*, Plaintiffs allege that the McGladrey US Defendants would have learned of the fraud had they contacted the retailers or visited warehouses. Compl. ¶¶ 5, 161, 163. But allegations of auditing failures support a claim for negligence, not fraud. *See, e.g., Navistar*, 2012 WL 4043283, at \*12. In any event, as Plaintiffs acknowledge, "the Audit team was auditing Lancelot, not [the Petters SPV] or Petters." Compl. ¶ 164. The merchandise was never owned by Lancelot Cayman; it was the Petters SPV that supposedly purchased merchandise from vendors and resold it to retailers. *Id.* ¶ 77. Plaintiffs fail to identify a single legal or professional standard that would require an auditor to conduct due diligence on a non-client or to conduct audit procedures on assets that were not on the books and records of its client, let alone allege any facts that suggest the failure to take such steps constitutes fraud.<sup>8</sup>

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<sup>8</sup> Similarly, the allegation that the McGladrey US Defendants failed to uncover the criminal backgrounds of Petters and his associates, Compl. ¶¶ 25, 83, is nothing more than an assertion of negligence. In that same regard, there is no allegation that the McGladrey US Defendants were aware of the fraudulent round-trip transactions in 2008 or that money was being put into the Petters SPV "lock-box" bank account by Petters himself, rather than the retailers. *Id.* ¶¶ 71, 73, 77, 88(G). And Plaintiffs offer no reason why the McGladrey US Defendants would have examined bank records of a bank account belonging to a non-client like the Petters SPV. Indeed, the Complaint makes clear that the McGladrey US Defendants were *not* aware that the money was coming in from Petters. *See id.* ¶ 16 (alleging that the auditors "should have" uncovered this fact).

Courts, in similar contexts, have dismissed fraud claims resting upon allegations that auditors should have performed procedures on the non-client perpetrator of the fraud:

But most critically, the Auditors were never engaged to audit Madoff's businesses or to issue an opinion on the financial statements of [Madoff]. The Auditors' only role is that they audited the financial statements of the [feeder funds]. The notion that a firm hired to audit the financial statements of one client ([the feeder funds]) must conduct audit procedures on a third party that is not an audit client ([Madoff]) on whose financial statements the audit firm expresses no opinion has no basis.

*In re Tremont Sec. Law, State Law, & Ins. Litig.*, 703 F. Supp. 2d 362, 371 (S.D.N.Y. 2010); accord, e.g., *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 F. App'x 636, 640–41 (2d Cir. 2012) (summary order) (“The Auditors were responsible for auditing the Tremont funds, not [Madoff]. Many of the purported ‘red flags’ that plaintiffs contend should have put the Auditors on notice of the Madoff fraud . . . were risks inherent to [Madoff], not the [the audit client].”).

*Second*, none of the “red flags” that the McGladrey US Defendants allegedly missed can be seriously considered sufficient to give rise to a fraud claim. Specifically, Plaintiffs allege that the McGladrey US Defendants “knew, or paid no attention” to the fact that: (i) the maturity dates of the loans to the Petters SPV were extended from 180 days to 270 days in 2007 after certain loans became delinquent; (ii) a bad debt reserve was never created even though the merchandise being purchased was allegedly “easily subject to damage and obsolescence”; (iii) the Petters SPV did not provide Lancelot Cayman with monthly financial statements; and (iv) Lancelot Cayman and its affiliates were heavily concentrated in Petters. Compl. ¶ 162. These too are, at most, allegations of negligence—crafted in hindsight—not fraud. Countless businesses concentrate their investments, waive contractual requirements, forgive delinquencies, or change loan terms without having any involvement in fraud whatsoever. None are “smoking guns” that clearly revealed the existence of the Petters fraud. Indeed, the Complaint alleges that even Gregory Bell—Lancelot

Cayman’s manager and director—had no awareness of the Ponzi scheme until it was publicly revealed. *Id.* ¶¶ 71, 181.

Similarly, the Complaint’s allegation that “the Auditors understood the possibility that source documents in connection with the Petters ‘transactions’ . . . could be forgeries,” *id.* ¶ 160, does not raise the “necessary or probable inference” that the McGladrey US Defendants knew of the Ponzi scheme. Understanding the theoretical risk does not mean that the McGladrey US Defendants knew that the Petters documents were, in fact, forged, or that any indicia of forgery existed. To hold otherwise would mean that a plaintiff could successfully accuse an auditor of fraud merely by alleging that the auditor considered the ever-present risk of forged documents in the ordinary course of conducting a fraud-risk assessment during an audit.<sup>9</sup>

Numerous courts confronting lawsuits arising from the Petters and Madoff Ponzi schemes have rejected fraud claims on motions to dismiss when, as here, the allegations of missed “red flags” established nothing more than that the auditors should have known of the Ponzi scheme (a contention that sounds in negligence, not fraud). *See, e.g., Meridian*, 487 F. App’x at 640 (affirming dismissal of fraud claims on motion to dismiss arising out of the Madoff Ponzi scheme based on “red flags” as “impermissible allegations of fraud by hindsight” (internal quotation marks omitted)); *In re Tremont*, 703 F. Supp. 2d at 371 (dismissing fraud claims on motion to dismiss for lack of scienter despite allegations of “red flags” surrounding the Madoff Ponzi scheme and holding that “alleging a shoddy audit in violation of GAAS does not establish the intent to defraud required to maintain a claim for securities fraud”); *see also DeLollis v. Friedberg, Smith & Co.*,

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<sup>9</sup> Equally off the mark is Plaintiffs’ irrelevant reference to Mr. Lesser’s work on the Alpha Titans’ matter. As Plaintiffs’ themselves admit, that fund was “unrelated” to Lancelot Cayman and the Petters Ponzi scheme and, in any event, all of the work post-dated the audit work for Lancelot Cayman. Compl. ¶ 52 & Ex. N.

600 F. App'x 792, 796 (2d Cir. 2015) (affirming dismissal on motion to dismiss of negligence and malpractice claims against auditor who failed to detect the Madoff Ponzi scheme and noting that “[n]umerous actions brought against auditors and investment advisors by victims of Madoff’s fraud have been dismissed despite the presence of ‘red flags,’ which in hindsight arguably should have called attention to Madoff’s illegal conduct”); *In re Palm Beach Fin. Partners, L.P.*, 488 B.R. 758, 773 (Bankr. S.D. Fla. 2013) (granting motion to dismiss aiding and abetting fraud claim because allegations did not indicate the defendant “had actual knowledge of Petters’ fraud” and instead “merely suggest[ed] that [the defendants] should have known of Petters’ fraud”).

Although Judge Atkins allowed the fraud claim in *Tradex* to proceed past the motion to dismiss stage, that decision has no application here as it was based primarily on allegations distinct from those in this matter. Specifically, Judge Atkins placed a strong emphasis on the Tradex plaintiffs’ allegation that the McGladrey Defendants had expressly agreed to confirm the transactions directly with Costco. Ex. 3 (*Tradex* Op. at 14). That allegation is false and Plaintiffs here make no such allegation, nor could they do so in good faith. Nevertheless the allegation was made in *Tradex* and Judge Atkins, as he must, relied upon it. This case is further distinguishable from *Tradex* because here, unlike in *Tradex*, Plaintiffs expressly (and rightfully) concede that the McGladrey Defendants were unaware of the Ponzi scheme. For the reasons stated above, that concession requires dismissal of the fraud claim. In any event, Judge Atkins’s ruling was erroneous as a matter of law, including without limitation, because it focused on allegations of “red flags” about which the Tradex plaintiffs (and the plaintiffs here) admit the McGladrey US Defendants were unaware, such as Petters’s prior criminal history, *see* Compl. ¶ 25, and alleged audit failures. In allowing the fraud claim to proceed, Judge Atkins’s decision went contrary to decisions of courts around the country that hold that allegations of audit failures or missing “red


flags” is insufficient to state a claim for fraud. *See supra* pp. 23–24 (citing cases). That is most certainly the case where, as here, the Plaintiffs concede that the McGladrey US Defendants lacked any knowledge of the fraud.

At most, Plaintiffs’ allegations suggest that Petters’s fraud went innocently undetected by the McGladrey US Defendants, just as it went undetected for years by other third-party professionals, the authorities, and Plaintiffs themselves. Courts repeatedly have dismissed fraud claims in such situations. *See, e.g., Meridian*, 487 F. App’x at 641 (“[T]he more compelling inference as to why Madoff’s fraud went undetected for two decades was his proficiency in covering up his scheme . . . .”); *In re Tremont*, 703 F. Supp. 2d at 371 (same); *SEC v. Cohmad Sec. Corp.*, No. 09 Civ. 5680, 2010 U.S. Dist. LEXIS 8597, at \*6 (S.D.N.Y. Feb. 2, 2010) (rejecting fraud claims because allegations suggested that “Madoff fooled the defendants as he did individual investors, financial institutions, and regulators”). That same result is required here.

### CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Respectfully submitted,

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*Attorneys for Defendants RSM US LLP and Simon Lesser*

Dated: February 27, 2017

**CERTIFICATE OF SERVICE**


I, Anand Mathew, an attorney, hereby certify that I caused a copy of the foregoing **Memorandum in Support of RSM US LLP and Simon Lesser's Motion To Dismiss Plaintiffs' Complaint**, to be served by First Class U.S. Mail, postage prepaid, and e-mail, on the individuals listed below this 27th day of February, 2017:

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# EXHIBIT

# 1

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 7
	)	
Lancelot Investors Fund, L.P., et al.	)	Case No. 08 B 28225, et al.
	)	(Jointly Administered)
Debtor.	)	
_____	)	
	)	
Ronald R. Peterson, as Chapter 7 Trustee	)	
for Lancelot Investors Fund, L.P., et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 09 A 413
	)	
Ellerbrock Family Trust, LLC, et al.,	)	
	)	
Defendants.	)	Judge Jacqueline P. Cox

**ORDER AND PRELIMINARY INJUNCTION (Docket No. 91)**

On March 10, 2010 Tradex Global Master Fund SPC Ltd., the ABL Segregated Portfolio 3, and Tradex Global Master Fund SPC Ltd., the Original Segregated Portfolio 3 (the "Tradex Plaintiffs") filed their third class action complaint against entities that Chapter 7 Trustee Ronald R. Peterson has targeted. The Plaintiffs have filed, amended and dismissed a federal class action complaint; they now seek to recover in state court ("Tradex State Class Action") against Lancelot Investment Management, L.L.C. ("LIM"), Gregory Bell ("Bell"), Swiss Financial Services (Bahamas), Ltd., and Swiss Financial Services, Inc. (together, "Swiss Financial"), McGladrey & Pullen LLP and McGladrey & Pullen, Cayman (together "M&P"), Altschuler, Melvoin & Glasser, Cayman and Altschuler, Melvoin & Glasser, LLP (together "AM&G"), and Simon Lesser ("Lesser", and with M&P and AM&G, "McGladrey") (collectively, the "Tradex Defendants"). The Tradex Plaintiffs generally allege that the Tradex Defendants made material

misrepresentations and omissions that induced them and others to invest millions of dollars in Lancelot Investors Fund, Ltd. (the "Offshore Fund") money that was lost when that fund filed for bankruptcy protection after the fraud of Thomas Petters ("Petters") and his co-conspirators was discovered.

Ronald R. Peterson, Debtors' Bankruptcy Trustee ("Trustee") argues that the Tradex Plaintiffs seek to litigate their claims despite this court's prior order that common investor claims against a target of the Trustee's investigation should be enjoined. On July 17, 2009 this court enjoined a group of Lancelot investors known as the McKinley Plaintiffs from pursuing a complaint against McGladrey for professional negligence because such claims were "general claims that rightfully belong to the bankruptcy estate." ( July 17, 2009 Mem. Op. At 6-7, Dkt. 54. 09 ap 413).

Before October 30, 2008, the date on which the underlying bankruptcy proceeding was filed, Bell controlled the Debtors through his management companies. He was authorized to make investment and management decisions on behalf of the Debtors through those entities.

The Debtors were commercial lenders to a special purpose vehicle, Thousand Lakes, which was controlled by Thomas Petters and the Petters Entities.<sup>1</sup> Bell and the management companies caused the Debtors to purchase from Thousand Lakes numerous notes that were purportedly secured by goods owned by the Petters Entities. The notes were ostensibly issued to finance Thousand Lakes' purchase of goods to fulfill existing purchase orders from discount retailers such as Costco, Sam's Club, Boscov's and B.J.'s. Instead, the transactions were part of a multi-billion dollar Ponzi scheme orchestrated by Petters and his co-conspirators.

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<sup>1</sup>The Debtors consist of nineteen related entities that were engaged in the operation of related hedge funds or special purpose vehicles and consist of: SWC Services, LLC; Lien Acquisition, LLC; AGM, LLC; AGM II, LLC; KD1, LLC; KD2, LLC; KD3, LLC; KD4, LLC; KD5, LLC; KD6, LLC; KD7, LLC; KD8, LLC; RWB Services, LLC; Surge Capital II, LLC; Colossus Capital Fund, L.P.; Colossus Capital Fund, Ltd.; Lancelot Investors Fund, L.P.; Lancelot Investors Fund II, L.P.; and Lancelot Investors Fund, Ltd. (Chap. 7 Vol. Pet., Case No. 1:08-bk-28225, Dkt. No. 1 (Oct. 20, 2008)).

Petters was convicted of mail and wire fraud, conspiracy to commit mail or wire fraud, money laundering conspiracy and money laundering. Petters and his co-conspirators created fictitious invoices, purchase orders and other documents and used the money they received from investors to make disbursements and other payments to earlier investors and to enrich themselves. The goods in which the Debtors purportedly held a security interest did not exist making the notes held by the Debtors worthless.

McGladrey & Pullen LLP provide auditing and financial services that consisted of auditing the Funds' financial statements and issuing opinions as to the accuracy of the Funds' financial condition. Lesser was the McGladrey partner in charge of the audits of the Offshore Fund. AM&G is M&P's predecessor.

Swiss Financial served as administrator for the Funds and performed various accounting, administrative and shareholder services. Swiss Financial agreed to calculate the Funds' New Asset Value on a monthly basis and provide monthly and year-end statements that accurately and fairly represent the Funds' financial condition.

Upon consideration of the Third Amended Complaint For Injunctive Relief ("Third Amended Complaint") of the Trustee; the Motion of Trustee Ronald R. Peterson for Preliminary Injunction Staying The Tradex State Class Action ("Motion"); the Memorandum of Law in Support of the Trustee's Motion; the Tradex Plaintiffs' Response in opposition; the Trustee's Reply; the hearing conducted before this court regarding the Motion held on August 5, 2010; due notice of the motion having been given; the relief requested in the Motion being in the interest of the Debtors' estates, their creditors, the public and other parties in interest and authorized pursuant to section 105(a) of Title 11 of the United States Code (the "Bankruptcy Code"), Rule 65 of the Federal Rules of Civil Procedure (the "Civil Rules"), and Rule 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Motion is GRANTED.

The continued prosecution by Tradex Global Master Fund SPC Ltd., the ABL Segregated Portfolio 3, and Tradex Global Master Fund SPC Ltd., the Original Segregated Portfolio 3

("Tradex Plaintiffs") of their currently pending state court class action against (a) Gregory Bell; (b) Lancelot Investment Management, LLC, one of the Debtors' management entities; (c) Swiss Financial Services, Inc. and Swiss Financial Services (Bahamas) Ltd., the administrators of Lancelot Investors Fund, Ltd., Lancelot Investors Fund, L.P., and Lancelot Investors Fund, II, L.P.; (d) and certain of the Debtors' auditors, McGladrey & Pullen LLP and McGladrey & Pullen, Cayman, Altschuler, Melvoin & Glasser, Cayman and Altschuler, Melvoin & Glasser LLP, and Simon Lesser, would (a) improperly permit creditors to litigate claims that belong to the bankruptcy estate as to the AM&G and M&P entities and (b) affect the amount of property in the bankruptcy estate and the allocation of property among creditors.

#### **LIKELIHOOD OF SUCCESS**

The Trustee has a likelihood of success on the merits. The criminal conviction of Petters lends credence to the Trustee's efforts as the burden of proof for criminal matters is beyond a reasonable doubt which is higher than the burdens of proof for civil matters, clear and convincing evidence and a preponderance of the evidence.

#### **PUBLIC INTEREST**

The Trustee's efforts are in the public interest as he is attempting to orderly administer the Debtors' bankruptcy estates and to make *pro rata* distributions to their creditors.

#### **LIMITED OBJECTION TO INJUNCTION**

The Tradex Plaintiffs do not generally oppose the imposition of the requested injunction. They ask that its imposition be limited to allow them to litigate a motion to dismiss regarding the issue of whether their claims are general or direct in state court. However, the Tradex Plaintiffs do not assert any authority in support of their position that the limited imposition of injunctive relief as suggested is proper. It is therefore waived. Their counsel admitted at the August 5, 2010 hearing that they can not litigate their claims until the Trustee concludes his litigation. Transcript of August 5, 2010 Hearing on Motion for Preliminary Injunction, 09 ap 413, p. 24 ("Transcript").

### **ELEMENT OF IRREPARABLE HARM**

The Tradex Plaintiffs argued at the hearing of this Motion that the Trustee would be entitled to injunctive relief under section 105 of the Code if he can demonstrate potential harm to the estate or some potential adverse impact to the claims he is pursuing. Transcript, p. 18. That is not the law. The Seventh Circuit ruled in *Fisher v. Apostolou* that a trustee does not have to show harm to obtain an injunction enjoining related litigation: "In other words, the court does not need to demonstrate an inadequate remedy at law or irreparable harm." *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998) (quoting *In re L&S Industries, Inc.*, 989 F.2d 929, 932 (7th Cir. 1993)).

### **RELATEDNESS OF CLAIMS**

Even if the claims that the Tradex Plaintiffs seek to proceed on in state court are determined to be direct such that a bankruptcy trustee can not pursue them, they are related to Trustee Peterson's lawsuits herein to marshal property of the estate to and to make *pro rata* distributions to the Debtors' creditors as the Tradex Plaintiffs would seek satisfaction from the same assets and insurance proceeds as the Trustee who does so on behalf of all creditors.

### **EXTENSION OF NOVEMBER 12, 2009 AGREEMENT**

The Tradex Plaintiffs ask that the court require Trustee Peterson to resume his November 12, 2009 agreement that allowed the Tradex Plaintiffs to pursue its claims then pending in federal district court. The Trustee asserts that he entered into that agreement only because the judge presiding over that matter insisted on proceeding. This court does not have the authority to require the Trustee to resume that agreement and declines to do so.

### **INTERFERENCE WITH BANKRUPTCY COURT JURISDICTION**

The court rejects the Tradex Plaintiffs' assertion that allowing the state court to resolve the nature and scope of the claims in this bankruptcy case would benefit the parties. Such a resolution could impermissibly interfere with this court's responsibility regarding this matter and prejudice the Trustee who is not a party in the state court case. The Tradex Plaintiffs' attempt to

resolve an issue central to the bankruptcy process outside of bankruptcy court supports the trustee's request herein for injunctive relief.

#### ALTER EGO CLAIMS

The Trustee has legitimately identified AM&G as a target of his investigation in arguing that it is a potential defendant. The court notes that the Trustee has commenced proceedings against M&P, whom the Tradex Plaintiffs claim is an "alter ego" of AM&G. *See* Amended Complaint for Injunctive Relief, 09 ap 413, Dkt. 99, Exh. #4, ¶18. To the extent that M&P is liable for the conduct of AM&G as its alter ego, claims asserted by the Tradex Plaintiffs against AM&G are claims that belong to the Trustee.

The Seventh Circuit has ruled that creditors with individual claims closely related to a trustee's claims "must wait their turn behind the trustee, who has the responsibility to recover assets for the estate on behalf of the creditors as a whole". *Fisher*, 155 F.3d at 881. The Tradex Plaintiffs' claims are closely related to the Trustee's claims. The Tradex Plaintiffs have not shown that they are pursuing wholly separate causes of action based on unrelated facts and circumstances.

#### IT IS HEREBY ORDERED THAT:

1. The motion is GRANTED.
2. Prosecution of the following state court action is preliminarily enjoined and restrained until the bankruptcy case is closed:

Tradex Global Master Fund SPC Ltd., the ABL Segregated Portfolio 3, and Tradex Global Master Fund SPC Ltd., the Original Segregated Portfolio 3 v. Lancelot Investment Management, L.L.C., Gregory Bell, Swiss Financial Services (Bahamas), Ltd., Swiss Financial Services, Inc., McGladrey & Pullen, LLP, McGladrey & Pullen, Cayman, Altschuler, Melvoin & Glasser, Cayman, Altschuler, Melvoin & Glasser, LLP and Simon Lesser, No. 2010-CH-13264, Circuit Court of Cook County, Ill.

3. Pursuant to Rule 7065 of the Bankruptcy Rules, the Trustee is excused from the requirement to post security under Rule 65(c) of the Civil Rules.

4. The trustee is authorized and empowered to take such actions as may be necessary to implement and to effectuate this Order.

5. This court shall retain jurisdiction to hear and to determine all matters involved in the implementation of this Order.

**Dated: August 24, 2010**

**ENTERED:**

*J.P. Cox* *Jacqueline P. Cox*  
\_\_\_\_\_  
**Jacqueline P. Cox**  
**United States Bankruptcy Judge**



# EXHIBIT

# 2

27-CV-09-16412

Filed in Fourth Judicial District Court  
5/25/2016 3:12:58 PM  
Hennepin County, MN

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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McKinley Lancelot One, LLC, McKinley Associates, Inc.,  
Scott Turban Family Trust, Scott Turban, Gene Turban,  
and Paul Dimond,

Court File No. 27-cv-09-16412

Plaintiffs,

**ORDER AND MEMORANDUM**

v.

McGladrey & Pullen, LLP,

Defendant.

---

**AND**

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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Belmont Strategic Income Fund, LP,

Court File No. 27-cv-15-16851

Plaintiff,

**ORDER AND MEMORANDUM**

v.

McGladrey & Pullen, LLP,

Defendant.

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**THIS MATTER** came before the undersigned for a hearing on February 18, 2016, on Defendant McGladrey & Pullen LLP's motion to dismiss the Complaint pursuant to Rule 12.02(e). After the hearing, the parties made additional submissions. The last submissions was filed on February 26, 2016, whereupon the matter was submitted.

Vincent D. Louwagie, Esq., Hugh P. Lambert, Esq., and Morgan Embleton, Esq., appeared on behalf of Plaintiffs McKinley Lancelot One, LLC, McKinley Associates, Inc., Scott Turban Family Trust, Scott Turban, Gene Turban, and Paul Dimond.

Michael A. Rosow, Esq., Jeffrey R. Ansel, Esq., and Robert R. Weinstine, Esq., appeared on behalf of Plaintiff Belmont Strategic Income Fund, LP.

Paul C. Peterson, Esq., Jessica L. Pahl, Esq., and Paul C. Peterson, Esq., appeared on behalf of Defendant McGladrey & Pullen, LLP.

#### FACTUAL SUMMARY

While the background of this case and its procedural path to this moment is complex and tortuous, the facts related to the basis for this Order are few and straightforward.

Plaintiffs were investors and limited partners in three funds: Lancelot I, Lancelot II, and Colossus ("the Funds"). The Funds made asset-based loans and other investments. The McKinley plaintiffs' investments in the Funds totaled approximately \$11 million.<sup>1</sup> The McKinley Complaint does not allege when each of the McKinley plaintiffs made their individual investments. Plaintiff Belmont Strategic Income Fund LLP ("Belmont") invested \$5.55 million in Lancelot II in May 2008. Belmont invested an additional \$1.5 million and \$3.0 million in July 2008 and September 2008. Unfortunately for Plaintiffs, almost all of the Funds' "assets" were

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<sup>1</sup> The Court is referring to the Plaintiffs in District Court File No. 27-CV-09-16412 as the McKinley plaintiffs and the Complaint in that matter as the McKinley Complaint.

tied up in what is now known as the Petters' Ponzi scheme which was uncovered in late September 2008. After the Petters fraud was uncovered, the general manager of the Funds informed its limited partners and investors that their investments were virtually worthless.

