Johnson v Rose
2014 NY Slip Op 30262(U)
January 23, 2014
Sup Ct, NY County
Docket Number: 652075/2011
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAWRENCE K. MARKS, *Justice* **PART** 41

Index Number : 652075/2011
JOHNSON, JR., JOHN SEWARD
vs
PROSKAUER ROSE, LLP
Sequence Number : 004
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the accompanying Decision and Order, dated January 23, 2014.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 1-27-14

_____, J.S.C.
HON. LAWRENCE K. MARKS

1. **CHECK ONE:** ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE: MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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JOHN SEWARD JOHNSON, JR., individually, JOYCE H. JOHNSON, individually, ROBERT MATTHEWS (as Trustee for The Trust F/B/O John S. Johnson III U/A 7/10/92 and The Trust F/B/O Clelia Johnson U/A 7/10/92), JOYCE H. JOHNSON (as Trustee for The Trust F/B/O John S. Johnson III U/A 7/10/92 and The Trust F/B/O Clelia Johnson U/A 7/10/92) and