Defendant McGladrey & Pullen, LLP ("McGladrey") is a national public accounting firm. McGladrey or its predecessors audited the financial statements of the Funds since their inception. Each year, McGladrey issued unqualified opinion letters for the Funds. McGladrey represented each time that the financial statements presented fairly the financial position of the Funds in conformity with generally accepted accounting standards.

In their Complaint, under count one for professional negligence, the McKinley plaintiffs allege: "McGladrey's audit reports were specifically addressed and directed to the partners of [the Funds], including Plaintiffs. Defendant expected and intended the limited partner investors in [the Funds] to rely on its audits."<sup>2</sup> Under count two for negligent misrepresentation, the McKinley plaintiffs allege: "[t]he misrepresentations made by McGladrey, were for Plaintiffs' guidance in deciding to invest and reinvest in [the Funds]."<sup>3</sup> Plaintiffs further allege that any reasonable investigation during the audits of the Funds would have revealed that the purchase orders and invoices which Petters prepared and gave to potential investment funds were phony.

In its Complaint, Belmont alleges that the manager of Lancelot II provided it with McGladrey's 2006 and 2007 audit reports before Belmont invested in this fund. It also makes almost the identical allegation that the McKinley plaintiffs make: "McGladrey's audit reports were specifically addressed and directed to the partners of [the Funds], including Plaintiffs. Defendant expected and intended the limited partner investors in [the Funds] including Plaintiffs, to rely on the thoroughness, accuracy, integrity, independence, and overall professional caliber of

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<sup>2</sup> Compl. at ¶ 37.

<sup>3</sup> Compl. at ¶ 44.

its audits.”<sup>4</sup> In count two, Belmont alleges that McGladrey owed Plaintiffs a duty to exercise reasonable care in the performance of its audits of the Funds’ financial statements and “negligently and carelessly discharged the aforesaid duty by supplying false information in the audit reports to Plaintiffs in connection with their investments in [the Funds].”<sup>5</sup>

#### **PROCEDURAL POSTURE**

As mentioned above, the procedural history of this case is complicated and involves the bankruptcy proceedings of the Funds in the U.S. District Court for the Northern District of Illinois; a preliminary injunction by the bankruptcy court enjoining the Plaintiffs from pursuing any action against McGladrey; the Lancelot trustee’s action for malpractice against McGladrey in federal court in Illinois; two trips to the U.S. Court of Appeals for the Seventh Circuit for that Case; the dissolution of the preliminary injunction against these Plaintiffs; and now, this motion by McGladrey to dismiss both Complaints for failing to state a claim upon which relief can be granted.

McGladrey’s motion is made on several grounds. First, McGladrey argues that the Plaintiffs lack standing because their claims are, as a matter of Delaware law, derivative claims, and therefore can only be brought by the trustee of the bankrupt funds in which Plaintiffs were investors.<sup>6</sup> Second, McGladrey argues that the Plaintiffs’ claims fail because under either Minnesota or Illinois law McGladrey owed no duty to Plaintiffs because Plaintiffs were not part of a limited group of third-parties known by McGladrey to have been intended to reply upon McGladrey’s work.

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<sup>4</sup> Compl. at ¶ 39.

<sup>5</sup> Compl. at ¶ 47.

<sup>6</sup> The trustee did pursue claims against McGladrey in federal court in Illinois and lost. These were the claims of the Funds, not of the individual investors. The Seventh Circuit upheld the district court’s conclusion that the complicity of the fund’s manager in the Petters’ fraud subjected the fund, and therefore the trustee, to the affirmative defense of *in pari dilecto*, and therefore barred any recovery by the trustee. See *Peterson v. McGladrey LLP*, 792 F.3d 785 (7<sup>th</sup> Cir. 2015).

The Plaintiffs disagree with McGladrey on every point of law, including whether or not their claims are direct or derivative, what state law applies to deciding the question of whether the Plaintiffs' claims are direct or derivative, whether a conflicts of law exists as to accountants' liability to third parties, and what Minnesota and Illinois case authorities hold on such liability.

### CONCLUSIONS OF LAW

#### A. Choice of Law

The parties agree that as to which state's law to apply, two are implicated: (1) Minnesota, which is the forum state, where McGladrey's headquarters were located at the time of the audits at issue, and the location of the Petters' Ponzi scheme; and (2) Illinois, which is where the Lancelot funds were based, where McGladrey is now located, and where the audits were performed. But a court need not engage in a choice of law analysis and may apply the law of the forum where there is no outcome determinative conflict between the states' laws.<sup>7</sup> The court concludes that Minnesota, like many other states, follows the Restatement (Second) of Torts § 552 in determining the extent of an auditor's duty to persons such as the plaintiffs here; and that there is little, if any, significant difference between the Restatement and the law in Illinois governing the liability of auditors to third persons.<sup>8</sup> Both Minnesota<sup>9</sup> and Illinois reject the strict privity requirement announced *Ultramares Corp. v. Touche*<sup>10</sup> and the foreseeability test applied in a small minority of jurisdictions in favor of a compromise approach. Accordingly, the court applies Minnesota law on this issue.

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<sup>7</sup> *Milbank Mut. Ins. V. U.S. Fid & Guar. Co.*, 332 N.W.2d 160, 163 n.4 (Minn. 1983).

<sup>8</sup> *Compare NorAm Inv. Servs., Inc v Stirtz Bernards Boyden Surdel & Larter, P.A.*, 611 N.W.2d 372, 375 (Minn. App. 2000) and *Builders Bank v. Barry Finkel & Assocs.*, 790 N.E.2d 30, 37 (Ill. App. 2003); *see also Bank of Am., N.A. v. Knight*, 875 F. Supp. 2d 837, 847 (N.D. Ill 2012), *aff'd* 725 F. 3d 815 (7<sup>th</sup> Cir. 2013).

<sup>9</sup> *See Bonhiver v. Graff*, 248 N.W.2d 291, 301 (Minn. 1976).

<sup>10</sup> 174 N.E. 441 (N.Y. 1931).

### **B. Standard of Review**

On a motion to dismiss pursuant to Rule 12.02(e), the court must accept as true all well-pled allegations of fact.<sup>11</sup> A “claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.”<sup>12</sup> A claim of negligent misrepresentation is a species of fraud and must be pled with particularity as required by the Minnesota Rules of Civil Procedure, Rule 9.02.<sup>13</sup>

### **C. Analysis of Negligent Misrepresentation Claim**

Minnesota law, applying the Restatement (Second) of Torts § 552, provides that an auditor’s liability for negligent misrepresentation to persons to whom it supplies false information is limited to losses suffered by the person or one of a limited group of persons for whose benefit and guidance the auditor intends to supply the information or knows that the recipient intends to supply it.<sup>14</sup> As stated above, the law in Illinois is almost identical: In Illinois, an accountant owes a duty to parties who relied on his report or opinion if the accountant was “acting at the direction of or on behalf of his client to benefit or influence [the] third party.”<sup>15</sup>

To understand the scope of liability for auditors created by the Restatement (Second) of Torts § 552 and courts applying the Restatement, it is important to contrast it with what is described as the “foreseeability” rule. Under the “foreseeability” rule, auditors are subject to liability to third parties much like any other tortfeasor. That is, auditors may be held liable to any third party for negligent misrepresentation if it is reasonably foreseeable that such third party

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<sup>11</sup> *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

<sup>12</sup> *Id.* at 603.

<sup>13</sup> *See, e.g., Gen. Ins. of Am. v. Lebowsky*, 252 N.W.2d 252, 255 (Minn. 1977).

<sup>14</sup> *See, e.g., NorAm Inv.*, 611 N.W. 2d at 375.

<sup>15</sup> *Chestnut Corp., v Pestine, Braniti, Gamer, Ltd.*, 667 N.WE.2d 543, 457 (Ill. App. 3d. 1996) (quoting *Brumley v. Touche, Ross & Co.*, 463 N.E.2d 195 (Ill. App. 3d 1996) and explaining that the Illinois Public Accounting Act states the general rule set out in *Brumley*, and creates a legislative exception to the general rule)

might obtain and rely on the audit report.<sup>16</sup> The foreseeability test has received substantial criticism from commentators.<sup>17</sup> One court, in rejecting the foreseeability approach, explained the appeal of the rule in the Restatement (Second) of Torts § 552:

The rule expressed [in the Restatement] attempts to define a narrow class and circumscribed class of persons to whom or for whom representations are made. In this way, it recognizes commercial realities by avoiding both unlimited and uncertain liability for economic losses in cases of professional mistake and exoneration of the auditor in situations where it clearly intended to undertake the responsibility of influencing particular business transactions involving third persons.<sup>18</sup>

Another court examining the Restatement rule concluded similarly:

[T]he Restatement approach does not allow recovery for every reasonably foreseeable consumer of financial information. Rather, the Restatement approach steers a middle course by allowing only a prescribed group of third parties to recover for pecuniary losses attributable to inaccurate financial statements.<sup>19</sup>

The comments to the Restatement make it clear that § 552 requires that an accountants' liability does not extend to the general class of people who "might reasonably be expected sooner or later to have access to the information and foreseeably take some action in reliance upon it."<sup>20</sup>

The court concludes that both Plaintiffs have not pled sufficient facts which, consistent with their theory, if proved, would provide them with relief because both Plaintiffs have pled facts that are only consistent with the "foreseeability theory" of accountant liability. Under Minnesota law, Plaintiffs are required to plead facts that, if

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<sup>16</sup> *Scottish Rite Heritable Trust, Plc and SHT Holdings (US), Inc. v. Peat Marwick Main & Co.*, 84 F.3d 606, 611 (5<sup>th</sup> Cir. 1996) (and cases cited therein); *see also Bily v. Arthur Young & Co.*, 834 P.2d 745, 757, 769 (1992) (rejecting the foreseeability approach, noting its few adherents, and substantial criticism from commentators); *Petrillo v. Bachenberg*, 655 A.2d 1354, 1360 (1995) (noting that New Jersey has statutorily changed its foreseeability rule for accountants to a more restrictive test).

<sup>17</sup> *See Bily*, 834 P.2d at 769.

<sup>18</sup> *Id.*

<sup>19</sup> *Scottish Rite Heritable Trust*, 81 F.3d at 612.

<sup>20</sup> Restatement (Second) of Torts Restatement (Second) of Torts § 552, cmt h.



proved, would establish that they are one of a limited group of persons who were relying on the audit for a particular transaction.<sup>21</sup> Similarly, in Illinois, Plaintiffs are required to plead facts that, if proved, will show that the purpose and intent of the accountant-client relationship was to benefit or influence the third-party plaintiff.<sup>22</sup>

The Minnesota Court of Appeals has rejected the very theory set forth in Plaintiffs' Complaints, i.e. that it is sufficient to allege that the audit reports were addressed generally to the partners of the funds.<sup>23</sup> In that unpublished but well-reasoned case, the plaintiff/shareholders argued that because the accountant there had directed audit reports to plaintiff/shareholders, consented to having its reports included in the company's SEC filings, and attended meetings with shareholders and answered their questions, they fell within a limited group of people expected to gain access to the financial information.<sup>24</sup> In that unpublished, but detailed and persuasive decision, the Court of Appeals stated: But accountants are not liable if they "merely know[] of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon an [audit], on the part of anyone to whom it may be repeated."<sup>25</sup>

The complaints here allege even fewer facts than those alleged in *Loop* upon which to base a finding that the McKinley plaintiffs and Belmont are part of a limited group to whom a duty was owed. The McKinley Complaint does not even allege when it invested in the Funds or if it received a copy of the audit reports. Belmont alleges it received a copy of the 2006 and 2007 audit reports before it invested, but of course, any unknown number of investors in the Funds may also have received the McGladrey audit reports before they invested in the Funds. In

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<sup>21</sup> See, e.g., *NorAm Inv. Servs.*, 611 N.W.2d at 375.

<sup>22</sup> *Chestnut Corp.*, 667 N.E.2d at 546 (citing *Brumley II*, 487 N.W. 2d 641 (1985)).

<sup>23</sup> See *Loop Corp v. McIlroy*, 2004 WL 2221619, \*4-5 (Oct. 5, 2004) (citing *NorAm*, 622 N.W.2d at 375)).

<sup>24</sup> *Id.* at \*4.

<sup>25</sup> *Id.* (quoting *NorAm*, 611 N.W.2d at 375).

sum, both Complaints allege nothing more than that an unidentifiable group of investors may have possibly relied upon the audit reports. Numerous courts have rejected such generalized allegations as Plaintiffs make here.<sup>26</sup>

**D. Analysis of Professional Negligence Claim**

In Minnesota, in order to state a valid claim for professional negligence, a nonclient plaintiff is required to plead that they were an intended third-party beneficiary and that the client's sole purpose in retaining the professional is to benefit the nonclient directly.<sup>27</sup> The "Goldberger" rule creates a high bar for professional negligence claims. In fact, as McGladrey points out, no Minnesota appellate court has ever allowed a non-audit client to bring such a claim.<sup>28</sup>

Despite Plaintiffs' protestations that they have pled valid claims for professional malpractice, they have not. There is no allegation to support a conclusion that they were an intended third-party beneficiary of the contract between the Funds and McGladrey or that the Funds' sole purpose in engaging McGladrey was to benefit Plaintiffs directly.

Similarly, in Illinois, plaintiffs must satisfy the strict test of the Illinois Public Accounting Act ("IPAA"), which provides that an accountant is liable to a nonclient third party only when the "accountant was aware that the primary intent of the client was for the professional services to benefit or influence the particular person bringing the action."<sup>29</sup> Again, Plaintiffs have not alleged facts to state a valid claim under the IPAA.

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<sup>26</sup> See, e.g., *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.2d 913, 921 (Tex. 2010); *Box Office Entm't, LLC v. Brian Gordon, CPA, P.A.*, No. 05-210100CIV, 2007 WL 1362898, at \*5 (S.D. Fla., May 9, 2007); *Machata v. Seidman & Seidman*, 664 So. 2d 114, 115 (Fla. Dist. App. 1994).

<sup>27</sup> See *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. App. 1995) rev'd on other grounds, 601 N.W. 179 (Minn. 1999).

<sup>28</sup> See *N.Am. Specialty Ins. V. Wipfli, LLP*, No. 12-1531 (JRT/JJK), 2013 WL 3871438, at \*2, \*4 (D. Minn. July 26, 2013) and *Assoc. Comm. Fin., Inc. v. Brady Martz & Assocs.*, No. 04-5555 (PJS/JJG), 2006 WL 3406762, at \*1 (D. Minn. Nov. 7, 2006).

<sup>29</sup> See 225 Ill. Comp. Stat. 450/30.1 (West 2015).

**E. Request for Leave to Amend the Complaints**

Plaintiffs argue that if the court determines there is some “technical defect” in their pleadings, they should be allowed leave to amend the complaint to cure these defects. They argue further that several of the authorities McGladrey relies upon were issued after this case was decided and that there is a “great deal” of information now available about the Petters’ Ponzi scheme. Plaintiffs seem to be suggesting that existing discovery will provide them with the specific facts needed to cure their complaints. However, to the Court’s knowledge, no discovery has occurred specifically related to the allegations in this case that are at issue here. And, more importantly, Plaintiffs argue themselves that the question “[whether] McGladrey knew that the funds intended to use the financial statements to influence the Plaintiffs’ investment decisions....can be determined only through discovery.”<sup>30</sup> Consistent with its conclusions above, the Court finds that discovery of such knowledge by McGladrey would still not establish the Plaintiffs as anything more than members of an ever-present group of people whom the Funds may have provided McGladrey’s audit papers. Finally, the Court notes that negligent misrepresentation is a species of fraud and must be pled with particularity, and the Minnesota Supreme Court has held that plaintiffs cannot expect discovery to provide factual support for conclusory allegations where particularity is required.<sup>31</sup> Accordingly, the court denies Plaintiffs’ request for leave to amend their Complaint.

**CONCLUSION**

For the reasons set forth above, the court grants Defendant McGladrey’s motion to dismiss. Because the court concludes that Plaintiffs have not stated claims upon which relief can

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<sup>30</sup> Plaintiffs’ Memorandum in Opposition, dated January 25, 2016, at 30.

<sup>31</sup> *Elwood v. County of Rice* 423 N.W. 671, 676 (Minn. 1988).

27-CV-09-16412

Filed in Fourth Judicial District Court  
5/25/2016 3:12:58 PM  
Hennepin County, MN

be granted, the Court does not reach the alternative basis for McGladrey's motion – namely, that Plaintiffs lack standing to assert claims based on losses suffered by the Funds. Having granted McGladrey's motion to dismiss, the Court hereby orders that the Complaint in both matters be dismissed with prejudice with costs and disbursements awarded in favor of Defendant.

**Let judgment be entered accordingly.**



Dated: May 25, 2016

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Bridget A. Sullivan  
Judge of District Court

# EXHIBIT

# 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

TRADEX GLOBAL MASTER FUND	)	
SPC LTD, THE ABL SEGREGATED	)	
PORTFOLIO 3; and TRADEX	)	
GLOBAL MASTER FUND SPC	)	
LTD., THE ORIGINAL	)	
SEGREGATED PORTFOLIO 3, on	)	
behalf of themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	No. 10 CH 13264
v.	)	
	)	Calendar 16
LANCELOT INVESTMENT	)	
MANAGEMENT, LLC., GREGORY	)	Judge David B. Atkins
BELL; McGLANDRY & PULLEN,	)	
LLP; McGLADREY & PULLEN,	)	
CAYMAN; ALTSCHULER,	)	
MELVOIN & GLASSER, CAYMAN;	)	
ALTSCHULER MELVOIN &	)	
GLASSER, LLP; and SIMON	)	
LESSER,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

THIS CAUSE COMING ON TO BE HEARD on defendants McGlandrey & Pullen, LLP, McGlandrey & Pullen, Cayman, and Simon Lesser's Motion to Dismiss pursuant to 735 ILCS 5/2-619.1, and Altschuler, Melvoin & Glasser, LLP's motion to dismiss pursuant to 735 ILCS 5/2-619.1, and the court having considered the briefs submitted, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendants' motions to dismiss are denied.

**Background**

In this class action lawsuit, plaintiffs Tradex Global Maser Fund Spc Ltd., The ABL Segregated Portfolio 3 ("Tradex ABL"), and Tradex Global Master Fund SPC Ltd., The Original Segregated Portfolio 3 ("Tradex OSP")(collectively "Tradex"), on behalf of themselves and others similarly situated, and allege that defendants Lancelot Investment Management, L.L.C., ("Lancelot"), Gregory Bell ("Bell"), McGladrey & Pullen, LLP ("M&P"), McGladrey & Pullen, Cayman ("M&P Cayman"), Altschuler, Melvin & Glasser, L.L.P. ("AM&G"), Altschuler,

Melvin & Glasser Cayman (“AM&G Cayman”), and Simon Lesser (“Lesser”)(collectively, M&P, M&P Cayman, AM&G, AM&G Cayman, and Lesser may be referred to hereinafter as “the auditors”), are liable for fraud and negligent misrepresentation.

The above causes of action arise out of a ponzi scheme perpetrated by Thomas Petters (“Petters”). Plaintiffs are each a segregated portfolio of Tradex Global Master Fund SPC, Ltd., which is a British Virgin Islands Business Company Limited by Shares and registered as a Segregated Portfolio Company under the laws of the British Virgin Islands. (Am. Compl. ¶ 11) Plaintiffs entered into various transactions through its custodian bank with Lancelot Investors Fund, Ltd. (“Lancelot Offshore” or “The Fund”) during the summer of 2008. (*Id.* at ¶ 12) The Fund, which was created in 2002 allegedly as a “feeder fund” for Petters, was purportedly created to engage in “purchase order inventory financing.” (*Id.* at ¶ 23) This essentially means that The Fund would issue a loan to a domestic affiliate (“Lancelot Onshore”) in return for a promissory note and collateral. (*Id.*) The Fund would then use the loan proceeds to purchase electronic merchandise from U.S. suppliers through a special purposes vehicle (“SPV”) and ship it to a retailer such as Sam’s Club or Costco Wholesale, which would then pay the SPV for the merchandise. The SPV would then pay the loan owed to Lancelot Onshore, which would then repay the loan from Lancelot Offshore with earned interest. However, in September of 2008 the FBI uncovered that none of this activity was actually occurring and that Petters was in fact operating a ponzi scheme. (*Id.* at ¶ 26) In December 2009 Petters was convicted of 20 counts of wire fraud, mail fraud, money laundering and conspiracy. (*Id.*)

Before the scheme was uncovered, Lancelot sought to attract investors to The Fund. To attract prospective investors Lancelot prepared an “Offering Memoranda” describing the purported activities of The Fund and outlining the purported protections and monitoring efforts defendants supposedly employed on behalf of investors. (*Id.* at ¶ 30) The Offering Memorandum was reviewed and/or approved by management for Lancelot as well as Bell, who was the sole principal of Lancelot. (*Id.* at ¶¶ 14, 28) Plaintiffs allege that due to the fraudulent nature of The Fund’s transactions, the representations contained in the Offering Memorandum were materially false and misleading. (*Id.* at ¶ 31)

In 2003, Lancelot retained AM&G and AM&G Cayman as outside auditors for The Fund. (*Id.* at ¶ 33) AM&G Cayman issued audit opinions for The Fund dated February 2005, January 2006, and March 30, 2007. (*Id.*) M&P and M&P Cayman assumed the role of The Fund’s outside auditors after AM&G and AM&G Cayman. (*Id.* at ¶ 35) In this capacity, M&P Cayman issued an audit opinion for The Fund on January 5, 2008. (*Id.*) Plaintiffs allege that the auditors failed in several respects to follow generally accepted accounting standards and guidelines, resulting in materially false and misleading audit reports that were later relied on by plaintiffs when investing in Lancelot. Plaintiffs allege that the work performed by the auditors was so perfunctory, careless, and rife with erroneous accounting judgments that the auditors either knew or were reckless in not knowing that the audit opinions were materially false and misleading.

Plaintiffs allege that in or around 2008 and prior to their investments in The Fund, representatives of Tradex spoke with defendant Lesser, who at the time was a partner at M&P and had previously served as a partner at AM&G, regarding the audit opinions. (*Id.* at ¶ 37)

Plaintiffs allege that Lesser told them that AM&G and M&P did serve as auditors in 2005, 2006, 2007 and 2008.

Plaintiffs initially filed suit in federal court. However, after defendants in the federal action moved to dismiss for lack of subject-matter jurisdiction plaintiffs voluntarily dismissed the federal action and filed the present lawsuit. Plaintiffs filed their initial class-action complaint on March 30, 2010. Shortly thereafter, the federal bankruptcy court overseeing Lancelot Cayman's bankruptcy proceeding stayed this action pursuant to a request from the Lancelot Cayman's bankruptcy trustee. This lawsuit remained stayed for five years while Lancelot Cayman's bankruptcy estate litigated against M&P. The District Court dismissed the trustee's lawsuit against M&P under the doctrine of *in pari delicto*, which rests on the idea that when the plaintiff is as culpable as the defendant, if not more so, the law will let the losses rest where they fell. *Peterson v. McGlandrey LLP*, 792 F.3d 785, 787 (7th Cir. 2015). Applying this doctrine, the district court found, without considering whether M&P failed to perform its duty, that The Fund's misconduct was at least equal in gravity to any alleged misconduct by M&P and therefore the doctrine applied. *Id.* The Seventh Circuit affirmed the District Court. *Id.* at 789. In affirming, the Seventh Circuit noted that while claims against Bell may not be worth much because he is in prison and claims against Lancelot may not be worth much because it is bankrupt, a claim against M&P may offer some compensation for the investors if the auditor was indeed negligent or willfully blind. *Id.* at 788. In so holding, the Seventh Circuit effectively lifted the stay on this lawsuit, stating that "[i]t is time to bring the investor's claims to the fore." *Id.* at 789.

In late 2015 plaintiffs reinstated this action. On February 16, 2016 plaintiffs filed an amended complaint. On March 4, 2016 M&P, M&P Cayman, and Lesser ("the M&P defendants") filed their present motions to dismiss pursuant to 735 ILCS 5/2-619.1. On that same date AM&G filed its motion to dismiss. Both motions were fully briefed and the court heard oral argument on July 27, 2016. The court then took the motions under advisement for consideration of the issues and to prepare a written order.

#### Legal Standard

The Illinois Code of Civil Procedure ("Code") permits a litigant to combine a motion to dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619 in a single motion. 735 ILCS 5/2-619.1; *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (1st Dist. 2003). However, a combined motion must be in parts. 735 ILCS 5/2-619.1. Each part shall be limited to either section 2-615 or section 2-619 and each part must clearly show the grounds for relief under the section upon which it is based. *Id.*; *Storm & Assocs., Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1st Dist. 1998) ("Meticulous practice dictates that the movants clearly state the section of the Code under which a motion to dismiss is brought."). Defendants' motions comport with these requirements.

#### Discussion

The M&P defendants initially argue that this action should be dismissed pursuant to 619(a)(9) due to a lack of standing. Because standing is a necessary element for all of plaintiffs'



claims and a potentially dispositive issue, the court will consider this issue first. AM&G's motion to dismiss joins M&P's arguments regarding standing, therefore their motions will be considered jointly in this regard.

735 ILCS 5/2-619

A section 2-619 motion is designed to provide a summary disposition of issues of law or easily proven issues of fact. *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 1057 (2d Dist.1991). Such a motion admits all well-pled facts alleged in the complaint and reasonable inferences to be drawn from those facts. *Ciono v. Gerhart*, 201 Ill. App. 3d 853, 856 (3d Dist. 1990). Where evidentiary material is submitted which contradicts well-pled allegations of fact in the complaint, the trial court should not dismiss a complaint pursuant to section 2-619. *Melko*, 219 Ill. App. 3d at 1057.

For plaintiffs to have standing in this action their claims must be direct and not derivative of The Fund itself. The reason for this is because the Bankruptcy Trustee is the proper representative of the claims for the The Fund. Accordingly, this action was stayed to allow the bankruptcy trustee to pursue the claims of The Fund and those claims have already been litigated. Plaintiffs, as investors, only have standing to pursue claims for directly suffered harm, not harm due to their position as investors of the company. Thus, the issue of standing may be determined by analyzing whether the plaintiffs' claims are direct or derivative.

Preliminarily, the court must determine from which jurisdiction's law to apply to the issue of whether the claims are direct or derivative. Defendants argue that the law of the Cayman Islands governs this issue because that is the place of incorporation of Lancelot Cayman. Under Illinois law, the issue of whether a claim is direct or derivative is a claim pertaining to how the internal affairs of a corporation are managed. *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir. 1990). Thus, Illinois applies the "internal affairs doctrine" to determine the choice of law on this issue. *Id.* "The internal affairs doctrine is a conflict of laws principle that prescribes that matters relating to a corporation's internal governance should be controlled exclusively by the state of incorporation." *Newell Co. v. Petersen*, 325 Ill. App. 3d 661, 687 (2d Dist. 2001). Thus, to determine whether plaintiffs must bring their claim as a derivative action or a direct action is governed by the jurisdiction of incorporation. *Lipman v. Batterson*, 316 Ill. App. 3d 1211, 1215 (1st Dist. 2000)("The issue of whether plaintiffs properly should have brought their claims in a derivative action instead of a direct class action is determined by application of the substantive law of Delaware since ISC is incorporated in that state."); *see also Housman v. Albright*, 368 Ill. App. 3d 214, 218 (5th Dist. 2006)("To determine whether the plaintiffs have standing to sue, we must first determine whether Illinois law or Delaware law applies. Waterfront is a Delaware corporation, and Illinois courts apply the law of the state of incorporation.").

Plaintiffs argue that Illinois law should be applied to this issue. First, plaintiffs point out that Lancelot Offshore's Officer Memo provides that subscription agreements, such as the ones entered into by plaintiffs, are to be governed by the State of Illinois. (Opp. to M&P's Mot., Ex. A) However, defendant auditors were not parties to the subscription agreement and cannot be bound by its terms. Additionally, plaintiffs' claims do not pertain to substantive rights arising

out of the subscription agreement. Instead, plaintiffs' claims against the auditors arise out of activity done by the auditors, who were third parties to the subscription agreement. Additionally, plaintiffs plead claims of negligent misrepresentation and fraud, not breach of contract arising out of a breach of the subscription agreement. Finally, the Illinois Court of Appeals has previously held that the internal affairs doctrine is a fundamental public policy as it relates to governing the inner workings of a corporation and controls over a choice of law provision in a contract. *Newell Co.*, 325 Ill. App. 3d at 387-88; *see also Bagdon*, 916 F.2d at 383 (where the Seventh Circuit reasoned in *dicta* that if the plaintiff had raised a choice of law question issue based on a choice-of-law provision in a contract, that the Court "would incline to think that the choice-of-law clause governs the validity and effect of the contract *and does not affect corporate law on subjects outside that pact.*") (emphasis added). Thus, the subscription agreement's choice of law provision does not govern whether plaintiffs' claims against the auditors are direct or derivative.

Second, plaintiffs argue that section 196 of the Restatement (Second) of Conflicts of Laws dictates that the court apply Illinois law. Section 196 states that in an action pertaining to the validity of a contract for the rendition of services and the rights created thereby are determined, that courts use the local law of the state where the contract that requires that the services or a major portion of the services, be rendered. Plaintiffs argue that because the audits by defendants occurred in Illinois that Illinois should control. However, as defendants point out, section 196 applies to issues of contract validity, which is not at issue here. Thus, section 196 is not applicable to the issue of whether plaintiffs' claims are direct or derivative. Therefore, the court will follow the rule provided in *Lipman*<sup>1</sup> and *Housman* that the issue of whether the claims are direct or derivative are governed by the jurisdiction of incorporation. Therefore, Cayman Island law applies to this specific issue<sup>2</sup>.

The Cayman Islands are a British Overseas Territory. (Aff. of Galatopoulos ¶ 5) Consequently, the Cayman's legal system is a common law system founded on the English system. (*Id.*) Where there is no applicable Cayman Island case law, the Cayman Islands Court will generally follow English appellate authorities to the extent they are not inconsistent with Cayman Islands statute or authority. (*Id.*) There is no dispute among the parties that the Cayman Island courts follow the English common law doctrine of "reflective loss" to determine whether a claim is direct or derivative. (*Id.* at ¶ 11; Aff of Harlowe ¶ 28) The issue is therefore whether the damages complained of by plaintiffs are merely reflective of the losses of the company as a whole as opposed to losses by its individual investors.

Generally, the rule against reflective loss states that a claim cannot lie with a shareholder where the loss complained of is merely reflective of the losses to the company itself. As Lord Bingham explained in the leading English case of *Johnson v. Gore-Wood*, "[n]o action lies at the

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<sup>1</sup> Plaintiffs attempt to distinguish *Lipman* by pointing out that *Lipman* dealt with claims directly against a corporation while the claims here are against third-party auditors. However, this is a distinction without a difference. The issue is whether the injuries in this action were suffered by the plaintiffs directly, or derivatively through injury to the corporation. *See Lipman*, 316 Ill. App. 3d at 1215 ("In a derivative suit, the shareholder sues on behalf of the corporation for harm done to it whereas, in a direct action, the shareholder brings suit individually or on behalf of the class of shareholders for injuries done to them in their individual capacities."). Whether the defendant is the corporation itself or a third party makes no difference for the purposes of a choice of law analysis.

<sup>2</sup> The court's application of Cayman Island law as to this discrete issue should in no way be construed as a finding that Cayman Island law governs any of plaintiffs' substantive causes of action in this matter.

suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss." *Johnson v. Gore Wood & Co.* [2000] UKHL 65. Defendants argue that the loss complained of by plaintiffs is merely reflective of the loss by the corporation Lancelot. Defendants point out that plaintiffs did not invest with Petters, but rather that they purchased shares of Lancelot Cayman. Lancelot Cayman made short-term loans to one of its domestic affiliates, which in turn made loans to the SPVs owned by Petters ("the Petters SPVs"). Defendants argue that because Lancelot Cayman was only forced into Bankruptcy after Petter's fraud was revealed and his SPVs defaulted on their loan obligations that the losses realized by the shareholders are reflective of the losses to Lancelot Cayman.

The court disagrees. When considering the rule against reflective loss, the court must consider the following guidance as to the application of the rule:

On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether the loss claimed is "merely a reflection of the loss suffered by the company." In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.

*Johnson v. Gore Wood & Co.*, [2000] UKHL 65.

Defendants' argument ignores two important elements fundamental to the amended complaint. First, the complaint alleges that Lancelot only existed to funnel monies solicited from its investors into the ponzi scheme operated by Petters. (Am. Compl. ¶ 44) The complaint alleges Lancelot's Offering Memorandum made materially false representations regarding monitoring and protections employed by Lancelot as well as concealing material facts regarding the prior criminal history of Petters in order to induce investors to invest in Lancelot. (*Id.* at ¶¶ 27-32) Plaintiffs also allege that Bell, the director of Lancelot, was himself complicit in the ponzi scheme. The amended complaint alleges that Bell admitted in his plea agreement with the SEC that he and others acting at his direction made material misrepresentations and concealed material information about Lancelot Funds' investment with Petters company from investors and

potential investors. Thus, plaintiffs' allegations are not merely that Lancelot suffered losses once Petter's fraud was revealed, but that Lancelot was complicit in the fraud in the first place. This, of course, was the basis for the federal court's dismissal of the Bankruptcy Trustee's action against AM&G pursuant to the doctrine of *in pari delicto*:

The district court concluded that the Funds' misconduct...was at least equal in gravity to McGladrey's, if not a greater fault...What's more, the court concluded, the Funds' representations and McGladrey's errors (if any) led to the same loss: investors' money went down a rabbit hole. Either truth by the Funds (leading to smaller investments), or McGladrey's discovery of Petters's scam, would have protected the investors from loss during 2006 and 2007, when the Funds were growing rapidly.

*Peterson*, 792 F.3d at 788. Accordingly, construing the complaint in the light most favorable to plaintiffs, the party responsible for the loss to Lancelot is not M&P or AM&G, but Lancelot itself. Plaintiffs would not be able to be compensated for their loss "if the company had enforced its full rights against the party responsible," *Johnson v. Gore Wood & Co.*, [2000] UKHL 65, because the party responsible was the corporation itself.

The second important element of the complaint is the nature of the loss alleged by plaintiffs. Defendants mischaracterize the complaint when they argue that plaintiffs merely seek to recover their *pro rata* losses as shareholders. To the contrary, nowhere in the complaint does it state that plaintiffs seek to recover their *pro rata* losses as shareholders. Nor does the complaint allege that the nature of plaintiffs' losses is merely those of The Fund. Instead, the complaint alleges that plaintiffs' losses are the result of defendants fraudulently inducing them into investing in a ponzi scheme. Paragraph 56 of the amended complaint is instructive. It alleges that:

In addition, the injuries sustained by members of the class were distinct and separate from any injuries purportedly sustained by the Fund. In this regard, Plaintiffs' losses as alleged herein were not caused by general corporate mismanagement, waste, or a diminution in their value of their Shares. Rather, Plaintiffs' losses — and the losses of other members of the Class — were sustained when each was fraudulently induced to part with monies based on Defendants' false and misleading disseminations about the Fund and its purported "investments," which Class members relied on in making their decisions. These disseminations were purportedly designed to convince Class members that Lancelot was a legitimate business enterprise engaging in routine financing transactions when, in fact, Lancelot was merely a vehicle for channeling millions of dollars into a multi-billion dollar Ponzi scheme. This misconduct was directed specifically to Lancelot investors — not the Fund itself — and caused immediate and distinct losses to those investors, separate and independent from any losses sustained by the Fund.

(Am. Compl. ¶ 56)

Plaintiffs allege that they invested in Lancelot in “express reliance” on defendants’ allegedly false and misleading documents, proximately causing defendant’s injuries. (*Id.* at ¶ 54) Thus, plaintiffs do not seek to recover their *pro rata* losses as shareholders. Instead, the complaint seeks to recover the actual monies initially invested in Lancelot by plaintiffs, not merely the *pro rata* shares of their stock. Had the bankruptcy trustee been successful in prosecuting Lancelot’s claim against the auditors, it may have mitigated plaintiffs’ damages, but would not necessarily have fully compensated them. Additionally, plaintiffs seek punitive damages for defendants’ conduct, which also goes beyond the *pro rata* shares value of their shares. (Am. Compl. at 38)

Thus, plaintiffs’ alleged damages are not merely reflective of the losses to The Fund. Consequently, plaintiffs’ claims that they were fraudulently induced into investing into Lancelot are direct, nor derivative, and they have standing to bring their claims.

It is also important to note that the above finding is consistent with the Seventh Circuit’s reasoning in affirming the dismissal of the bankruptcy trustee’s claims against the auditors in the bankruptcy action under the *pari delicto* doctrine. In affirming the dismissal, the Seventh Circuit recognized that dismissing one party’s claims because that party is a wrongdoer arguably excuses the other party from performing its duties. *Peterson*, 792 F.3d at 788. This would potentially leave a gap in the law where the investors are left unprotected. *Id.* However, the Seventh Circuit reasoned, “that’s not the outcome of applying the *pari delicto* doctrine to the Trustee’s suit. The Trustee stepped into the shoes of the Funds, not the shoes of the investors. People who put up money have their own claims.” *Id.* To hold that plaintiffs lack standing because their claims belong to the Fund would be to fall into the gap that the Seventh Circuit explicitly sought to avoid. It would also inequitably foreclose any possibility of plaintiffs substantively pursuing their claims against the auditors because then no one would have that ability.

#### 735 ILCS 5/2-615

Illinois is a fact-pleading jurisdiction. *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451 (2004). A motion to strike or dismiss pursuant to 735 ILCS 5/2-615 challenges only the legal sufficiency of a pleading. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 85 (2002). The central inquiry is whether the allegations, when considered in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Jarvis*, 201 Ill. 2d at 86. The court may only consider the allegations of the pleading and the attached exhibits. *Haddick v. Valor Ins.*, 198 Ill. 2d 409, 413-14 (2001). A pleading should not be dismissed unless it appears there is no set of provable facts that would entitle plaintiff to recovery. *Id.* Where there is a conflict between an attached exhibit and the allegations of a pleading, the exhibits control. *Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 431-432 (2004).

Plaintiffs’ amended complaint contains two counts. The first count is for common law fraud and fraudulent inducement. The second count is for negligent misrepresentation.

Preliminarily, the court recognizes that the laws of three potential jurisdictions are implicated by plaintiff’s allegations. To determine whether the court must apply a law other than

that of the forum for claims based on “false representations” Illinois courts use section 148 of the Restatement (Sections) of Conflicts of Laws. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 61 (2007). Accordingly, Illinois courts look to the jurisdiction that retained the most significant relationship to the occurrence of the parties to determine the rights and liabilities of the particular issues presented in the lawsuit. *Id.* Although the parties have not filed a choice of law motion, the court recognizes that three potential jurisdictions are implicated. Those jurisdictions are Illinois, where Lancelot Cayman’s management is alleged to have operated and where the plaintiffs allege that the majority of the audit work for The Fund was performed, the British Virgin Islands (“BVI”), where plaintiffs are registered and organized as offshore investment vehicles, and the Cayman Islands, where Lancelot Cayman, AM&G Cayman, and M&P Cayman are located and registered. Defendants<sup>3</sup> argue that at this stage a choice of law analysis is unnecessary because the amended complaint fails to state a claim regardless of which jurisdiction it is evaluated under. The court disagrees that plaintiffs’ claims fail no matter what choice of law the court applies because, as discussed below, dismissal is not warranted under Illinois law. Because the parties have not yet filed a choice of law motion for plaintiffs’ substantive claims the court cannot find that dismissal of either of plaintiffs’ causes of action are warranted because they would be permitted to proceed in at least one of the possible jurisdictions implicated.

#### Negligent Misrepresentation

Defendants argue that plaintiffs have not stated a claim for negligent misrepresentation under Illinois law because they have not met the requirements pleading this claim as provided for under the Illinois Public Accounting Act (“IPPA”). The IPPA provides that a claim for negligent misrepresentation may only be brought against an auditor by a non-client where the auditor “was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action.” 225 ILCS 450/30.1(2).

The amended complaint alleges that the auditors “knew a primary intent of the Lancelot Defendants was to influence prospective and existing investors in The Fund.” (Am. Compl. ¶ 37) Plaintiffs support this conclusion by alleging that the audit reports were “specifically addressed and sent to the ‘Shareholders of Lancelot Investors Fund, Ltd.’” (*Id.* at ¶ 33, 35) and that the auditors knew “based on their years of experience” with hedge funds that Lancelot Cayman would provide the reports to potential investors. (*Id.* at ¶ 33) Plaintiffs also allege that the audit opinions represented, without qualification, that the audits were conducted “in accordance with auditing standards generally accepted in the United States of America” and that AM&G Cayman believed “that [its] audit provide[d] a reasonable basis for [its] opinion.” (*Id.* at ¶ 34) Plaintiffs also allege that they spoke with Lesser regarding the audit opinions and that Lesser informed them that, among other things, the M&P had been involved as auditors since The Fund’s inception but that the firm name for 2005 was his predecessor firm, which was AM&G, and that The Fund/its partners were communicative during M&P’s last audit procedure. (*Id.* at ¶ 37)

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<sup>3</sup> Although this argument is put forth by M&P, M&P Cayman, and Lesser, AM&G has joined this part of M&P’s motion to dismiss

However, as defendants point out, the complaint alleges that plaintiffs did not invest in The Fund until after all the audit opinions were issued and there is no allegation that the auditors knew that Lancelot intended for the audits to influence the plaintiffs in particular. Under Illinois law, it is not enough that the auditors knew that their client would generally show the audit reports to third parties. *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 817 (7th Cir. 2013) (“The statute would be ineffectual if knowledge that clients show financial statements to third parties were enough to demonstrate that the client’s ‘primary intent’ was to benefit a particular lender.”); *see also Builders Bank v. Barry Finkel & Assocs.*, 339 Ill. App. 3d 1, 9-10 (1st Dist. 2003) (“[T]here is no ambiguity in the requirement of the statute that the third party be ‘the particular person bringing the action.’”). Hence, defendants argue that plaintiffs have not pleaded that the “primary intent” of Lancelot was that plaintiffs were the particular persons Lancelot intended to influence with the audit opinions.

Plaintiffs argue that case law shows similar situations to the present one where other plaintiffs were deemed to have pleaded the particular person requirement. For instance *Freeman, Freeman, and Salzman P.C. v. Lipper* the plaintiffs were investors in a limited partnership that was audited by PricewaterhouseCoopers (“PWC”). *Freeman, Freeman, and Salzman P.C. v. Lipper*, 349 Ill. App. 3d 677, 681 (2004). In alleging a claim of negligent misrepresentation by PWC, the complaint:

[A]lleged that PWC is in the business of supplying audit opinions to investors for guidance with their investment decisions; PWC knew that plaintiffs would rely upon PWC’s audit opinions, the funds’ audited financial statements and the related schedules; and that plaintiffs did rely on PWC’s representations in the audit opinions, the audited financial statements and related schedules in deciding to invest in and continue to reinvest in Lipper Convertibles and the Fixed Income Fund.

*Id.* at 682. Ultimately the Court of Appeals held that the complaint sufficiently alleged that PWC knew that the primary intent of their client was to influence the plaintiffs. *Id.* at 682-83. Defendants point out that the complaint also alleged that PWC provided the audit reports directly to the plaintiff, did tax work for the specific plaintiff using the allegedly false audited financial figures, directly communicated with the plaintiffs regarding the contents of the audits, and knew that plaintiffs specifically relied on and benefited from the information contained therein. *Id.* at 681-83. While some of those elements are missing here, plaintiffs do allege that they talked with Lesser about a month before they invested at which time Lesser confirmed that M&P had been involved as auditors since The Fund’s inception but that the firm name for 2005 was his predecessor firm, which was AM&G, and that The Fund/its partners were communicative during M&P’s last audit procedure. (*Id.* at ¶ 37)

Similarly, in *Brumley v. Touche, Ross & Co.*, 139 Ill. App. 3d 831 (2d Dist. 1985) (“*Brumley IP*”) the plaintiff alleged that they specifically told the auditor that he was interested in acquiring stock and that the audit reports had been submitted to plaintiff for the purpose of influencing his stock purchase option and the auditor confirmed to plaintiff on three occasions that the audit reports were accurate. *Id.* at 833. Conversely, an earlier pleading in *Brumley* was dismissed where plaintiff had only alleged that the auditor “knew and foresaw that

its audit report” would be distributed to “potential investors, such as plaintiff, who would rely upon the audit report” but did not allege that the auditor knew that “the report was to be used by [the auditor’s client] to influence plaintiff’s purchase decision.” *Brumley v. Touche, Ross & Co.*, 123 Ill. App. 3d 636, 637, 642 (2d Dist. 1984)(“*Brumley I*”)⁴. The *Brumley* cases are specifically instructive because the complaint in *Brumley* alleged that the auditor “confirmed to plaintiff” on three occasions that the audit reports were accurate after the audit reports were issued but before plaintiffs invested. *Brumley II*, 139 Ill. App. 3d at 833. Here, plaintiffs allege that Lesser confirmed to Tradex that his auditing firms conducted the audits for the fund for 2005, 2006, and 2007. (Am. Compl. ¶ 37) Plaintiffs also allege that by virtue of this conversation that Lesser was aware that the audit opinions would be used to influence the actions of plaintiffs. (*Id.*) On the basis of these allegations, it is reasonable to infer that Lesser knew that M&P and AM&G’s audit opinions were being used to influence Tradex in particular. By confirming that the firms conducted these audits, it is also reasonable to infer that Lesser was adopting the representations in the audit opinions that the audits were conducted in accordance with auditing standards generally accepted in the USA and that the audits formed a reasonable basis for the auditing firms’ opinions. (*Id.* at ¶ 34) Therefore, plaintiffs have sufficiently pleaded the “primary intent” element of a claim for negligent misrepresentation. Thus, the court should not dismiss this count for failure to state a claim of negligent misrepresentation. Accordingly, the motion to dismiss is denied as to count I.

#### Common Law Fraud and Fraudulent Inducement

In order to state a claim for fraud under the laws of Illinois, the BVI, or the Cayman Islands, plaintiffs must allege facts indicating that the defendants acted with knowledge of falsity and an intent to deceive. *Fox v. Heimann*, 375 Ill. App. 3d 35, 47 (1st Dist. 2007); *Park v. Sohn*, 89 Ill. 2d 453, 459 (1982)(scienter is an “essential element of actionable fraud”). (See also Aff. of di Iorio ¶¶ 21-30; Aff. of Harlowe ¶¶ 15-16) Complaints alleging fraud must contain specific allegations of facts from which fraud is the necessary or probable inference. *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989).

Plaintiffs conceded that they do not plead that the auditors had actual knowledge as to the falsity of their statements, but instead that they satisfy the scienter element by pleading that the auditors did not follow proper accounting practices and thereby recklessly ignored certain “red flags” available to the auditors at the time of the audit. *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 247 F. Supp. 2d 987, 998 (N.D. Ill. 2002)(noting that alleged violations of accounting are relevant to proving scienter “when the complaint also identifies ‘red flags,’ or specific, highly suspicious facts and circumstances available to the auditor at the time of the audit, and alleges that these facts were ignored, either deliberately or recklessly”). “In the context of outside auditors, recklessness means that the accounting firm practices amounted to no audit at all, or to an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts.” *Id.* (internal quote marks omitted).

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<sup>4</sup> The *Brumley* cases were decided prior to the enactment of the IPAA, but courts have recognized that the IPAA codifies the holdings of those cases. *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 836 (7th Cir. 2007).



Plaintiffs allege that the auditors failed to follow generally accepted accounting standards and guidelines in that the auditors did not assure that The Fund was a legitimate business enterprise, obtain original source material to assure that The Fund's transactions were not based on forged documents, or make inquiries about key individuals involved in The Fund's transactions to assure they were not convicted felons that had been incarcerated for fraud. (Am. Compl. ¶ 42) Plaintiffs also allege that the auditors internally designated The Fund as a "high risk" client and understood that it was possible that the sources of documents in connection with the Petters transactions could be forgeries. (*Id.* at ¶ 47) The complaint asserts that in spite of this, the auditors did not:

1. Perform due diligence on Thousand Lakes – one of one of the Petters SPVs and allegedly The Fund's principal counter-party in the Petters transactions;
2. Review any wire transfers to determine who was paying the notes held by Lancelot Onshore;
3. Confirm any transactions with the retailers purportedly purchasing the merchandise in the underlying Petters transactions, despite specifically agreeing to do so in some instances;
4. Visit any warehouses where any of the purported merchandise was stored or otherwise determine where the merchandise was warehoused;
5. Determine whether or not the inventory underlying the Petters transactions existed;
6. Request or review shipping documentation to confirm whether merchandise was actually delivered to a retailer;
7. Conduct due diligence on Petters or his affiliated entities;
8. Perform due diligence on the purported guarantors of the notes issued by Thousand Lakes and other SPVs;
9. Contact the law firm that prepared the Fund's UCC filings to ascertain the procedures it was following in connection with those filings;
10. Perform any substantive analysis as to the true value of the notes held by The Fund, instead merely reporting the value of the notes at cost plus accrued interest; and
11. Make necessary disclosures in the audit opinions concerning the risks and characteristics of the notes as required by applicable accounting standards.

(*Id.*) Plaintiffs also allege that the auditors ignored several "red flags" in relation to the Petters transactions, which included:

1. That The Fund extended the terms of the Petters notes to as long as 270 days, which plaintiffs argue signaled a level of financial stress and instability that should have triggered further investigation;
2. That while the money to satisfy the loan obligations underlying the Lancelot notes was supposed to come from retailers such as Costco and placed in a “lock-box” account, that the money was instead coming from Petters, which plaintiffs argue indicated the existence of a ponzi scheme;
3. That a bad debt reserve was never created on The Fund’s balance sheet even though The Fund’s investments were supposed to be secured by tens of millions of dollars in electronic merchandise that would have been subject to damage and obsolescence;
4. That Thousand Lakes repeatedly failed to provide Lancelot with monthly financial statements as required by the parties’ master loan agreement and that the auditors were aware of this;
5. That Petters and several of his conspirators were convicted felons who had served time in prison in connection with various fraudulent schemes and criminal activities;
6. That neither The Fund nor the Onshore Funds had programs or controls in place to guard against fraudulent activities, even though the auditors were informed by “the Bell Defendants”<sup>5</sup> that source documents associated with the Petters transactions could be forgeries; and
7. That The Fund and the Onshore Funds were purportedly making billions of dollars of investments exclusively with Petters, a concentration risk that warranted diligence, attention, and oversight that the defendants, including the auditors, never performed.

(*Id.* at ¶ 48)

Defendants argue that plaintiff’s allegations are merely impermissible “allegations of fraud by hindsight.” *See Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 Fed. Appx. 636, 640 (2d Cir. 2012). In order to support a cause of action for fraud against an auditor, the allegations must support an inference that the auditor’s activity was “an extreme departure from the standards of ordinary care.” *Id.* “Such recklessness must, in fact, approximate an actual intent to aid in the fraud being perpetrated by the audited company.” *Id.* The court disagrees that the above allegations are merely allegations of “fraud by hindsight.” Plaintiffs argue that the auditor’s ignoring of the above “red flags” basically amounts to there being no real audit at all. Because this matter is still at the pleading stage, defendants have not yet had to answer the above allegations or otherwise explain their auditing procedure in this case. However, if the above allegations, particularly those listed in paragraph 47, are true, without more, they support an

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<sup>5</sup> Although paragraph 48 specifically refers to “the Bell Defendants,” this term is undefined in the complaint. Presumably, this is a scrivener’s error and ought to read “the Lancelot Defendants,” which the complaint specifies as a collective of Bell and Lancelot Investment Management, L.L.C.

inference the auditors did not seriously look at Lancelot to determine its financial stability. This is especially concerning in relation to the “red flags” listed in paragraph 48.

Defendants argue that most of the claims of plaintiffs are based on failure to look into the Petters SPVs which were third-parties to their client. Defendants compare this case to other fraud cases that were dismissed against auditors in relation to the Ponzi scheme perpetrated by Bernie Madoff. *E.g., Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 Fed. Appx. 636, 640-41 (2d Cir. 2012); *In re Tremont Security Law, State Law & Ins. Litigation*, 703 F. Supp. 2d 362, 371 (S.D.N.Y. 2010). In both of these cases, causes of action for fraud were dismissed against auditors of feeder funds that invested with Madoff because the plaintiffs’ allegations of scienter were merely allegations of fraud by hindsight and thus not actionable fraud. *Meridian Horizon Fund*, 487 Fed. Appx. at 640-41; *Tremont Security Law*, 703 F. Supp. 2d at 371. In both those cases, the courts considered allegations of red flags that plaintiffs allege should have tipped the auditors off to the Ponzi scheme but disregarded it because the red flags related to Madoff and his business, not the feeder funds themselves. *Meridian Horizon Fund*, 487 Fed. Appx. at 640-41 (“Many of the purported ‘red flags’ that plaintiffs contend should have put the Auditors on notice of the Madoff fraud, such as the lack of an independent third-party custodian, and BLMIS’s dual role as both investment manager and administrator, were risks inherent to BLMIS, not the Tremont entities.”); *Tremont Security Law*, 703 F. Supp. 2d at 371 (“But most critically, the Auditors were never engaged to audit Madoff’s businesses or to issue an opinion on the financial statements of BMIS. The Auditors’ only role is that they audited the financial statements of the Rye Funds and the Market Neutral Fund. The notion that a firm hired to audit the financial statements of one client (the Rye Funds and the Market Neutral Fund) must conduct audit procedures on a third party that is not an audit client (BMIS) on whose financial statements the audit firm expresses no opinion has no basis.”).

However, the red flags in this case are more egregious, and much closer to possible smoking guns, than the red flags in the Madoff cases. First, Madoff was not a convicted felon at the time he was running his ponzi scheme. Here, Petters had previously served jail time for fraud. Second, one of the red flags alleged here is that the auditors were informed that source documents associated with the Petters transactions could be forgeries and yet The Fund allegedly did not have any controls in place to guard against fraudulent activities. Third, the auditors were allegedly aware that Thousand Lakes repeatedly failed to provide monthly financial statements to The Fund, in violation of the parties’ master loan agreement. Finally, plaintiffs allege that The Fund dealt exclusively with Petters’s SPVs, significantly concentrating the risk and making it more reasonable to infer that the auditors should have taken a closer look at Petters. *Contra, Tremont Security Law*, 703 F. Supp. 2d at 366 (where one of the two feeder funds only invested 27% of the fund with Madoff). This is especially alarming in light of Petters’s criminal record and the alleged warning to the auditors that source documents may be forged.

Additionally, while the plaintiffs in the Madoff cases did not allege that the auditors had any explicit responsibility to audit Madoff’s businesses, here plaintiffs allege that that auditors specifically agreed to confirm transactions with the retailers purportedly purchasing the merchandise in the underlying Petters transactions but failed to do so. This allegation, if true, is a strong indication that no real audit occurred. Finally, in *Meridian Horizon Fund* the investment risks were plainly disclosed in the feeder funds offering materials. *Meridian*

*Horizon Fund*, 487 Fed. Appx. at 641. Here, plaintiffs allege that the investment risks were never disclosed. (Am. Compl. ¶ 47(p))

When considered along with the other steps that the auditors allegedly did not engage in, as well as all of the red flags alleged (without regard to any potentially mitigating factors or other audit procedures that may later be alleged by the defendants), it supports the necessary and probable inference that the auditors' work could be considered an extreme departure from the ordinary standards of care such that essentially no audit occurred. Therefore, the motion to dismiss should be denied as to count II.

#### AM&G's Motion to Dismiss

AM&G joins M&P and Lesser's motion to dismiss. To the extent that AM&G joins that motion, it is denied for the same reasons already discussed. AM&G, however, raises two additional bases for its dismissal as a defendant. Both bases for dismissal are raised pursuant to section 2-615 of the Code of Civil Procedure.

First, AM&G argues that it should be dismissed as a defendant in this action because it never made any statements and therefore cannot be held liable for fraud or negligent misrepresentation. *See Board of Education*, 131 Ill. 2d at 452 (noting that a false statement is an essential element of both fraud and negligent misrepresentation). AM&G argues that it was AM&G Cayman that made the alleged false statements in this case, not AM&G. AM&G points out that the complaint alleges that AM&G Cayman issued the audit reports relevant in this matter (Am. Compl. ¶¶ 18, 20, 33) and that the complaint does not point to any relevant statements made by AM&G or any of its agents.

However, as plaintiffs point out, the complaint does allege that the actual work within the audit reports issued by AM&G Cayman was performed, at least in part, by AM&G employees. (*Id.* at ¶¶ 18, 45) The complaint also alleges that the partner at AM&G Cayman who approved the audit reports played a nominal role in the audits themselves and merely reviewed a package of financial statements and then authorized AM&G's audit team to sign the audit opinions on behalf of AM&G Cayman using AM&G Cayman letterhead. (*Id.* at ¶ 46) Construing these facts in the light most favorable to plaintiff, the information in the audit opinions may be credited towards AM&G because AM&G employees actually wrote the contents of the audit reports. AM&G cites no authority indicating an auditor may avoid liability for audit work primarily done by that auditor simply by handing the audit off to a foreign alter-ego at the last minute for that foreign alter-ego to officially sign off on it. Therefore, this is not a basis for dismissal.

AM&G's second argument is that they cannot be held liable for negligent misrepresentation because no one from AM&G was aware that the primary intent of the audits was to benefit or influence plaintiffs. As discussed previously, Lesser's conversation with plaintiffs satisfies the primary intent element of a negligent misrepresentation count. However, AM&G points out that Lesser was an employee of M&P, not AM&G, at the time he made the alleged statements. Therefore, AM&G argues, neither his alleged statement to plaintiff, nor his knowledge of the audit's intent to influence plaintiff, cannot be imputed upon AM&G. The

court disagrees. The complaint alleges that M&P purchased the assets of AM&G in 2006. (*Id.* at ¶ 19) The complaint further alleges:

In connection with that transaction, the partners and employees of AM&G became the partners and employees at M&P. In addition, clients of AM&G became clients of M&P. Moreover, M&P assumed the office space where AM&G was located in Chicago, Illinois, which is where the audit workpapers relating to the Fund were maintained. Thus, M&P owns and controls AM&G and is its alter ego.

(*Id.*) Construing these facts in the light most favorable to plaintiff, the above sufficiently alleges that M&P was AM&G's alter-ego. M&P assumed AM&G's employees, clients, and workspace after M&P purchased AM&G's assets. There is no indication at this time that AM&G functioned in any meaningfully separate capacity after the merger. Thus, for the purposes of the present motion, it is reasonable to infer that AM&G learned of the Fund's intent to influence plaintiffs with the audit opinions to the extent that M&P gained knowledge through the conversation Lesser had with plaintiffs. Accordingly, this is not a basis for dismissal.

WHEREFORE, defendants' motions to dismiss are denied. Defendants must answer the complaint no later than February 15, 2017. Due to plaintiff counsel's presence out of state, the parties shall confer with the court to schedule a new case management conference at such a date after the pleadings are due.

ENTERED:

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Judge David B. Atkins

The Court.

# EXHIBIT

# 4

#### SETTLEMENT AGREEMENT

This settlement agreement (this "Agreement") is entered into as of June 3, 2015 by and among: (a) Gregory Bell ("Bell"); (b) the Gregory Bell Revocable Trust (the "Bell Trust"); (c) Lancelot Investment Management, LLC ("Lancelot Management"); (d) Inna Goldman ("Goldman"); (e) the Inna Goldman Revocable Trust (the "Goldman Trust" and together with Bell, the Bell Trust, Lancelot Management and Goldman, the "Receivership Parties"); (f) Ronald R. Peterson, not individually but in his capacity as the court appointed receiver for the assets of the Receivership Parties (the "Receiver"); (g) Ronald R. Peterson, not individually but in his capacity as the Chapter 7 case trustee for the Debtors (as hereinafter defined) (the "Trustee" and together with the Receiver, "Peterson"); (h) the United States Securities and Exchange Commission (the "SEC") and the United States Department of Justice (the "DOJ" and together with the SEC, the "United States"); (i) David Bell ("David"); (j) Rebecca Bell ("Rebecca" and together with David, the "Bell Children"); (k) 12H Wellington LLC ("Wellington"); (l) Spruce Family Partnership L.P. ("Spruce"); (m) Blue Sky Investment Holdings LLC ("Blue Sky"); (n) Asia Trust, Ltd. ("Asia Trust"); and (o) Blue Sky Trust ("Blue Sky Trust" and together with Wellington, Spruce, Blue Sky and Asia Trust, the "Affiliated Entities" and the Affiliated Entities, together with the Receivership Parties and the Bell Children, the "Bell Parties"). Each of the foregoing is sometimes referred to individually herein as a "Party" hereto and, together, the "Parties" hereto.

#### RECITALS

WHEREAS, Bell was the founder and, indirectly through Lancelot Investment Management, Inc., Lancelot Holdings, LP, BRG Services LLC, Lancelot Investment Management LP, and Colossus Capital Management, LP (collectively, the "Management Entities") the principal manager of five hedge funds known as Lancelot Investors Fund, L.P., Lancelot Investors Fund II, L.P., Lancelot Investors Fund, Ltd., Colossus Capital Fund, L.P., and Colossus Capital Fund, Ltd. (collectively, the "Funds");

WHEREAS, Bell and Goldman are husband and wife and the Bell Children are Bell and Goldman's children;

WHEREAS, together Bell and Goldman owned 100% of the Management Entities and received, over the course of the Funds' operation, certain management fees;

WHEREAS, prior to October 22, 2008, a majority of the Funds' investments were in notes issued by Thousand Lakes, LLC and/or Petters Company, Inc., two entities affiliated with Thomas J. Petters (Thousand Lakes, LLC, Petters Company, Inc. and Thomas J. Petters are collectively referred to herein as "Petters") which purported to be engaged in the business of diverting consumer electronics;

WHEREAS, in September 2008, it was revealed that Petters' purported diverting business was in fact a massive Ponzi scheme, which revelation resulted in over \$750 million in cash losses by investors in the Funds (collectively, these investors are referred to as "Net Losers");

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 3 of 48

WHEREAS, on October 22, 2008, the Funds and certain affiliated entities filed for Chapter 7 bankruptcy relief in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court") in cases jointly administered under case no. 08-28225 (collectively, the "Bankruptcy Cases");

WHEREAS, thereafter the Trustee was appointed permanent Chapter 7 case trustee for the Funds and their affiliated Debtors, by the Office of the United States Trustee;

WHEREAS, on September 17, 2009, after the revelation of the Ponzi scheme and the bankruptcy of the Funds, the United States Department of Justice filed a felony Information against Bell in the United States District Court for the District of Minnesota (the "District Court") on a charge of wire fraud (case no. 09-269), based on his having participated in certain "round trip" transactions with Petters beginning on February 26, 2008, which had the effect of hiding from investors in the Funds the fact that Petters was having liquidity problems;

WHEREAS, on July 8, 2009, the United States Securities and Exchange Commission also brought a civil action (the "Receivership Case") against Bell and Lancelot Management in the District Court, which among other things named the other Receivership Parties and Asia Trust and Blue Sky Trust as relief defendants (case no. 09-1750) seeking return of approximately \$41.7MM of management and incentive fees and interest;

WHEREAS, Bell pled guilty to and was convicted of the charge of wire fraud, and a money judgment was entered against him in the amount of \$208,896,307 (the "Judgment"), which also is the subject of a separate repayment agreement between Bell and the United States Department of Justice;

WHEREAS, on November 3, 2010, the United States Securities and Exchange Commission instituted an administrative proceeding (the "SEC Administrative Proceeding") against Bell which barred him from association with any investment adviser (In the Matter of Gregory M. Bell, Investment Advisers Act Release No. 3102, 2010 SEC LEXIS 3689 (Nov. 3, 2010));

WHEREAS, on December 7, 2009, the Trustee brought suit against Bell, among others, asserting negligence, gross negligence, breach of fiduciary duty, unjust enrichment and the avoidability of certain transfers in the Bankruptcy Court in case no. 09-01252 (the "Trustee's Suit");

WHEREAS, on October 11, 2010, the District Court appointed the Receiver as the receiver for the Receivership Parties' assets;

WHEREAS, on August 30, 2011, for purposes of administration, an ancillary proceeding to the Receivership Case was filed in the United States District Court for the Northern District of Illinois (the "Illinois District Court") as case no. 11-06032 (the "Illinois Receivership Case").



Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 4 of 48

WHEREAS, certain of the Receivership Parties have raised issues relating to which of the Receivership Parties' assets are proceeds of the management and incentive fees attributable to Petters' Ponzi scheme and/or the wire fraud to which Bell pled guilty;

WHEREAS, on July 22, 2013, in the Receivership Action, Bell signed a "Consent of Gregory M. Bell," in which he agreed to a final judgment including disgorgement of \$41,702,834 ("Consent Agreement")—an amount Bell had previously declared as ordinary income from management and incentive fees;

WHEREAS, on December 16, 2013, Bell signed a "Notice of Intent to Collect Payment," reflecting his agreement to repay the forfeiture money judgment ("Repayment Agreement") entered on September 24, 2010, in the United States Federal Court for the District of Minnesota;

WHEREAS the Receiver now desires to marshal the Receivership Parties assets for distribution to the Net Losers; and

WHEREAS, the Parties each have consulted with their respective counsel in connection with the matters subject hereto;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. **Recitals Incorporated.** The recitals and prefatory phrases and paragraphs set forth above are hereby incorporated in full, and made a part of, this Settlement Agreement.
2. **Definitions.**
  - a. "**Affidavits**" has the meaning set forth in Section 4(a)(viii) hereof.
  - b. "**Agreement**" has the meaning set forth in the preamble hereto.
  - c. "**Affiliated Entities**" has the meaning set forth in the preamble hereto.
  - d. "**Applewood Mortgage**" has the meaning set forth in Section 3(a)(iv) hereof.
  - e. "**Applicable Law**" shall mean all applicable laws, statutes, treaties, rules, codes, ordinances, regulations, certificates, orders, interpretations, licenses and permits of any Governmental Authority and judgments, decrees, injunctions, writs, orders or like action of any court, arbitrator or other administrative, judicial or quasi-judicial tribunal or agency of competent jurisdiction
  - f. "**Asia Trust**" has the meaning set forth in the preamble hereto.
  - g. "**Bankruptcy Cases**" has the meaning set forth in the sixth "whereas" clause hereto.
  - h. "**Bankruptcy Court**" has the meaning set forth in the sixth "whereas" clause above.

- i. "Bell" has the meaning set forth in the preamble hereto.
- j. "Bell Assets" has the meaning set forth in Section 3(c) hereof.
- k. "Bell Children" has the meaning set forth in the preamble hereto.
- l. "Bell Parties" has the meaning set forth in the preamble hereto.
- m. "Bell Trust" has the meaning set forth in the preamble hereto.
- n. "Blue Sky" has the meaning set forth in the preamble hereto.
- o. "Blue Sky Trust" has the meaning set forth in the preamble hereto.
- p. "Consent Agreement" has the meaning set forth in the fifteenth "whereas" clause above.
- q. "David" has the meaning set forth in the preamble hereto.
- r. "David Bell Assets" has the meaning set forth in Section 3(e) hereof.
- s. "Debtors" shall mean collectively the Funds and SWC Services, LLC, Lien Acquisition, LLC, AGM, LLC, AGM II, LLC, KD1, LLC, KD2, LLC, KD3, LLC, KD4, LLC, KD5, LLC, KD6, LLC, KD7, LLC, KD8, LLC, RWB Services LLC, and Surge Capital, LLC, all of whose Chapter 7 cases are being jointly administered by the Bankruptcy Court under case no. 08-28225.
- t. "District Court" has the meaning set forth in the eighth "whereas" clause above.
- u. "DOJ" has the meaning set forth in the preamble hereto.
- v. "Effective Date" has the meaning set forth in Section 5(c) hereof.
- w. "Final and Non-Appealable" shall mean that the order had been entered after notice and a hearing, the order is final for purposes of 28 U.S.C. §§158 and 1291, the order is no longer subject to appeal or *certiorari* proceedings and no appeal or *certiorari* proceedings is pending.
- x. "Funds" has the meaning set forth in the first "whereas" clause above.
- y. "Freeze Orders" shall mean collectively that certain "Temporary Restraining Order and Order Imposing Asset Freeze and Other Ancillary Relief" entered by the District Court on the docket of the Receivership Case at docket no. 18, that certain "Agreed Order of Preliminary Injunction Asset Freeze and Other Ancillary Relief" entered by the District Court on the docket of the Receivership Case at docket no. 45, that certain "Agreed Order of Asset Freeze and Other Ancillary Relief" entered by the District Court on the docket of the Receivership Case at docket no. 46, and that certain "Order of Asset Freeze and Other Ancillary Relief

as to Relief Defendants Asia Trust, Ltd. and Blue Sky Trust” entered on the docket of the Receivership Case at docket no. 52.

- z. “Goldman” has the meaning set forth in the preamble hereto.
- aa. “Goldman Assets” has the meaning set forth in Section 3(b) hereof.
- bb. “Goldman Trust” has the meaning set forth in the preamble hereto.
- cc. “Governmental Authority” shall mean, with respect to the United States, any federal, state, county, municipal or other governmental authority or judicial or regulatory agency, board, body, commission, instrumentality, court or quasi-governmental authority from time to time, and, in the case of any foreign governmental authority, all similar entities to the foregoing having jurisdiction over any Person that is a Party to this Agreement, any property of any of them or any of the transactions contemplated by this Agreement.
- dd. “Illinois District Court” has the meaning set forth in the thirteenth “whereas” clause above.
- ee. “Illinois Receivership Proceeding” has the meaning set forth in the thirteenth “whereas” clause above.
- ff. “Joint Assets” has the meaning set forth in Section 3(d) hereof.
- gg. “Judgment” has the meaning set forth in the ninth “whereas” clause above.
- hh. “Lancelot Management” has the meaning set forth in the preamble hereto.
- ii. “Lexus” has the meaning set forth in Section 3(a)(vi).
- jj. “Management Entities” has the meaning set forth in the first “whereas” clause above.
- kk. “Marshalling Account” has the meaning set forth in Section 3(a)(i) hereof.
- ll. “Net Losers” has the meaning set forth in the fifth “whereas” clause above.
- mm. “Notice of Compliance” has the meaning set forth in Section 5(b) hereof.
- nn. “Oakton Mortgage” has the meaning set forth in Section 3(a)(iii) hereof.
- oo. “Party” and “Parties” have the meanings set forth in the preamble hereto.
- pp. “Person” shall mean any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, Governmental Authority or any other entity.
- qq. “Personal Property” has the meaning set forth in Section 3(c)(ii) hereof.

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 7 of 48

- rr. "Peterson" has the meaning set forth in the preamble hereto.
- ss. "Petters" has the meaning set forth in the forth "whereas" clause above.
- tt. "Rebecca" has the meaning set forth in the preamble hereto.
- uu. "Rebecca Bell Assets" has the meaning set forth in Section 3(f) hereof.
- vv. "Receiver" has the meaning set forth in the preamble hereto.
- ww. "Receiver Accounts" has the meaning set forth in Section 3(a)(i) hereof.
- xx. "Receiver Assets" has the meaning set forth in Section 3(a) hereof.
- yy. "Receivership Case" has the meaning set forth in the tenth "whereas" clause above.
- zz. "Receivership Parties" has the meaning set forth in the preamble hereto.
- aaa. "Repayment Agreement" has the meaning set forth in the seventeenth "whereas" clause above.
- bbb. "SEC" has the meaning set forth in the preamble hereto.
- ccc. "Spruce" has the meaning set forth in the preamble hereto.
- ddd. "Spruce Street Home" has the meaning set forth in Section 3(a)(ii) hereof.
- eee. "Tax Refunds" has the meaning set forth in Section 4(a)(ii) hereof.
- fff. "Trustee" has the meaning set forth in the preamble hereto.
- ggg. "Trustee's Suit" has the meaning set forth in the eleventh "whereas" clause above.
- hhh. "United States" has the meaning set forth in the preamble hereto.
- iii. "Wellington" has the meaning set forth in the preamble hereto.
- jjj. "Wellington Assets" has the meaning set forth in Section 3(g) hereof.

3. **Allocation of Assets.** The Parties agree that upon the Effective Date, the assets of the Bell Parties shall be allocated as follows:

- a. The Receiver shall receive, for distribution to the Net Losers as and to the extent authorized by the District Court, the funds and other assets set forth below (collectively, the "Receiver Assets"):

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 8 of 48

- i. All funds and assets in the following accounts, which total approximately \$ 28 million: Merrill Lynch acct. no. 69F-946633 (Goldman f/b/o Rebecca), Merrill Lynch acct. no. 69F-946634 (Goldman f/b/o David), JP Morgan Chase acct. no. Q55183-00-0 (Spruce), PrivateBank acct. no. 2322123 (Receiver) (the "Marshalling Account"), PrivateBank acct. no. 0002173396 (Blue Sky), and the \$4,248,563.93 held in the Bank of America internal account associated with ref. no. U071009000856 (collectively, the "Receiver Accounts").
  - ii. The real property commonly known as 1947 Spruce Street, Highland Park, Illinois 60635 (the "Spruce Street Home").
  - iii. The mortgage in favor of Lancelot Investment Management LLC dated 9/13/06 and recorded 9/19/06 as document no. 0626222060 on the property commonly known as 5001 Oakton #404, Skokie, IL, ID no. 10-28-201-034-1015 (the "Oakton Mortgage").
  - iv. The mortgage in favor of Goldman dated 11/10/05 and recorded 5/20/08 as document no. 6348049 on the property commonly known as 3175 Applewood, Highland Park, IL, ID no. 16-16-103-011-0000 (the "Applewood Mortgage").
  - v. The Overpayment of taxes remaining on 2013 Federal Income Tax Return.
  - vi. All shares, membership interests, partnership interests or other incidences of ownership, including approximately \$1.9MM in frozen distributions held by Helix Funds in the following entities and all proceeds thereof: Spruce Family Partnership, Helix Rainbow Lake LLC, RC Westwood Estate Investors LLC, RC Pheasant Lake Estate LLC, and RC Arc Investors LLC. Upon the Effective Date, the Receiver shall change the taxpayer identification numbers for each of these entities so that they are no longer recorded as related to Inna Goldman.
  - vii. The 2002 Lexus SL 430 titled in the name of Bell (the "Lexus").
  - viii. All claims totaling \$160,896,244 to deferred compensation, management fees, and/or incentive fees related to any of the Funds or Management Entities.
  - ix. Any and all investments in the Funds by Gregory Bell, Gregory Bell IRA and Gregory Bell SEP-IRA valued \$1,819,305 pre-petition .
- b. Goldman shall retain, free and clear of all claims of the Receiver (collectively, the "Goldman Assets"):
- i. All funds and assets in the following accounts: Synergy Non-Affiliated Employers Retirement acct. no. Plan ID401363, American Funds IRA

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 9 of 48

acct. no. 63667407, Vanguard IRA acct. no. 09879926811, and Vanguard  
IRA acct. no. 88027040942;

- ii. 2004 Lexus GX 470.
  - iii. Funds from Account Nos. xxxxxxxx4624 and Account No. xxxxxxxx0904 at Bank of America, which were previously transferred into Goldman's Fifth Third Bank Account (ending in 8890) by order of the Receivership Court [Dkt. No. 145 at 5].
  - iv. One-hundred percent of the ownership interests in Wellington, which, in turn, shall retain, free and clear of all claims of the Receiver (collectively, the "Wellington Assets"):
    1. All funds and assets in the following account: Bank of America acct. no. 291006076627.
    2. The real property commonly known as 445 Wellington, Unit 12H, Chicago, Illinois 60657.
  - v. All personal property housed at the Spruce Street Home (the "Personal Property").
  - c. Bell shall retain, free and clear of all claims of the Receiver (collectively, the "Bell Assets"):
    - i. All funds and assets in the following accounts: Vanguard IRA acct. no. 88027041462 and Vanguard IRA acct. no. 88032279355.
  - d. Bell and Goldman jointly shall retain, free and clear of all claims of the Receiver (collectively, the "Joint Assets"):
    - i. All funds and assets in the following accounts: Vanguard acct. no. 9898839785 (Bell and Goldman JTWROS) and JP Morgan Chase acct. no. 01110020839221 (Bell and Goldman JTWROS).
4. Cooperation with Marshalling of Assets.
- a. As promptly as practicable after the Effective Date, and in no event more than 10 business days thereafter, the Bell Parties shall take all steps reasonably requested by the Receiver to:
    - i. Transfer all funds and other assets held in the Receiver Accounts to the Marshalling Account.
    - ii. File tax returns (or amended tax returns) with the Internal Revenue Service for the tax year 2013 requesting the payment of the overpayments/refunds due into the Marshalling Account, with \$300,000

held and to be returned after 3 years audit period limitation to cover potential liabilities on capital gains on assets turned over to the Receiver and provide the Receiver with copies of such returns. Nothing in this provision or in this Agreement suggests that the IRS will or will not pay overpayments or refunds due to any party.

- iii. Sign and deliver to the Receiver the quitclaim deed for the Spruce Street Home attached hereto as Exhibit A.
  - iv. Sign and deliver to the Receiver the [stock powers] attached hereto as Exhibits B, C,     and    .
  - v. Sign and deliver to the Receiver the assignments of the Applewood Mortgage and the Oakton Mortgage attached hereto as Exhibits D and E.
  - vi. Sign and deliver to the Receiver title to the Lexus within 30 days of settlement.
  - vii. On the date of the closing of the sale of the house by the Receiver (provided the Receiver provides two-weeks advance notice of any closing), vacate the Spruce Street Home, including removing the Personal Property and delivering possession thereof to the Receiver.
- b. Each of Bell and Goldman shall deliver to the Receiver affidavits (the "Affidavits") in the form attached hereto as Exhibit F attesting that neither owns or controls, directly or indirectly, assets with a value in excess of \$25,000 except those assets described in Section 3 hereof.
  - c. As promptly as practicable, but in no event more than 5 business days after the last of the receipt by the Receiver of (a) all funds due to the Marshalling Account under Sections 4(a)(i) and 4(a)(ii), (b) the deliveries required Sections 4(a)(iii), 4(a)(iv), 4(a)(v) and 4(a)(vi), (c) the delivery of a quit claim deed of the Spruce Street Home as set forth in Section 4(a)(vii), and (d) the delivery to the Receiver of the Affidavits as set forth in Section 4(b) hereof, the Receiver (x) shall file the Notice of Compliance with the District Court, and (y) file a notice of dismissal of the Trustee's Suit with the Bankruptcy Court.

5. Effectiveness.

- a. As promptly as practicable upon the execution of this Agreement by all Parties hereto, the Receiver and the Trustee shall provide to counsel for Goldman drafts of motions seeking approval of this Agreement ("Approval Motions") from the District Court, the Illinois District Court, and the Bankruptcy Court seeking approval of this Agreement.
- b. As promptly as practicable, counsel for Goldman shall review the draft Approval Motions, make only necessary changes, and return the draft Approval Motions to

- the Receiver and the Trustee. Counsel for Goldman shall not unnecessarily withhold approval on the Approval Motions.
- c. As promptly as practicable after counsel for Goldman has reviewed and approved the Approval Motions, the Receiver and Trustee shall file the Approval Motions with the District Court, the Illinois District Court, and the Bankruptcy Court seeking approval of this Agreement.
  - d. Without limiting the generality of the foregoing, the motion filed with the District Court will also request that the Freeze Orders be vacated upon the filing, by the Receiver, of a "Notice of Compliance" (the "Notice of Compliance") certifying that all obligations of the Bell Parties under this Agreement have been complied with.
  - e. The "Effective Date" of this Agreement shall be the date on which the last of the following occurs: (a) a District Court order approving this Agreement shall have become Final and Non-Appealable; (b) an Illinois District Court order approving this Agreement shall have become Final and Non-Appealable; and (c) a Bankruptcy Court order approving this settlement shall have become Final and Non-Appealable.
  - f. The Parties may jointly waive the requirement that the aforementioned orders be Final and Non-Appealable.
6. **Waivers and Releases of Claims.**
- a. Subject to and conditioned upon the occurrence of (i) the Effective Date and (ii) the issuance of a Final and Non-Appealable order from the District Court lifting the asset freeze, the Receiver shall require, as a condition of any Net Loser receiving a distribution from the Receiver Assets, that any such Net Loser first sign a release and waiver of any and all claims they may have against either Goldman or Bell.
  - b. Subject to and conditioned upon the occurrence of (i) the Effective Date, and (ii) the satisfaction of all the conditions for the filing of a Notice of Compliance set forth in Section 4(b), each of the Parties except for the DOJ, and each of their officers, agents, professionals, employees, attorneys, other legal representatives, affiliates, predecessors, successors and assigns, and each of them (collectively, the "Releasers"), shall be conclusively deemed to have unconditionally, absolutely, and irrevocably released all other Parties and their officers, agents, professionals, employees, attorneys, other legal representatives, affiliates, predecessors, heirs, agents, successors and assigns, and each of them (collectively, the "Releasees") with respect to any and all actions, causes of action, suits, debts, accounts, promises, warranties, damages and consequential damages, demands, agreements, costs, expenses, claims or demands whatsoever, of any kind or nature, whether known or unknown, liquidated or unliquidated, disputed or undisputed, contingent, inchoate, or matured, in law or in equity, arising in connection with or



relating to the Bankruptcy Cases, the Receivership Case, the Illinois Receivership Proceeding, the Trustee's Suit, the SEC Administrative Proceeding, or the Debtors, including any claims, surcharges or causes of action under chapter 5 of the Bankruptcy Code, which each of the Releasors have or ever had against the Releasees on or at any time prior to the date of this Agreement; provided, however, that for avoidance of doubt, nothing herein shall be deemed to release the Judgment which is the subject of the Repayment Agreement; and provided further that nothing contained in this Section 6 shall be deemed or construed to be a release, waiver or discharge of the terms and conditions of this Agreement.

- c. The DOJ covenants and agrees that, notwithstanding the survival of the Judgment and the Repayment Agreement, it waives any right to, and covenants not to seek recovery from, the Goldman Assets, the Bell Assets, or the Joint Assets as partial satisfaction of the Judgment.
- d. Notwithstanding anything to the contrary in the foregoing, the SEC remains able to enforce its permanent injunction in the Receivership Case and the injunctive relief it obtained in the Order in the SEC Administrative Proceeding.

7. **Stay of Claims.** The Parties agree that the Trustee and Receiver shall seek a stay ("Stay") from the District Court and the Illinois District Court of any and all claims against Goldman, Bell, the Goldman Assets, the Bell Assets, or the Joint Assets arising out of the events described in the Recitals.

- a. The Trustee and Receiver shall seek the Stay as promptly as possible after the Effective Date. Counsel for Goldman shall provide requested assistance in obtaining the Stay.
- b. The Stay is to remain in place, as long as Bell remains compliant with the Repayment Agreement, until the Repayment Agreement is fully satisfied.
- c. Notwithstanding the foregoing, the stay shall not limit the SEC's ability to enforce the injunctive relief it has obtained in the Receivership Case or the SEC Administrative Proceeding.
- d. Notwithstanding the foregoing, and except as provided in Section 6c above, the stay shall not limit the DOJ's ability to amend the Repayment Agreement or to enforce the Judgment.

8. **Jurisdiction and Governing Law.** The Parties agree that the District Court shall retain jurisdiction to the fullest extent possible over the interpretation and enforcement of this Agreement, and over any dispute between them in any way related to this Agreement. The Parties further agree that this Agreement shall be construed and governed by the laws of the State of Illinois, irrespective of its choice of law rules.

9. **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties as to the subject matter hereof (except, as between Bell and the DOJ, for the Repayment Agreement) and is the final and complete expression of their intent. The undersigned

acknowledge that there are no communications or understandings, oral or written, contrary, different, or which in any way restrict this Agreement. The undersigned further acknowledge that all prior agreements, communications, and understandings within the scope of the subject matter of this Agreement are, upon execution of this Agreement, superseded, null and void. This Agreement can only be changed, modified or discharged if consented to in writing executed by the Parties hereto and, if applicable, approved by order of the District Court.

10. **Counterparts.** This Agreement may be executed in one or more counterparts, via facsimile or electronic means; each counterpart to be considered an original portion of this Agreement.

11. **Enforcement.** Notwithstanding anything herein to the contrary, to the extent that an action is brought to enforce any provision of this Agreement, the prevailing party in that action shall be entitled to an award of its reasonable attorneys' fees and costs of maintaining the action, except that notwithstanding the foregoing, no attorney's fees or costs shall be imposed against the SEC or DOJ.

12. **Advice of Counsel.** The Parties acknowledge that each Party has had the opportunity to make an investigation of the facts pertaining to this Agreement and all matters pertaining thereto, as it deems necessary. The Parties further acknowledge: (a) each Party is represented by experienced counsel; (b) each Party has read this Agreement and understands its contents; and (c) each Party is entering into this Agreement voluntarily and without duress, and with a full understanding of its terms. The Parties agree that no Party shall later seek to overturn or invalidate any aspect of this Agreement on grounds of unconscionability, oppression or any similar reason.

13. **No Admissions.** Nothing contained in this Agreement shall be deemed to be an admission, by any Party, of any fact, matter, claim or defense previously in dispute. Each Party is aware that it may hereafter discover claims or facts in addition to or different from those it now knows or believes to be true. Nevertheless, it is the intention of the Parties to fully, finally, and forever settle and release any and all controversies among themselves, and all claims relative thereto, that do now exist or heretofore have existed between them as and to the extent expressly provided herein. In furtherance of such intention, the releases given herein shall be and remain in effect as full and complete releases of all such matters, notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

14. **Covenant of Further Assurances.** The Parties covenant and agree that, from and after the execution and delivery of this Agreement, they shall, execute, deliver and file any and all documents and instruments as are reasonably necessary or requested by the other Party to obtain approval of or implement the terms of this Agreement, and shall not take any action to directly or indirectly oppose the approval of this Agreement.

15. **Representations and Warranties.** Each Party hereto, severally, hereby represents and warrants as of the Effective Date that, subject to the approval of this Agreement by the District Court, the Illinois District Court, and the Bankruptcy Court:

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 14 of 48

- a. it has all requisite power and authority and legal right to execute, deliver, and perform its obligations under this Agreement, to consummate the transactions contemplated hereby, and to carry out and perform its obligations under this Agreement;
- b. its execution, delivery, and performance of this Agreement (i) has been duly authorized by all necessary action, (ii) does not violate any Applicable Law, (iii) does not require the consent or approval of, the giving notice to, or the registration with, or the taking of any other action with respect to, any Governmental Authority or any third Person (except such as shall have been duly obtained or given and are in full force and effect), and (iv) does not contravene or constitute a default under its organizational documents or any indenture, mortgage, contract or agreement to which it is party or by which it is bound, or any judgment or order binding on it;
- c. with the exception of the Receivership Case, the Illinois Receivership Proceeding, the Bankruptcy Cases, the Trustee's Suit, and the SEC Administrative Proceeding, no action or proceeding has been instituted by it, and it is not aware of (i) any action or proceeding that has been instituted by any other Person, or (ii) any action, proceeding or action by any Governmental Authority that is threatened, or (iii) any order, judgment or decree that has been issued or proposed to be issued, at the Effective Date to set aside, restrain, enjoin or prevent the completion and consummation of the transactions contemplated by this Agreement; and
- d. this Agreement constitutes the legal, valid and binding obligations of such Party and is enforceable in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the rights of creditors generally and by general principles of equity.

16. **Notices.** Any and all notices required or permitted under this Agreement and any and all correspondence shall be in writing and shall be personally delivered or mailed by registered or certified mail, return receipt requested, or by overnight delivery to the Parties at the addresses designated with their respective signatures below, unless and until a different address has been designated by written notice to the other Parties.

[Signature pages follow.]

**IN WITNESS WHEREOF**, the Parties hereto, each by persons duly authorized,  
have caused the Settlement Agreement to be executed as of the day and year first written above.

**GREGORY BELL**

**THE GREGORY BELL REVOCABLE  
TRUST**

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Notice address:

Notice address:

Vincent P. (Trace) Schmeltz III  
Barnes & Thornburg LLP  
One North Wacker Drive  
Suite 4400  
Chicago, Illinois 60606  
Attn: Vincent P. (Trace) Schmeltz III  
Email: [tschmeltz@btlaw.com](mailto:tschmeltz@btlaw.com) [*for all Bell-  
related entities/individuals*]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn:  
Email:

**RONALD R. PETERSON, NOT  
INDIVIDUALLY BUT IN HIS  
CAPACITY AS THE CHAPTER 7 CASE  
TRUSTEE FOR THE DEBTORS**

**RONALD R. PETERSON, NOT  
INDIVIDUALLY BUT IN HIS CAPACITY  
AS THE COURT APPOINTED RECEIVER  
FOR THE ASSETS OF THE  
RECEIVERSHIP PARTIES**

By: *Ron Peterson*

By: *Ron Peterson*

Notice address:

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn:  
Email:

\_\_\_\_\_  
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Attn:  
Email:

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 16 of 48

**LANCELOT INVESTMENT  
MANAGEMENT, LLC**

**INNA GOLDMAN**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_

Notice address:

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

Attn:  
Email:

Attn:  
Email:

**THE INNA GOLDMAN REVOCABLE  
TRUST**

**12H WELLINGTON LLC**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Notice address:

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
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Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 17 of 48

**SPRUCE FAMILY PARTNERSHIP L.P.**

**SPRUCE INVESTMENT  
MANAGEMENT LLC**

By: Leonid  
Goldman  
Its: President

Notice address:

Attn:  
Email:

**BLUE SKY INVESTMENT HOLDINGS  
LLC**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Notice address:

Attn:  
Email:

**UNITED STATES DEPARTMENT OF  
JUSTICE**

By: James S. Alexander  
Its: Assistant U.S. Attorney

Notice address:

600 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Attn:  
Email: jim.alexander@usdoj.gov

**BLUE SKY TRUST**


By: \_\_\_\_\_  
Its: \_\_\_\_\_

Notice address:

Attn:  
Email:

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 18 of 48

**SECURITIES AND EXCHANGE  
COMMISSION**

By:   
John E. Birkenheier  
Its: Supervisory Trial Counsel

Notice address:

175 W. Jackson Blvd., Suite 900  
Chicago, Illinois 60604  
Attn: John E. Birkenheier  
Email: birkenheierj@sec.gov

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 19 of 48

IN WITNESS WHEREOF, the Parties hereto, each by persons duly authorized,  
have caused the Settlement Agreement to be executed as of the day and year first written above.

**GREGORY BELL**

**THE GREGORY BELL REVOCABLE  
TRUST**

By: G Bell

By: G Bell  
Its: GRANTOR

Notice address:

Notice address:

Vincent P. (Trace) Schmeltz III  
Barnes & Thornburg LLP  
One North Wacker Drive  
Suite 4400  
Chicago, Illinois 60606  
Attn: Vincent P. (Trace) Schmeltz III  
Email: [tschmeltz@btlaw.com](mailto:tschmeltz@btlaw.com) [for all Bell-  
related entities/individuals]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn:  
Email:

**RONALD R. PETERSON, NOT  
INDIVIDUALLY BUT IN HIS  
CAPACITY AS THE CHAPTER 7 CASE  
TRUSTEE FOR THE DEBTORS**

**RONALD R. PETERSON, NOT  
INDIVIDUALLY BUT IN HIS CAPACITY  
AS THE COURT APPOINTED RECEIVER  
FOR THE ASSETS OF THE  
RECEIVERSHIP PARTIES**

By: \_\_\_\_\_

By: \_\_\_\_\_

Notice address:

Notice address:

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Attn:  
Email:

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Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 20 of 48

LANCELOT INVESTMENT  
MANAGEMENT, LLC

By: GBM  
Its: MANAGER

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn:  
Email:

INNA GOLDMAN

By: Inna Goldman

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn:  
Email:

THE INNA GOLDMAN REVOCABLE  
TRUST

By: Inna Goldman  
Its: GRANTOR

Notice address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn:  
Email:

12H WELLINGTON LLC

By: Inna Goldman  
Its: MANAGER

Notice address:

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\_\_\_\_\_

Attn:  
Email:

Case 08-28225 Doc 1613-1 Filed 09/29/15 Entered 09/29/15 13:26:23 Desc  
Exhibit A Page 21 of 48

SPRUCE FAMILY PARTNERSHIP L.P.

SPRUCE INVESTMENT  
MANAGEMENT LLC

By: Leonid Leo Gold  
Goldman Goldman  
Its: President

Notice address:

Attn:  
Email:

BLUE SKY INVESTMENT HOLDINGS  
LLC

By: Bill  
Its: GRANTOR

Notice address:

Attn:  
Email:

UNITED STATES DEPARTMENT OF  
JUSTICE

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Notice address:

Attn:  
Email:

BLUE SKY TRUST

By: Bill  
Its: GRANTOR

Notice address:

Attn:  
Email:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

RS INVESTMENTS LIMITED, ET AL.,

Plaintiffs,

v.

Case No.: 2016LO11459

RSM US LLP, RSM CAYMAN LTD, AND  
SIMON LESSER,

Defendants.

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AFFIDAVIT OF ARISTOTELIS ALEXANDROS GALATOPOULOS

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I, ARISTOTELIS ALEXANDROS GALATOPOULOS, of Uglan House, South Church Street, George Town, Grand Cayman, Cayman Islands MAKE OATH and SAY as follows:

- 1 I am a Partner and the Head of the Litigation Department of the Cayman Islands office of Maples and Calder, attorneys-at-law practising at the above address.
- 2 I make this Affidavit in connection with the Complaint dated 21 November 2016 filed in the Circuit Court of Cook County, Illinois (the "Complaint"), against RSM US LLP, RSM Cayman Ltd and Simon Lesser.
- 3 I graduated from Cambridge University in 1988 with a BA Honours degree in Law. I qualified as a solicitor of the Supreme Court of England and Wales in 1991. Between 1991 and late 2001 I practised as a solicitor in the City of London with Clifford Chance (now Clifford Chance LLP). I joined Maples and Calder in October 2001 and was admitted as a Cayman Islands attorney in January 2002. I have been a Partner of Maples and Calder since 1 December 2003.
- 4 I am a litigation specialist and I act for a wide variety of clients in relation to disputes in the investment funds and financial services sectors. Much of my work is also bankruptcy related. I have acted for a number of auditors in audit negligence cases.

- 5 Maples and Calder is one of the largest law firms based in the Cayman Islands, having over 300 lawyers and 500 support staff based in offices in George Town, Grand Cayman as well as Dublin, London, Hong Kong, Singapore, Dubai and the British Virgin Islands. In addition to advising on all aspects of Cayman Islands law, Maples and Calder and its affiliates provides registered offices and related administrative and legal services to a significant number of Cayman Islands companies and limited partnerships.

#### **An overview of the Cayman Islands**

- 6 The Cayman Islands are a British Overseas Territory. The legal system is a common law system founded on the English system. Specific sources of Cayman Islands law are Cayman Islands legislation, English legislative provisions extended to the Cayman Islands by United Kingdom Orders in Council, Cayman Islands case law and case law from England and other common law jurisdictions.
- 7 The doctrine of judicial precedent applies in the Cayman Islands as it applies in England. The ultimate court of appeal is the Judicial Committee of the Privy Council, whose decisions are binding on the Cayman Islands Court of Appeal and the Cayman Islands Grand Court. Decisions of the Cayman Islands Court of Appeal are similarly binding on the Grand Court. Where there is no applicable Cayman Islands case law, the Cayman Islands Court will generally follow English appellate authorities to the extent they are not inconsistent with Cayman Islands statute or authority and do not relate to English statutory provisions that have no equivalent in the Cayman Islands. Such authorities are persuasive but not binding on the Cayman Islands Court. Similarly, decisions of the appellate courts of other Commonwealth jurisdictions are also of persuasive, but not binding, authority.

#### **Scope of Instructions**

- 8 I have been requested by the law firm of Williams & Connolly LLP, which represents RSM US LLP and Simon Lesser, to set forth the relevant law of the Cayman Islands. I have reviewed the Complaint. I have not been provided with any other pleadings or documents relating to these proceedings. I express no opinion as to whether Cayman Islands law would apply to the claims made by the Plaintiffs in these proceedings.

### **The Plaintiffs' Claims**

- 9 The following causes of action are asserted by the Plaintiffs:
- (a) Common law fraud and fraudulent inducement;
  - (b) Negligent misrepresentation; and
  - (c) Professional malpractice.
- 10 Various forms of relief are sought, including damages and punitive damages.
- 11 The claims are predicated on a set of factual allegations that may be summarised as follows:
- (a) The Plaintiffs are the beneficial owners of shares in a Cayman fund known as Lancelot Investors Fund, Ltd (which is referred to in the Complaint as "Lancelot Offshore" or the "Fund" and I will use the former definition in this affidavit);
  - (b) The Defendants were, at all material times, outside auditors for Lancelot Offshore and their annual audit reports, for the years ended 5 January 2004 to 5 January 2008, were addressed to the Plaintiffs;
  - (c) The Plaintiffs have relied on some of these reports and/or the Defendants' services generally in connection with the purchase and/or retention of shares in Lancelot Offshore;
  - (d) As a result the Plaintiffs lost their investments in Lancelot Offshore, when that fund was exposed as a victim of the Petters fraud.
- 12 Lancelot Offshore is currently in insolvent liquidation in the Cayman Islands and is in Chapter 7 bankruptcy in the United States.

### **Fundamental Propositions of Cayman Islands Company Law**

- 13 The distinction between the personal rights of a shareholder in a Cayman Islands company, and the rights of the company itself, is fundamental in Cayman Islands law. Where a shareholder seeks to enforce a right that is vested in the company itself (as opposed to a

personal right of his own) he can only do so (if at all) by way of a derivative action.<sup>1</sup> This is because only the company may sue for damage that has been done to it.

- 14 The fact that a company is in liquidation means that a derivative claim cannot be brought by a shareholder, but does not mean that the company's rights now vest in the shareholders. Those rights remain vested in the company, but can now only be enforced by the liquidator on the company's behalf.<sup>2</sup>
- 15 Even if a shareholder is able to show that a wrong has been done to him, he cannot recover the loss he has suffered, in circumstances where that loss is a reflection of the loss that the company itself has suffered. In other words, if the company were to enforce its rights against the wrongdoer, and the result of that enforcement would be that the shareholder's loss would be made good, then the loss is reflective and the Cayman Islands courts will not allow the shareholder to proceed even if the shareholder has a separate and distinct cause of action. Of course if the shareholder cannot actually show that a wrong has been done to him – either

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<sup>1</sup> *Renova v Gilbertson* [2009] CILR 268 and *Nedgroup Trust (Jersey) Limited v Renova Industries Limited* [2014] (2) CILR N-6.

<sup>2</sup> See *Fargro Limited v Godfroy and Others* [1986] 1 WLR 1134, where in the context of a deadlocked company, the Court held as follows: "...one starts from the position that as regards a claim such as is made in the present action which, putting it very compendiously, is that the defendants ...have diverted assets and opportunity belonging to the company to their own use, the proper plaintiff is the fourth defendant, the company. It is such because it is the company which has suffered the loss. Now if that company had not been in liquidation, it is conceded that the pleas contained in paragraph 8 and paragraph 28 of the statement of claim would have laid a proper foundation for a minority shareholders' action, because it would have been impossible for the plaintiff to have got the company to have taken any action against its other shareholder or indeed the other defendants. That is quite clearly because if the matter had been put to the board of the company the board would have been equally split. There would therefore have been no resolution to bring such an action. And if the matter had been carried to the shareholders in general meeting exactly the same result would have followed. Therefore, as a practical matter, it would have been totally impossible for the plaintiff to set the company in motion to bring the action and it is under those circumstances that a minority shareholders' action will lie. But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested. Now, that being the case, the plaintiff can take a variety of courses. The plaintiff can ask the liquidator to bring the action in the name of the company. Doubtless, as in virtually all cases, the liquidator will require an indemnity from the persons who wish to set the company in motion against all the costs, including, of course, the costs of the defendant, which he may have to incur in bringing that action. The liquidator may ask for unreasonable terms or, on the other hand, the liquidator may be unwilling to bring the action, and under those circumstances it is always possible for the shareholders who wish the action to be brought to go to the court asking for an order either that the liquidator bring the action in the name of the company or, more usually, that they are given the right to bring the action in the name of the company, of course, against the usual type of indemnity, which will, if there is any difficulty about the matter, be settled by the court." *Fargro* was applied by the Cayman Islands Grand Court in *In the Matter of The Sphinx Group of Companies* [2014] (2) CILR 131.

because the wrongdoer owes him no duty of care or because another element of the claim cannot be made out – then the shareholder will fail in any event.

- 16 The "no reflective loss" principle is well illustrated by the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*.<sup>3</sup> The claimant minority shareholders in that case brought a derivative action in respect of damage suffered by the company as a result of fraud; the claimants also brought a personal claim for damages against the defendants. They alleged that the fraud had caused a reduction in the company's net profits, which in turn had adversely affected the value of the company's shares. The Court of Appeal viewed the personal claim as "misconceived".<sup>4</sup>
- 17 The decision in *Prudential Assurance Co Ltd v Newman Industries (No 2)* has been followed in England and has also been referred to and approved by the Cayman Islands Court of Appeal in *Svanstrom v Jonasson* [1997] CILR 192.
- 18 In *Renova Resources Private Equity Limited v Gilbertson* [2009] CILR 268 the Grand Court of the Cayman Islands applied the principle that a plaintiff bringing in a derivative action may not recover reflective loss.
- 19 The leading English authority on reflective loss, *Johnson v Gore Wood & Co* [2002] 2 AC 1, was also considered in *Renova Resources Private Equity Limited v Gilbertson*. *Johnson v Gore Wood & Co* is a decision of the English House of Lords, and the doctrine of reflective loss was considered by all five Law Lords. The speeches of Lord Bingham<sup>5</sup> and Lord Millett<sup>6</sup> are particularly instructive.

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<sup>3</sup> [1982] Ch 204.

<sup>4</sup> "[A shareholder] cannot ... recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The [claimant's] shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The [claimant] still holds all the shares as his own unencumbered property. The deceit practiced upon the [claimant] does not affect the shares; it merely enables the defendant to rob the company."

<sup>5</sup> Lord Bingham set out the following three principles: (1) *Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder*

20 In a number of subsequent English decisions, the reflective loss principle has been held to apply even where the Court found that there was no risk of the shareholder and the company obtaining recovery in respect of the same loss, including because of a successful defence to the claims made by the company. For example, in *Day v Cook* [2002] 1 BCLC 1 at paragraph 38, Arden LJ explained that:

*"It is not simply the case that double recovery will not be allowed so that, for instance, if the company's claim is not pursued or there is some defence to*

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*to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss... (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. ... (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it, but neither may recover loss caused to the other by breach of the duty caused to that other."*

<sup>6</sup> "A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If a company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] 1 All ER 354 at 357, [1982] Ch 204 at 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then *prima facie* he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets and if these are depleted the diminution in its assets will be reflected in the diminution in value of the shares. ... This causes no difficulty where the company has a cause of action and the shareholder has none, or where the shareholder has a cause of action and the company has none... Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder. The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."



*the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder.*

*Accordingly the court has no discretion. The claim cannot be entertained."*

21 That case was decided after *Johnson v Gore Wood* and the Court relied on and applied that decision in its judgment.

22 I also note the decision of *Giles v Rhind* [2002] EWCA Civ 1428 which has been approved in a number of subsequent cases,<sup>7</sup> which includes the following statement:

*"[The reflective loss principle] is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to and therefore includes the case where the company has settled for less than it might...;"*

23 In *Barings plc (In liquidation) v Coopers & Lybrand* [2002] 2 BCLC 364 which I discuss further below in relation to the Plaintiffs' negligence claims, a bank traded in securities and futures through a subsidiary (BSL), which incorporated a subsidiary in Singapore (BFS) to trade on behalf of BSL and the bank's other subsidiaries and other clients. The manager of BFS used a secret account to carry out unauthorised trading and incurred huge losses. The auditors of BFS at the relevant times did not detect the manager's activities.

24 The bank and BSL issued proceedings against the auditors alleging that the manager's activities remained undetected because of the auditors' negligence. The auditors filed a defence and counterclaim which alleged they had been deceived into signing the audit by a directors' representation letter from BFS that there had been no irregularities with management or employees and that there were no errors in the financial statements. The auditors also applied to strike out two of the claims on the grounds that those claims ought properly be brought by BFS, not the bank and BSL, and the claims were reflective of BFS's claims. The bank and BSL submitted that the rule preventing reflective loss did not apply because if the claims were brought by BFS then the auditors would have a "complete defence" by reason of a claim in deceit based on the directors' representation letter.

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<sup>7</sup> Including the English Court of Appeal decisions in *Gardner v Parker* [2004] 2 BCLC 554 and *Webster v Sanderson* [2009] 2 BCLC 542.

25 Evans-Lomb J, after a detailed review of the decisions in *Johnson v Gore Wood* and *Day v Cook*, came to the conclusion that the fact that the third party may have one or more defences to a claim against it by the company was not sufficient to oust the reflective loss principle. The Court indicated, without reaching a final conclusion, that in determining whether this limit on the reflective loss principle applies, a distinction had to be drawn between "cases where there was no claim at all and those where the claim existed but was subject to a defence." The Court held that the "complete defence" based on deceit did not "permit...BSL, as a shareholder of BFS, to sue for reflective loss." (see paragraphs 128 and 137 of the judgment).

26 More recently, in *Malhotra v Malhotra* [2015] 1 BCLC 428 (at paragraph 54) the English High Court described an exception to the reflective loss principle as being:

*"Where the company itself has no cause of action (eg because it was not a party to the relevant contract; or was not owed a duty of care in tort; or did not exist at the time of the wrongful conduct but was incorporated subsequently)..."*

27 I turn now to consider the various causes of action that are pleaded against the Defendants.

### **Count 1: Common Law Fraud and Fraudulent Inducement**

#### Overview

28 Common law fraud is known as deceit under Cayman Islands law. The tort can be stated as follows: where a false representation is made which the party making it knows to be untrue, or is reckless, in the sense that he makes the representation without caring whether it is true or false, with the intent, or which from the mode in which it is made is calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred.

29 In the case of *Derry v Peek* (1889) 14 App Cas 337 it was held that negligence was insufficient to establish the tort of deceit. Lord Herschell summarised the principles relating to deceit as follows:

*"Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."*

30 Lord Herschell continued:

*"In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds."<sup>8</sup>*

31 Honest belief in the truth of a statement on the part of the representor will negate the necessary requirement of knowledge even if extravagant or ill-founded and however much it might objectively be taken to mean something else.<sup>9</sup>

32 I address each of the elements of the tort in turn below.

#### False representation of fact

33 The first element of the cause of action in deceit which the Plaintiffs would need to establish is that the Defendants made some false representation of fact to the Plaintiffs.<sup>10</sup> It is not

<sup>8</sup> The dictum of Lord Herschell was applied in *Bodden v Ferryman Invs. and O'Brien* [1992-3] CILR N-8.

<sup>9</sup> *Gross v Lewis Hillman* [1970] Ch 445.

enough simply to allege that there was a false representation by the Defendants. A false representation must have been either made by the Defendants to the Plaintiffs directly (or to a class to which they belong), or made to a third party with the intention that it be passed to the Plaintiffs.<sup>11</sup> If the Plaintiffs cannot show the communication of a false representation to them, this claim would fail.

Knowledge or recklessness of false representation

34 In order to establish this element of the claim, the Plaintiffs would have to plead (and ultimately prove) sufficient particularised facts from which it could be inferred that at the time they issued their audit reports, the Defendants either knew or were reckless as to whether the reports contained false representations, or had no honest belief in the truth of the reports.<sup>12</sup>

35 In this context, recklessness means the making of a representation without caring whether it is true or false. It is not simply tantamount to negligence. On the contrary, it is akin to the making of a representation without any belief in its truth. In *Derry v Peek (1889)* 14 App Cas 337 (at page 374) Lord Herschell stated:

*"...fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a false statement under such circumstances can have no real belief in the truth of what he states."*

36 In *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601 Rix LJ described this element of the cause of action in the following terms (at paragraphs 256):

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<sup>10</sup> The elements of deceit are set out in the recent decision of the English Court of Appeal in *Eco3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 at paragraph 77.

<sup>11</sup> *Renault UK Ltd v Fleetpro Technical Services Ltd* [2007] EWHC 2541 (QB) at paragraph 118.

<sup>12</sup> See *Derry v Peek (1889)* 14 App Cas 377.

*"As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross."*

- 37 The Court cited the following passage from *Armstrong v Strain* [1951] 1 TLR 856 at 871 per Devlin J with approval:

*"A man may be said to know a fact when once he has been told it and pigeon-holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty. When judges say, therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge which is necessary."*

- 38 Accordingly, there is a fundamental distinction between the mental element required to establish a claim in negligence i.e. a want of due care (however gross), and that required to establish a claim in deceit i.e. dishonesty in the sense described above. In order to determine that the Plaintiffs could succeed in a claim for deceit against the Defendants, the Court would need to be satisfied that the Defendants' alleged failures in preparing the audit reports pleaded in the Amended Complaint fall into the latter category and not the former.

Intention that false representation will be relied upon

- 39 The Plaintiffs would need to establish that the Defendants intended, when auditing the accounts of Lancelot Offshore, that the Plaintiffs would rely on their audit reports in deciding whether to invest in the fund: *Peek v Gurney* (1873) LR 6HL 377. If such intent cannot be shown, the claim will fail.<sup>13</sup> Auditors do not owe individual shareholders or investors any duty of care in negligence in relation to the content of their audit reports in the absence of some special relationship. It follows therefore in my view that, in the context of a deceit claim, it

<sup>13</sup> An intention to deceive the plaintiff will be found to exist where this element of the cause of action and the second element referred to above are present: see *Eco3 Capital Ltd* at paragraph 78 per Jackson LJ. "Intention to deceive" is not a separate element of the claim.

cannot be established that an auditor had the requisite intention to deceive a party which alleges that it has relied on the content of the auditor's report in making an investment decision simply by alleging in general terms that the auditor must have appreciated that the report would be shared with investors and shareholders and would be relied upon by them in making investment decisions. What is required is a clear factual basis from which the Court can conclude that the auditor intended the plaintiff to act upon a false representation in the audit report and thereby intended to deceive the plaintiff.

- 40 *Peek v Gurney* also clearly establishes that liability for a fraudulent misrepresentation extends only so far as the specific transaction to which that representation was directed. In that case promoters of a company issued a fraudulent prospectus. They were held not liable to persons who purchased their shares in the market, because their intention had been to influence investors to subscribe for shares, not to influence dealings in the shares after that.

#### Reliance

- 41 The final element of the cause of action is that the plaintiff has acted in reliance upon the false representation. The false representation must have substantially contributed to deceiving the plaintiff.<sup>14</sup>

#### Proving Fraud

- 42 More convincing evidence will be required to establish fraud than other types of allegation.<sup>15</sup>
- 43 Clear guidance has been provided by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England*<sup>16</sup> on the proper pleading and proof of fraud claims. Lord Millet said as follows:<sup>17</sup>

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<sup>14</sup> *Edgington v Fitzmaurice* (1885) 29 Ch 459 (CA) at 483 per Bowen LJ.

<sup>15</sup> *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, per Denning LJ at 258: "The more serious the allegation the higher the degree of probability that is required."

<sup>16</sup> Followed by the Grand Court of the Cayman Islands in *Kernohan v H.E. The Governor, Bridger, Acting Commissioner of Police and H.M. Attorney General* [2011] (2) CILR 7.

<sup>17</sup> [2003] 2 AC 1, at paragraph 184.

*"It is well established that fraud or dishonesty must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644; Davy v Garrett (1878) 7 Ch D 473, 489; Bullivant v Attorney General for Victoria [1901] AC 196; Armitage v Nurse [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."*

- 44 As a matter of Cayman Islands law, an allegation of fraud must be distinctly alleged and distinctly proved and more convincing evidence is required to establish fraud than other

types of allegation. In addition, the guidance in *The Supreme Court Practice 1999* paragraph 18/8/16 in relation to Order 18, rule 8 of the Grand Court Rules provides that "any charge of fraud or misrepresentation must be pleaded with the utmost particularity."

- 45 In *McLaughlin v American Home Assurance Co*<sup>18</sup> the Cayman Islands Grand Court applied the principle that the cogency of the evidence required to prove allegations of fraud is greater than to prove other types of allegations in civil cases. Similarly, in *Johnson v Johnson*<sup>19</sup> the Grand Court referred with approval to the longstanding common law principle that an allegation of fraud must be distinctly alleged and distinctly proved and that it is not sufficient to leave fraud to be inferred from the facts.

#### Fraudulent inducement

- 46 Fraudulent inducement, in these circumstances, would also be considered a claim for deceit as a matter of Cayman Islands law as it is one of the necessary elements of the tort of deceit. As set out above, the tort requires that a false representation be made by the representor with the intention that it be acted upon by the claimant.<sup>20</sup> The intention element requires not only that the representor actually intended that the claimant would rely on the representations but also that the representor appreciated that in the absence of unseen intervention the claimant would actually do so.<sup>21</sup>

#### **Counts 2 and 3: Negligent Misrepresentation and Professional Malpractice**

- 47 Cayman Islands law does not recognise a separate cause of action of professional malpractice. The legal elements of a claim in negligence against a professional, such as an auditor, are the same as against any other party.
- 48 I therefore deal with counts 2 and 3 in the Complaint together.
- 49 There are four requirements of the tort of negligence: the existence of a duty of care; breach of that duty by the defendant; a causal connection between the defendant's conduct and the

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<sup>18</sup> [1994-1995] CILR Note 18a.

<sup>19</sup> [1988-89] CILR 413.

<sup>20</sup> *Peek v Gurney* (1873) LR 6HL 377 at 411-413.

<sup>21</sup> *Shinhan Bank Ltd v Sea Containers Ltd* [2000] 2 Lloyd's rep 406.



damage caused; and that the particular kind of damage caused to the particular claimant was not so unforeseeable as to be too remote. It is trite law that the breach of the duty of care may result from a misrepresentation made by the defendant to the plaintiff.

- 50 The English courts have considered a number of tests that can be applied in order to determine whether the relationship between plaintiff and defendant is such that a duty of care exists. The three main contenders are the "threefold test", the "assumption of responsibility test" and the "incremental approach". In *BCCI (Overseas) Ltd v Price Waterhouse (No 2)*<sup>22</sup> Sir Brian Neill commented that it might be useful to consider a set of facts by applying all three tests, and that the tests could be considered as mutually supportive. The tests can be briefly explained as follows: the threefold test considers (1) whether it is foreseeable that if the defendant is negligent the plaintiff is likely to suffer damage; (2) whether there is a sufficiently proximate relationship between the parties; and (3) whether it is just and reasonable to impose the liability. The assumption of responsibility test was considered by the House of Lords in *Henderson v Merrett Syndicates Ltd.*<sup>23</sup> Lord Goff said:

*"...if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages in respect of economic loss which flows from the negligent performance of those services."*<sup>24</sup>

- 51 The three stage test was introduced by the House of Lords in *Caparo Industries v Dickman*<sup>25</sup> in circumstances where their Lordships felt that the assumption of responsibility test did not necessarily help to identify the key factors in any particular case. It involves consideration not only of foreseeability, and proximity, but also fairness justice and reasonableness.
- 52 The facts in *Caparo* were these. The plaintiffs, a public limited company, which had taken over F Plc, brought proceedings against the directors of F Plc, alleging fraudulent misrepresentation, and against the auditors of F Plc alleging that they were negligent in carrying out the audit and in making their report. The plaintiffs alleged that they had been

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<sup>22</sup> [1998] PNLR 564.

<sup>23</sup> [1995] 2 AC 145.

<sup>24</sup> Cited by the Cayman Islands Grand Court in *In the Matter of Omni Securities Limited (No. 3)* [1998] CILR 275.

<sup>25</sup> [1990] 2 A.C.605.

induced to purchase shares in F Plc in reliance on the accounts and that the auditors owed both existing shareholders and potential investors a duty of care in respect of the accounts. The Court of Appeal had held that although there was no relationship between an auditor and a potential investor sufficiently proximate to give rise to a duty of care at common law, there was such a relationship with individual shareholders. The auditors appealed to the House of Lords.

- 53 The auditors' appeal was successful. Some passages from the judgments are helpful. Lord Bridge of Harwich, having reviewed the authorities, observed as follows:

*"The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. ... The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any more of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an indeterminate class:" see *Ultramares Corporation v Touche* (1931) 174 NE 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement."*

- 54 Lord Bridge went on to say:

*"These considerations amply justify the conclusion that auditors of a public company's accounts owe no duty of care to members of the public at large who rely upon the accounts in deciding to buy shares in the company. If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company. A claim that such a duty was owed by auditors to a bank lending to a company was emphatically and convincingly rejected by Millett J in Al Saudi Banque v Clarke Pixley [1990] Ch 313. The only support for an unlimited duty of care owed by auditors for the accuracy of their accounts to all who may foreseeably rely on them is to be found in some jurisdictions in the United States of America where there are striking differences in the law in different states. In this jurisdiction I have no doubt that the creation of such an unlimited duty would be a legislative step which it would be for Parliament, not the courts, to take."*

- 55 Finally, having reviewed an auditor's statutory duty (under sections 236, 237 and 384 of the English Companies Act 1985, which have since been repealed and replaced by sections 495, 498, 485 and 489 of the Companies Act 2006) to investigate and form an opinion on the company's records and report to the members, Lord Bridge said:

*"No doubt these provisions establish a relationship between the auditors and the shareholders of a company on which the shareholder is entitled to rely for the protection of his interest. But the crucial question concerns the extent of the shareholder's interest which the auditor has a duty to protect. The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of*

*the company itself and any loss suffered by the shareholders, e.g. by the negligent failure of the auditor to discover and expose a misappropriation of funds by a director of the company, will be recouped by a claim against the auditors in the name of the company, not by individual shareholders. I find it difficult to visualise a situation arising in the real world in which the individual shareholder could claim to have sustained a loss in respect of his existing shareholding referable to the negligence of the auditor which could not be recouped by the company."*

In other words, we are back to the issue of reflective loss.

- 56 There are also some relevant and helpful passages in the speech of Lord Oliver of Aylmerton. At page 638 of the report, he says as follows:

*"What can be deduced from the Hedley Byrne<sup>26</sup> case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent enquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions."*

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<sup>26</sup> A case of negligent misrepresentation, and the first occasion on which the courts extended the tort of negligence to cover pure economic loss not resulting from physical damage.

57 Lord Oliver quoted with approval the following passage from Richmond P's judgment in the New Zealand decision in *Scott Group Limited v McFarlane*:<sup>27</sup>

*"The question in any given case is whether the nature of the relationship is such that one party can fairly be held to have assumed a responsibility to the other as regards the reliability of the advice or information. I do not think that such a relationship should be found to exist unless, at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction. I would especially emphasise that to my mind it does not seem reasonable to attribute an assumption of responsibility unless the maker of the statement ought in all the circumstances, both in preparing himself for what he said, and in saying it, to have directed his mind, and to have been able to direct his mind, to some particular and specific purpose for which he was aware that his advice or information would be relied on. In many situations that purpose will be obvious. But the annual accounts of a company can be relied on in all sorts of ways and for many purposes. It would be going too far to treat accountants as assuming a responsibility towards all persons dealing with the company or its members, in reliance on to some greater or lesser degree on the accuracy of the accounts, merely because it was reasonably foreseeable, in a general way, that a transaction of the kind in which the plaintiff happened to become involved might indeed take place. The relationship between the parties would, I think, be too general and not sufficiently "special" to come within the principles underlying the decision in Hedley Byrne. As I have said, I believe it to be essential to the existence of a "special relationship" that the maker of the statement was or should have been aware that his advice was required for use in a specific type of contemplated transaction. This requirement has not always required emphasis in the course of judicial discussion as to the nature of a special relationship. Probably this is because in most cases the purpose for which the*

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<sup>27</sup> [1978] NZLR 553.

*information was required was, on the facts, quite obvious. But certainly this particular point was made very clear indeed in Denning LJ's judgment in Candler v Crane, Christmas & Co. I would think that it must almost inevitably follow, once the maker of the statement is aware of a specific purpose for which his information will be used, that he will also have in direct contemplation a specific person or class of persons, even though unidentified by name."*

58 Lord Oliver's approval of the above passage was expressed in the following terms:

*"For my part, however, I can see nothing in the statutory duties of a company's auditor to suggest that they were intended by Parliament to protect the interests of investors in the market and I see no reason in policy or in principle why it should be either desirable or appropriate that the ambit of the special relationship required to give rise to liability in cases such as the present should be extended beyond those limits which are deducible from the cases of Hedley Byrne and Smith v Eric S Bush. Those limits appear to me to be correctly and admirably stated in the passages from the judgment of Richmond P in the Scott Group case to which I have already referred. In particular, I see no reason why any special relationship should be held to arise simply from the circumstances that the affairs of the company are such as to render it susceptible to the attention of predators in the market who may be interested in acquiring all or the majority of the shares rather than merely a parcel of shares by way of addition to a portfolio."*

59 *Caparo Industries* has been followed by the Cayman Islands Grand Court in *Banque Commerciale (Cayman) Limited (In Liquidation) v Coopers & Lybrand and Coopers & Lybrand International* [1990-91] CILR 1, and in *Re Omni Securities* (no. 3) [1998] CILR 275.

60 A more recent review of the position of auditors is to be found in the decision of Moore-Bick LJ in *Man Nutzfahrzeuge Ag & Ors v Freightliner Ltd.*<sup>28</sup> The following passages from the judgment are informative:

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<sup>28</sup> [2005] EWHC 2347.

*"Auditors are appointed by a company to investigate and form an opinion on the adequacy of its accounting records and returns and to report to the shareholders whether in their opinion the accounts give a true and fair view of its financial position: see per Lord Bingham LJ in Caparo Industries Plc v Dickman [1989] QB 653, 680-681 cited with approval by Lord Bridge at [1990] 2 AC 605, 625. In the words of Lord Oliver in the same case:*

*"It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order, first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing (by, for instance, declaring dividends out of capital) and, secondly, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinize the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided."*

*The auditors' primary duty, therefore, is owed to the company pursuant to the contract under which they are engaged, but it is now accepted that they also owe a duty of care under the general law to the shareholders as a body who can be expected to exercise their rights and powers in a general meeting on the basis of the audited accounts: see Caparo v Dickman per Lord Bridge at page 626C-E, Lord Oliver at page 654C and Lord Jauncey at page 662A-B. ... The duty of care owed by auditors to the shareholders is unusual in a number of respects. It is not owed to shareholders as individuals, but to the shareholders as a body, and is a duty which has as its object the protection of their interest in the proper management of the company. The damage from which the auditors must take care to protect the shareholders is a diminution in the value of their interest in the company, that is, in the value of their shares, but as Lord Bridge pointed out at page 626D-E, the interest of the shareholders in the proper management of the company is indistinguishable from the interest of the company itself and therefore any loss falling within the scope of this duty that is suffered by the shareholders will be recouped by a*

*claim against the auditors in the name of the company. It follows that neither individual shareholders, nor for that matter the shareholders as a body, can bring an action in their own names to recover that loss. This was one of the points made by the House of Lords in Johnson v Gore Wood & Co [2002] 2 AC 1 and may explain why there appears to be no reported case in which shareholders individually or as a body have succeeded in recovering damages for a breach of this duty."*

- 61 In *Barings plc (In liquidation) v Coopers & Lybrand* [2002] 2 BCLC 364, in a claim against a firm of auditors in relation to fraudulent trading activities, the Court described the applicable legal principles as follows:

*"...[I]n the case of a claim in tort against an auditor the claimant must plead and prove, in addition to a relationship between the auditor and the claimant capable of giving rise to a duty of care, and that the loss flowing from the auditor's breach of that duty was caused by the auditor's negligent report, and was foreseeable, that, at the time he undertook those services, the auditor had in contemplation that they would be relied on by the claimant for the purpose of a particular transaction or class of transaction that was likely to result and that the claimant, in fact, relied on the auditor's report when embarking on such transaction which resulted in the loss for which compensation is claimed."*

- 62 In *Anthony v Wright* [1995] BCLC 236, the Court stated:

*"The law is well established that auditors do not, in respect of their audits, owe a duty of care to anyone other than the company itself save in exceptional circumstances where a special duty has been treated as assumed to a third party. Thus in principle no duty is owed to shareholders or prospective shareholders in respect of investment decisions made regarding the purchase or sale of shares in the company, nor to existing or future creditors who may rely on the audited accounts and leaving debts outstanding or making loans to the company. A special relationship is required and, in particular, intention, actual or inferred on the part of the auditors, that the third party shall rely and*



*reliance by the third party on the audit before a claim in negligence against the auditor can be maintained."*

- 63 The mere fact that a party is an existing or prospective shareholder in a company is not sufficient to give rise to such a special relationship. As Richmond P stated in the *Scott Group Limited v McFarlane* decision referred to at paragraph [52] above:

*"...the annual accounts of a company can be relied on in all sorts of ways and for many purposes. It would be going too far to treat accountants as assuming a responsibility towards all persons dealing with the company or its members, in reliance to some greater or lesser degree on the accuracy of the accounts, merely because it is reasonably foreseeable, in a general way, that a transaction of the kind which the plaintiff happened to become involved might take place."*

- 64 In order to establish a special relationship, it is necessary to show that the auditors knew and intended, at the time of issuing their audit report, that the report would be communicated to and relied upon by the plaintiff either individually or as a member of a defined class for a particular purpose in connection with the particular transaction(s) alleged to have caused the plaintiff loss.<sup>29</sup>

- 65 It is instructive to look at a decision of the House of Lords in *Moore Stephens (a firm) v Stone & Rolls Limited (in liquidation)*.<sup>30</sup> This was a strike out application, which was principally concerned with the doctrine of *ex turpi causa* (illegality). Two of the five Law Lords dissented, however the following passages from the judgment of Lord Phillips of Worth Matravers illustrate and confirm the principles I have set out above:

*"The duties of an auditor are founded in contract and the extent of the duties undertaken by contract must be interpreted in the light of the relevant statutory provisions and the relevant accounting standards. The duties are duties of reasonable care in carrying out the audit of the company's accounts. They are owed to the company in the interests of its shareholders. No duty is owed*

<sup>29</sup> *Caparo Industries v Dickman* [1990] 2 AC 605 at page 638 per Lord Bridge; *Man Nutzfahrzeuge v Freightliner Ltd* [2005] EWHC 2347 per Moore-Bick LJ at paragraph 339.

<sup>30</sup> [2009] UKHL 39.

*directly to the individual shareholders. This is because the shareholders' interests are protected by the duty owed to the company. ... The exercise of an auditor's duties to a company will, in some situations, have the effect of preserving the assets of the company. Such preservation will, whenever there is a risk that the company's assets may prove inadequate to meet its liabilities, protect not merely the interests of the shareholders but those of the creditors. It is arguable that the scope of the duty undertaken by the auditors of a company should extend to protecting the interest that the creditors have in the preservation of the assets of the company. So to hold would involve departing from or at least extending, the reasoning of this House in Caparo. Such an extension would not, however, assist S&R in this case. To recover damages in this case S&R would have to establish that the scope of the duty undertaken by [the auditors] extended to taking reasonable care to ensure that the company was not used as a vehicle for fraud and that this duty was owed for the benefit of those that the company might defraud. I see no prospect that such a duty could be established."*

- 66 The recent case of *Jetivia SA v Bilta (UK) Limited*<sup>31</sup> has, to some extent, cast doubt on the decision in *Stone & Rolls*, however *Jetivia v Bilta* was concerned with the liability of the directors of a company in a fraudulent transaction and whether they could attribute their own knowledge of wrongdoing to their own company in order to found a reliance on the *ex turpi causa* defence against the company. *Stone & Rolls* is still relevant and of value in present circumstances as it relates to the question of auditors' negligence.
- 67 It will be apparent from the passages quoted above that in general only the company will have a claim against its auditors. That claim is likely to lie primarily in contract, under the terms of the auditors' engagement by the company, but will also lie in tort, pursuant to the duty of care owed by the auditors to the company. The shareholders themselves will generally be unable to sue because the loss they suffer will be merely reflective of that suffered by the company. Moreover, even if the auditors could reasonably foresee that reliance might be placed on the accounts by others, that in itself is not sufficient to give rise to a duty of care. What will be required is a special relationship (in other words knowledge

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<sup>31</sup> [2015] UKSC 23.

on the part of the auditors that the accounts would be relied on for the specific transaction for which they were in fact relied on<sup>32</sup>), a loss that is not merely reflective of the company's, and circumstances such that it would be fair, just and reasonable for a duty of care to be imposed.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

SWORN to at George Town, )  
Cayman Islands )  
this 24th day of February 2017 )  
)

  
\_\_\_\_\_  
ARISTOTELIS ALEXANDROS GALATOPOULOS

BEFORE ME:

  
\_\_\_\_\_

Chandra Solomon  
Notary Public in and for the Cayman Islands  
(My commission expires on 31st January 2018)



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See the dicta of Moore-Bick LJ in *Man Nutzfahrzeuge & Ors v Freightliner Ltd* [2005] EWHC 2347: "In my view Mr Fenwick was right in saying that when a claim is made by a third party against a company's auditors based on an alleged duty of care in relation to the statutory accounts, close attention must be paid to the particular statement on which the claimant seeks to rely, the circumstances in which and purpose for which that statement was made and the type of loss which the claimant is seeking to recover. The auditors will only be held to have incurred such a duty if it can be shown that they knew and intended that their statement as to the company's accounts would be communicated to and relied on by a particular person or class of persons for a particular purpose in connection with a particular transaction."

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

RS INVESTMENTS LIMITED, ET AL.,

Plaintiffs,

v.

Case No.: 2016LO11459

RSM US LLP, RSM CAYMAN LTD, AND  
SIMON LESSER,

Defendants.

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THIRD AFFIDAVIT OF ARISTOTELIS ALEXANDROS GALATOPOULOS

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I, ARISTOTELIS ALEXANDROS GALATOPOULOS, of Ugland House, South Church Street, George Town, Grand Cayman, Cayman Islands MAKE OATH and SAY as follows:

- 1 I am the same Aristotelis Alexandros Galatopoulos who has sworn two previous affidavits in these proceedings dated 24 February 2017 and 26 April 2017. I am a Partner and the Head of the Litigation Department of the Cayman Islands office of Maples and Calder, attorneys-at-law practising at the above address.
- 2 I have been requested by the law firm Williams & Connolly LLP, which represents Defendants RSM US LLP and Simon Lesser, to review the affidavit of William Helfrecht dated 12 April 2017 filed in these proceedings on behalf of the Plaintiffs and to comment on Mr Helfrecht's affidavit from a Cayman Islands law perspective.
- 3 I note the statement at paragraph 12 of Mr Helfrecht's affidavit that "*...the courts will be flexible in applying limits to the reflective loss doctrine so long as a limitation is consistent with the guiding principles and policy concerns...*". I agree with Mr Helfrecht that, like all common law principles, the reflective loss doctrine may evolve over time and its boundaries may be developed by the courts. Nevertheless, in my view, the current boundaries of the principle are clear, and have been considered and applied by the English and Cayman

Islands courts on numerous occasions since the House of Lords decision in *Johnson v Gore Wood* [2002] 2 AC 1, which is the leading authority on reflective loss.<sup>1</sup>

- 4 Insofar as Mr Helfrecht is suggesting that there is some flexibility in the application of the doctrine, I note in Lord Millett's speech in *Johnson v Gore Wood* (at p.62) he said:

*"The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the £ diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed."*  
[emphasis added]

- 5 This passage has been cited with approval in a number of subsequent decisions including *Bank Mellat v HM Treasury (No 3)* [2017] 2 All ER 139, *Gardner v Parker* [2003] All ER (D) 249 and *Giles v Rhind* [2003] 1 BCLC 1.

- 6 In *Day v Cook* [2002] 1 BCLC 1, before the passage in the judgment of Arden LJ to which Mr Helfrecht refers at paragraph 6 of his affidavit, Her Ladyship cited the passage above from Lord Millett's speech and went on to state (at [38] to [40]):

*"It will thus be seen from the speeches in Johnson v Gore Wood & Co ... that where there is a breach of duty to both the shareholder and the company and the loss which*

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<sup>1</sup> Including in cases where the court found that there was no risk of the shareholder and the company obtaining recovery in respect of the same loss because of a successful defence to the company's claims, as I discuss at paragraphs 20 to 25 of my first affidavit.

*the shareholder suffers is merely a reflection of the company's loss there is now a clear rule that the shareholder cannot recover. ...*

*Accordingly the court has no discretion. The claim cannot be entertained.*

*...Thus the position in English law differs from the position (as I understand it to be) in the majority of states in the USA, where the courts exercise limited discretion to allow direct recovery by shareholders of closely-held corporations..."*

7 I also note Mr Helfrecht's statement at paragraph 13 of his affidavit that the question of whether the reflective loss principle applies requires a "*sufficiently developed factual matrix*". To the extent that Mr Helfrecht is suggesting that the court cannot or should not consider the application of the reflective loss principle at a very early stage of the proceedings, I do not agree.

8 There are two main ways in which a Cayman Islands court has the power to dispose of a claim at an early stage:<sup>2</sup>

8.1 The court may strike out a claim and enter judgment for the defendant on a number of grounds, including that the claim discloses no reasonable cause of action.<sup>3</sup> Such an application is normally made at an early stage of the proceedings, and commonly before completion of the exchange of pleadings between the parties.<sup>4</sup>

8.2 The court may give judgment against a plaintiff or a defendant without a full trial when that party has no reasonable prospect of success,<sup>5</sup> or in the case of an application by a defendant when the plaintiff has no prospect of recovering more than nominal damages.<sup>6</sup> Again, such an application is normally made at an early stage of the proceedings, and commonly before completion of the exchange of pleadings.

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<sup>2</sup> Although these powers can be used at any stage of the proceedings.

<sup>3</sup> *Grand Court Rules*, Order 18, rule 19(1)(a). The English court has a similar power pursuant to the *English Civil Procedure Rules*, Part 3, rule 3.4(2)(a).

<sup>4</sup> Which in commercial litigation in the Cayman Islands is generally the first stage of the proceedings and takes place before document discovery and the exchange of evidence.

<sup>5</sup> *MBI Dive Corporation Incorporated v Condoco Grand Cayman Resort Limited* [2004] CILR 254.

<sup>6</sup> *Grand Court Rules*, Order 14, rule 1(1) and rule 12(1). The English court has a similar power pursuant to the *English Civil Procedure Rules*, Part 24, rule 24.2.

9 In *Giles v Rhind* [2003] 1 BCLC 1<sup>7</sup> it was acknowledged that an early disposition of a claim can occur on the basis of reflective loss. The Court of Appeal approved the following summary of the principles as formulated by the first instance Judge in that case<sup>8</sup> (and cited in a number of subsequent decisions including the first instance decision in *Gardner v Parker* [2003] All ER (D) 346 and *Webster v Sanderson* [2009] 2 BCLC 542):

"...the relevant principles are... as follows...:

(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company – i.e. a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer – is not recoverable by the shareholder save in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer;

(2) where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending heads of claim;

..." [emphasis added]

10 Below are examples of decisions of the English courts where a claim has been disposed of or otherwise found to be unsustainable at a preliminary stage of the proceedings due to the application of the rule against reflective loss include:

10.1 *Barclay Pharmaceuticals Ltd and others v Waypharm LP and others* [2014] 2 All ER (Comm) 82, where the claim was struck out.

10.2 *Rawnsley and another v Weatherall Green & Smith North Ltd* [2010] 1 BCLC 658, where the claim was struck out.

10.3 *Gaetano Limited v Obertor Limited* [2009] EWHC 2653, where the claim was struck out.

10.4 *Kazakhstan Kagazy plc and others v Zhunus and others* [2013] All ER (D) 238, where the court held there was no good arguable case for a claim to proceed based on the

<sup>7</sup> Referred to at paragraph 22 of my First Affidavit and at paragraphs 8 to 12 of Mr Helfrecht's affidavit.

<sup>8</sup> *Giles v Rhind* [2001] 2 BCLC 582

rule against reflective loss, in the context of an application to discharge a freezing injunction.

- 11 Therefore, at an early stage of the proceedings the court can, if it is satisfied on the material then before it<sup>9</sup> that the claim is barred by the rule against reflective loss, strike out the claim without the matter proceeding to trial.
- 12 Finally I note Mr Helfrecht's comments on auditor liability to shareholders for negligent misstatement.<sup>10</sup> I generally agree with Mr Helfrecht's summary of the law, and in particular I agree with the summary at paragraphs 26 (a), (b) and (c). I also agree with Mr Helfrecht's statement at paragraph 26(d) that "*the requirement for a special relationship is aimed at removing the spectre of indeterminate liability*". However, I am not aware of the approach of the Canadian court in the decision of *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2016 ONCA 922 referred to by Mr Helfrecht having yet been adopted or approved by the Cayman Islands or English courts.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

SWORN to at George Town, )  
Cayman Islands )  
this 8<sup>th</sup> day of May 2017 )  
)

  
\_\_\_\_\_  
ARISTOTELIS ALEXANDROS GALATOPOULOS

BEFORE ME:

  
\_\_\_\_\_  
Chandra Solomon  
Notary Public in and for the Cayman Islands  
(My commission expires on 31st January 2019)

<sup>9</sup> Which, in a case where the defendant applies to strike out the claim before filing a Defence, would be only the plaintiff's Statement of Claim.

<sup>10</sup> At paragraphs 16 to 25 of the affidavit.



**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

**MVC CAPITAL, INC.,**

**Plaintiff,**

**-against-**

**RSM US LLP,**

**Defendant.**

**Index No. 69544/2016**

**DEFENDANT RSM US LLP'S MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION TO DISMISS**

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March 21, 2017

**TABLE OF CONTENTS**

	<b>Page</b>
<b>PRELIMINARY STATEMENT .....</b>	<b>1</b>
<b>STATEMENT OF FACTS.....</b>	<b>1</b>
<b>ARGUMENT.....</b>	<b>4</b>
<b>I. NEW YORK LAW REGARDING ACCOUNTANT LIABILITY BARS MVC’S CLAIM AGAINST RSM. ....</b>	<b>4</b>
<b>II. THE ALLEGATIONS IN MVC’S COMPLAINT FAIL TO MEET THE HIGH THRESHOLD FOR THIRD PARTY CLAIMS AGAINST AN ACCOUNTANT.....</b>	<b>8</b>
<b>A. Plaintiff has Failed to Plead that RSM was Aware that its Financial Reports Would be Used As a Basis for MVC’s Lending Decision. ....</b>	<b>8</b>
<b>B. Plaintiff has Failed to Plead that RSM was Aware that MVC Would Rely on its Financial Reports and Intended for MVC to Do So.....</b>	<b>10</b>
<b>C. Plaintiff has Failed to Plead that RSM Acted In a Way Demonstrating RSM’s Awareness of MVC’s Reliance on the Financial Reports As a Basis for MVC’s Decision to Lend to G3K.....</b>	<b>11</b>
<b>CONCLUSION .....</b>	<b>13</b>

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Breytman v. Olinville Realty, LLC,</i> 5 A.D.3d 703 (2d Dep’t 2008).....	4, 9
<i>Credit Alliance Corp. v. Arthur Andersen &amp; Co.,</i> 65 N.Y.2d 536 (1985), amended, 66 N.Y.2d 812 (1985).....	passim
<i>CRT Invs., Ltd. v. BDO Seidman, LLP,</i> 85 A.D.3d 470 (1st Dep’t 2011) .....	12
<i>Jacobs v. Macy’s E., Inc.,</i> 262 A.D.2d 607 (2d Dep’t 1999).....	4
<i>LaSalle Nat’l Bank v. Ernst &amp; Young LLP,</i> 285 A.D.3d 101 (1st Dep’t 2001) .....	11, 12
<i>Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson,</i> 73 N.Y.2d 417 (1989).....	6
<i>Parrott v. Coopers &amp; Lybrand, LLP,</i> 263 A.D.2d 316 (1st Dep’t 2000), aff’d, 95 N.Y.2d 479 (2000) .....	11, 12
<i>Sec. Pac. Bus. Credit, Inc. v. Peat Marwick Main &amp; Co.,</i> 586 N.Y.2d 695 (1992).....	6, 7
<i>Signature Bank v. Holtz Rubenstein Reminick, LLP,</i> 109 A.D.3d 465 (2d Dep’t 2013).....	passim
<i>Signature Bank v. Holtz Rubenstein Reminick,</i> Index No. 15936/2011, 2012 WL 11980647 (Sup. Ct. Nassau Co. Aug. 14, 2012).....	7, 12
<i>State St. Trust Co. v. Ernst,</i> 278 N.Y. 104 (1938).....	9
<i>Sykes v. RFD Third Ave. 1 Assocs., LLC,</i> 15 N.Y.3d 370 (2010).....	6, 10
<i>Ultramares Corp. v. Touche,</i> 255 N.Y. 170 (1931).....	passim
<i>Westpac Banking Corp. v. Deschamps,</i> 66 N.Y.2d 16 (1985).....	passim

**STATUTES**

CPLR § 3211(a)(1) ..... 1  
CPLR § 3211(a)(7) ..... 1

**OTHER AUTHORITIES**

76 N.Y. JUR. 2D *Malpractice* § 10 ..... 5  
16 AM. JUR. 2D *Proof of Facts* § 641 ..... 5  
American Institute of CPAs, *Guide to Financial Statement Services: Compilation,  
Review and Audit* ..... 8  
Kenneth Davis, *Accounts' Liability for Negligently Certifying Financial Reports:  
The Legacy of Ultramares v. Touche*, 61 N.Y. ST. B.J. 30 (1992) ..... 5, 6

Defendant RSM US LLP (“Defendant” or “RSM”) respectfully submits this memorandum of law in support of its motion for an order dismissing the complaint with prejudice pursuant to CPLR § 3211(a)(7) for failure to state a claim, and pursuant to CPLR § 3211(a)(1) on the basis of documentary evidence, on the grounds that Plaintiff MVC Capital, Inc. (“Plaintiff” or “MVC”) fails to properly plead the elements of a claim for negligent misrepresentation against an auditor or accountant.

### **PRELIMINARY STATEMENT**

The Plaintiff in this case is attempting to recover its loan losses from a party with whom it had no relationship: its borrower’s auditor, RSM. Plaintiff lent money to former advertising and display company, G3K Displays, Inc. (formerly known as Projuban, LLC) (“G3K”). Unbeknownst to the Plaintiff and RSM, G3K and its principals perpetrated an extensive fraud, fooling a variety of parties into believing that it was a successful, financially secure company, when the company was, in fact, essentially worthless. Three G3K principals, a former G3K employee and a former G3K customer’s employee each admitted to their role in the fraud, and are or were incarcerated. The responsibility for this criminal fraud lies with the individuals who perpetrated it. MVC cannot attempt to pin blame on fellow victim, RSM, a party with whom MVC had no contractual relationship.

New York is among the American jurisdictions which require third parties seeking to assert claims against auditors to meet the high standard of “near privity” with the auditor. MVC fails to meet this well-established standard under New York law.

### **STATEMENT OF FACTS**

Defendant RSM US LLP, formerly known as McGladrey LLP (“RSM”), is a national audit, tax, and consulting services firm. (Affirmation of Ian Jay, dated March 21, 2017 (“Jay Aff.”), Exhibit A) (the “Complaint”) ¶ 13. Plaintiff MVC is a publicly-traded business

development company, which invests in small and mid-market companies through the provision of equity and debt investment capital. Complaint ¶ 12. G3K was a company which claimed to be a designer, installer, and marketer of retail product displays for large chain retailers. Complaint ¶ 17. Prior to its dissolution, G3K was owned by three individuals, Steven Kaitz, Latchmee Mahato, and Jonathan Wheeler. *Id.*

In 2013, G3K -- not MVC -- hired RSM to report on G3K's financial statements. Complaint ¶ 20. The audit engagement letter was signed by G3K and RSM and MVC is not referenced anywhere in the letter. Jay Aff., Exhibit B. The engagement letter specifically states that the final audit report will be directed to the members of G3K's operating company, not to MVC, *id.* at 5, and requires G3K to obtain permission before utilizing the report as part of a securities offering. *Id.* at 3.

The Complaint cites only limited, sporadic contact with MVC by RSM. The first communication cited is a December 13, 2013 email from the CFO of G3K to a representative of RSM, copying two MVC employees, advising RSM that "it looks like MVC will be requiring McGladrey to perform a review of some kind for 9/30/13" and proposing a conference call. Complaint ¶ 21. A review is a very different type of engagement than the audit ultimately performed and the reference to the potential "review" being "as of 9/30/13" indicates that G3K and MVC were contemplating work on an interim financial period, not an audit as of fiscal year-end, which is the engagement that RSM actually performed. Additionally, the Complaint fails to allege whether the conference call referenced in the email actually occurred, and if so, who participated and what was discussed.

The only other communication cited in the Complaint other than unspecified "oral and written" communications (Complaint ¶ 25), is a March 6, 2014 email from RSM transmitting a

draft of the audited financial statements, copying a group of people including one MVC employee. The email appears to be directed to the audit firm of BDO, the firm actually retained directly by MVC, and reads as follows:

Dear Michael [Kuczborski, of BDO],

I have attached the 2012 and 2013 audit draft reports. As mentioned this morning, final release final [*sic*] is pending a couple of administrative items which we hope to wrap up at the beginning of the next week. We do not anticipate any changes to the numbers as presented in the drafts attached.

*We will be able to accommodate the request to review the 2012 and 2013 audit workpapers locally in our Blue Bell, PA office. Please just provide me with a tentative date so that I can start coordinating. I will also send over the required access letter which we will need to be executed by BDO prior to allowing the workpapers to be reviewed.*

Please don't hesitate to reach out if you need anything else.

Jay Aff., Exhibit C (emphasis supplied). This email indicates that MVC was not content to rely on RSM's audit opinion, but rather wanted its own independent review of the sufficiency of the financial statement information and underlying evidential matter, performed by its own directly contracted audit firm.

RSM provided its final audit report only to its client, G3K. Complaint ¶ 26. The Plaintiff alleges that G3K then provided the report to MVC, but makes no assertion that RSM was included in that communication or was aware it occurred. Complaint ¶ 26.

Shortly after MVC made its loan, the magnitude of the fraud committed by the G3K principals became clear and a federal criminal investigation ensued, culminating in plea bargains and jail time. Each of the G3K principals was indicted, pled guilty to criminal fraud charges, and sentenced to significant federal prison terms. Complaint ¶ 58.<sup>1</sup> In announcing the sentencing,

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<sup>1</sup> Steven Kaitz was sentenced to 40 months in prison; Latchmee Mahato was sentenced to 24 months in prison; and Jonathan Wheeler was sentenced to 21 months in prison. Complaint ¶ 58. In addition, Zachary Kaitz (a graphic designer employed by G3K who created the false documentation of nonexistent receivables) and Kathleen Smith (a

federal prosecutors specifically noted that the G3K principals “took elaborate steps to [...] prevent G3K’s lenders *and outside auditors* from discovering the fraud.” United States Department of Justice, United States Attorney’s Office for the Southern District of New York, *Four Executives Sentenced In Manhattan Federal Court for Their Roles In Multimillion-Dollar Corporate Accounting Fraud* (Sept. 9, 2015) (emphasis supplied).<sup>2</sup>

### ARGUMENT

In reviewing this motion to dismiss, this Court must accept the facts alleged in the Complaint to be true and accord the Plaintiff the benefit of favorable inferences. *Jacobs v. Macy’s E., Inc.*, 262 A.D.2d 607, 608 (2d Dep’t 1999). However, the Court need not accept as true bare legal conclusions or allegations of fact that are not credible. *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 (2d Dep’t 2008).

#### **I. NEW YORK LAW REGARDING ACCOUNTANT LIABILITY BARS MVC’S CLAIM AGAINST RSM.**

For nearly a century, the law in New York has been clear and explicit: in actions seeking to hold accountants liable for alleged misstatements, the only parties which may pursue claims are those who actually engaged the accountant, and third-parties meeting the high standard of being in near-privy with the auditor. New York courts have recognized, time and again, that permitting third parties who may have seen an audit report to maintain claims against the accountant who prepare it would effectively cripple the auditors’ ability to do business in New York, and the clients’ ability to obtain high-quality audit services. This policy is effectively designed to ensure that only in certain, very specific situations can a third party meet this standard. A review of the precedential cases in this area shows that MVC does not do so here.

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former employee of Foot Locker who participated in a kickback scheme involving the false confirmation of nonexistent receivables) were each sentenced to four months in prison.

<sup>2</sup> Available at <https://www.justice.gov/usao-sdny/pr/four-executives-sentenced-manhattan-federal-court-their-roles-multimillion-dollar>.



New York's strict near-privity policy has its origins in the landmark Court of Appeals decision, *Ultramares Corp. v. Touche*, 255 N.Y. 170 (1931). Writing for the Court, Chief Judge Cardozo commented on the "assault upon the citadel of privity", and searched for the "antidote . . . to the overuse of the doctrine of liability for negligent misstatement." *Id.* at 185. Judge Cardozo's "antidote" was to limit auditor liability for negligent misrepresentation to those parties either in privity of contract with the auditor or those with such a close relationship with the auditor as to approach a relationship equivalent to privity. Otherwise, Chief Judge Cardozo feared auditor liability for an "indeterminate amount" to an "indeterminate class" for failure to uncover fraudulent behavior masked by the audit client's deceptive practices. *Id.* at 179. That is to say, without a clear limitation on potential liability, an auditor might be held answerable to anyone who might happen to view an audit report or audited financial statements and later claim reliance, an untenable situation which would expose an accountant to limitless liability and make the practice of accounting in New York a practical impossibility.

In the years since *Ultramares*, which has been cited hundreds of times by the courts of this state, this principle has become the foundation of New York law regarding accountant and auditor liability. Numerous authorities have commented on the strict nature of New York's policy. *See, e.g.*, 76 N.Y. JUR. 2D *Malpractice* § 10 (noting that, under *Ultramares*, "failure to allege a relationship between the parties even approaching one of the practical equivalent of privity prevents recovery under *any* negligence theory") (emphasis supplied); 16 AM. JUR. 2D *Proof of Facts* § 641 (noting that under *Ultramares*, New York law does not recognize a cause of action against an accountant, even for gross negligence, unless the claim rises to the level of actual fraud, which MVC does not allege here); Kenneth Davis, *Accountants' Liability for Negligently Certifying Financial Reports: The Legacy of Ultramares v. Touche*, 64 N.Y. ST. B.J.

30 (1992) (noting that New York’s standard for accountant liability is particularly strict in comparison to those of other jurisdictions).

Courts in New York, including the Court of Appeals, have consistently affirmed, and indeed expanded, the strong limitation on accountant liability articulated in *Ultramares*. See, e.g., *Sec. Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co.*, 586 N.Y.2d 695, 703 (1992) (applying “sufficiently approaching privity” standard); *Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424-25 (1989) (extending *Ultramares* rule to actions against architectural firm, and noting that the “imposition of such broad liability [for non-contractual parties] is unwise as a matter of policy”); *Sykes v. RFD Third Ave. 1 Assocs., LLC*, 15 N.Y.3d 370, 372-73 (2010) (extending *Ultramares* rule to actions against engineering firm).

As the policy has crystalized over the decades, a clear test has emerged. Today, under New York law, a party seeking to assert a claim of negligent misrepresentation against an accountant for statements made in a financial report, where that party is not a client of the accountant, must plead three discrete elements. The party must demonstrate that (i) the accountant was aware that the financial report would be used for a particular purpose; (ii) the accountant must have intended that the financial report would be used by a specific, known party or parties; and (iii) there was affirmative conduct on the part of the accountant, linking them to that party or parties and demonstrating the accountant’s awareness that the party or parties would be relying on the financial statements. *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551, *amended*, 66 N.Y.2d 812 (1985). The third prong, in particular, is the lynchpin protecting what the Court of Appeals has described as the “citadel of privity” protecting auditors from liability to entities which are neither signatories to the engagement agreement nor mentioned therein. *Ultramares*, 255 N.Y. at 445 (1931). Taken together, the complaint must

allege that the totality of a plaintiff's relationship with the accountant was such that it approaches contractual privity between the plaintiff and the accountant. *Sec. Pac. Bus. Credit*, 79 N.Y.2d at 702-703. Here, MVC has failed to properly plead even a single element of the *Credit Alliance* test, and its claim against RSM for negligent misrepresentation must necessarily be dismissed.

This strong policy against holding auditors liable to third parties was demonstrated in a recent case with facts remarkably similar to those alleged by MVC. Indeed, almost identical allegations were rejected by the Second Department in *Signature Bank v. Holtz Rubenstein Reminick, LLP*, 109 A.D.3d 465 (2d Dep't 2013).

*Signature Bank* was an action brought by a plaintiff who had lent money to a borrower, allegedly based on audited financial statements; the borrower declared bankruptcy shortly after receiving the loan proceeds, and the lender brought suit against the auditor. The trial court initially held that the lender had adequately satisfied the third prong of *Credit Alliance*, based on the allegation that the auditor "knew" that the lender was relying on the audit reports as part of its lending decision. Knowledge and linking conduct were present, according to the trial court, because (1) an executive affiliated with the borrower supposedly informed the auditor of this, and (2) the lender had "several conversations" with the auditor concerning the borrower's financial viability. *Signature Bank v. Holtz Rubenstein Reminick LLP*, Index No. 15936/2011, 2012 WL 11980647, at \*2 (Sup. Ct. Nassau Co. Aug. 14, 2012). Notably, the Second Department reversed, holding that the lender's allegations referred to by the trial court (which are almost identical to those made by MVC in the instant matter) failed to satisfy the *Credit Alliance* test, and directed the trial court to dismiss the negligent misrepresentation claim. *Signature Bank*, 109 A.D.3d at 466-67; *see also, Westpac Banking Corp. v. Deschamps*, 66 N.Y.2d 16 (1985) (holding that an auditor may not be liable to a lender even where the auditor

knew that its reports would be used by potential lenders and that plaintiff was one of the likely potential lenders). As discussed below, the same outcome is required here.

**II. THE ALLEGATIONS IN MVC’S COMPLAINT FAIL TO MEET THE HIGH THRESHOLD FOR THIRD PARTY CLAIMS AGAINST AN ACCOUNTANT.**

**A. Plaintiff has Failed to Plead that RSM was Aware that its Financial Reports Would be Used As a Basis for MVC’s Lending Decision.**

The first prong of the *Credit Alliance* test requires the complaint to plead that the report in question was prepared with a particular purpose in mind. *Credit Alliance*, 65 N.Y.2d at 551. Here, MVC would be required to plead that RSM was aware that its audit report would be used as the basis for MVC’s decision whether or not to lend to G3K, and that RSM prepared its audit report with that intent in mind. Nothing in the Complaint rises to that level as a matter of law. Two allegations possibly relevant to this first element are an email from a G3K executive to an RSM employee stating that “it looks like MVC will be requiring McGladrey to perform a review of some kind for 9/30/13” and proposing a conference call, Complaint ¶ 21, and the conclusory statement that G3K “informed McGladrey of MVC’s heightened requirement.” Complaint ¶ 23.

A request for “some sort of review” is substantively different than a formal audit. Indeed, the American Institute of CPAs explicitly distinguishes between an “review” and an “audit”, noting that a “review” is intended only to provide a “basic level of assurance on the accuracy of financial statements”, while an “audit” is intended to provide “a high level of comfort on the accuracy of financial statements” and involves a formal “opinion on whether the financial statements are presented fairly, in all material respects”. American Institute of CPAs, *Guide to Financial Statement Services: Compilation, Review and Audit*, available at <https://www.aicpa.org/InterestAreas/PrivateCompaniesPracticeSection/QualityServicesDelivery/KeepingUp/DownloadableDocuments/financial-statement-services-guide.pdf>. Furthermore, the reference to “9/30/13” is for a different time period than what RSM actually audited, namely the

year ending December 31, 2013. There thus is no indication that there was any agreement as to the scope of work to be performed, nor is there any indication that the proposed conference call ever took place. None of these allegations demonstrate that RSM prepared its audit report with the specific intent that the report would be utilized and relied upon by MVC. MVC's bald assertion that RSM had "the knowledge and understanding that it was asked to [provide an audit report] in order to provide MVC with comfort", Complaint ¶ 23, is a bare legal conclusion, which is not presumed to be true even on a motion to dismiss. *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 (2d Dep't 2008).

The only other allegations potentially relevant to RSM's supposed awareness of MVC's desire to use the audit report to assist in its loan decision are vague and inconclusive. MVC alleges that MVC and RSM "communicated" regarding unspecified subjects during the course of the audit, and that RSM "sent a draft" of the audit report to a group which included an individual purportedly employed by MVC. Notably, the draft was specifically directed toward an individual at BDO, another auditing firm, and the cover email explicitly referenced BDO's review of the audit workpapers for the benefit of MVC. Jay Aff., Exhibit C. This communication is evidence that RSM did *not* know that MVC would rely directly on its audit report, but rather expected MVC to engage in its own independent review, using auditors MVC itself had engaged, before determining whether or not to lend money to G3K.

All other allegations relate to *G3K's* use of the audit report, and in particular *G3K's* relationship with MVC. This simply does not meet New York's near-privity requirement. As discussed above, the Second Circuit rejected a finding of near privity on nearly identical facts. *See Signature Bank*, 109 A.D.3d at 466-67; *see also State St. Trust Co. v. Ernst*, 278 N.Y. 104, 111 (1938) ("in the absence of a contractual relationship or its equivalent, accountants cannot be

held liable for ordinary negligence in preparing a certified balance sheet *even though they are aware that the balance sheet will be used to obtain credit*") (emphasis supplied).

**B. Plaintiff has Failed to Plead that RSM was Aware that MVC Would Rely on its Financial Reports and Intended for MVC to Do So.**

The second prong of the *Credit Alliance* test requires a plaintiff to demonstrate that the accountant intended a specific party or parties to rely on its report. *Credit Alliance*, 65 N.Y.2d at 551. Plaintiff fails to plead, other than in a conclusory and unsupported fashion, that RSM knew that MVC specifically would receive and rely on the final audit reports. Without such specificity, the second prong of the *Credit Alliance* test is not met. *Westpac*, 66 N.Y.2d 16; *see also Sykes*, 15 N.Y.3d at 373.

*Westpac* involved an action brought by a lender, Westpac, against an auditor, Seidman & Seidman, which prepared financial statements for a company; these statements were allegedly relied upon by Westpac in determining whether to extend credit to the company. Following Westpac's extension of a bridge loan, significant fraud emerged, the company's planned public offering (the proceeds of which were intended to repay the bridge loan) was cancelled, and the loan became uncollectible. In its complaint, Westpac alleged that the auditor knew not only that the company was in the process of obtaining additional financing from third-party lenders, but knew that Westpac was the largest existing lender and thus the most likely to extend additional credit. The Court of Appeals nonetheless held that this was insufficient to satisfy the particularity requirement of the *Credit Alliance* test, and ordered the action dismissed. Despite the auditor's potential knowledge of Westpac's interest, the Court noted the lack of any "allegation of any word or action on the part of [Seidman & Seidman] directed to Westpac, or anything contained in [Seidman & Seidman's] retainer agreement with [the borrower] which provided the necessary link" between Westpac and the auditor. Again, MVC's allegations do not

meet the mark, including because MVC is not a party to the engagement letter, it is not referenced in the engagement letter, and there is no indication that RSM had knowledge that its final audit report was shared with MVC, much less that RSM intended to have it shared and relied upon by MVC. This, too, requires dismissal of MVC's Complaint.

**C. Plaintiff has Failed to Plead that RSM Acted In a Way Demonstrating RSM's Awareness of MVC's Reliance on the Financial Reports As a Basis for MVC's Decision to Lend to G3K.**

MVC's complaint also fails to adequately plead the third prong of the *Credit Alliance* test. This prong, which as noted above is perhaps the most critical and the most difficult to satisfy, requires MVC to establish a *direct* relationship with RSM, based upon the auditor's affirmative conduct, evincing RSM's understanding that MVC will be relying on its audited financial reports. *Credit Alliance*, 65 N.Y.2d at 551; *see also Signature Bank*, 109 A.D.3d at 466-67 (2d Dep't 2013); *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.3d 101, 108 (1st Dep't 2001); *Parrott v. Coopers & Lybrand, LLP*, 263 A.D.2d 316, 321 (1st Dep't 2000), *aff'd*, 95 N.Y.2d 479 (2000). Without this affirmative linking conduct, the alleged relationship between RSM and MVC is too attenuated for RSM to be held liable for G3K's extensive fraud. As discussed in Section I, *supra*, this prong is both the most important, and the most difficult to satisfy, and unsurprisingly MVC fails to do so here.

Only four paragraphs in MVC's complaint allege any direct contact between RSM and MVC. *See* Complaint ¶¶ 21, 24, 25, 64. All other contact alleged in the complaint is indirect, and places G3K as the middle-man providing information separately to MVC and RSM. Taken together, such unspecific, minimal and sporadic communications between the parties fail to allege "linking conduct" sufficient to establish near privity. As the Second Department held in *Signature Bank*, "Here, the allegations supporting the cause of action to recover damages for negligent misrepresentation do not satisfy the third *Credit Alliance* prong.... [T]he complaint

failed to allege some conduct of the defendant ‘linking’ it to the plaintiff which evinced the defendant’s understanding of the plaintiff’s reliance. [Citations omitted]. Accordingly, the Supreme Court should have granted the subject branch of the defendant’s motion.” *Signature Bank*, 109 A.D.3d at 466-67. The Second Department came to this conclusion notwithstanding the trial court noting that the plaintiff/lender, Signature Bank, had alleged that the audit firm knew, through the Chief Executive Officer of the audit firm’s lende/audit client, that “plaintiff [Signature Bank] relied on the 2008 audit report to determine whether to extend credit.” *Signature Bank*, 2012 WL 11980647 at \*2. Signature Bank further alleged “that it had several communications with [the auditor] concerning the [lende] company’s financial viability.” As is the case here, however, such communications are insufficient to establish the necessary “linking” conduct to satisfy the third prong of *Credit Alliance*. *Signature Bank*, 109 A.D.3d at 466-67. *See also LaSalle Nat’l Bank*, 285 A.D.3d at 108 (finding minimal or sporadic communications to be insufficient to satisfy prong three of the *Credit Alliance* test); *Westpac*, 66 N.Y.2d at 19 (1985) (noting plaintiff lender’s absence from the engagement agreement between borrower and auditor in dismissing negligent misrepresentation action).

The lack of substantive communications between the parties is also important. *See Parrott*, 263 A.D.2d at 321 (“The factors utilized in demonstrating the requisite relationship depend not only on the number of contacts but also on the substantive nature of the contacts.”); *see also CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470 (1st Dep’t 2011) (internal citations omitted) (holding that “minimal or nonexistent” contact between accountant and plaintiff is insufficient to support recovery, even where plaintiff, unlike MVC, was actually entitled to receive a copy of the audited financial statements).



Based on the allegations of the Complaint, RSM took no action demonstrating its awareness of MVC's reliance on its audit report. Indeed, considering BDO's involvement, RSM could have reasonably concluded that MVC was relying not on RSM's report, but on BDO's independent review in coming to its decision to extend credit to G3K. Without any further linking conduct, none of which is alleged, MVC cannot satisfy the *Credit Alliance* factors. This is particularly true in light of MVC's admissions in other cases that it relied in great part upon its own due diligence in making its lending decision to G3K.

### **CONCLUSION**

For the foregoing reasons, Defendant RSM US LLP respectfully requests that the single claim against it in the Complaint be dismissed with prejudice.

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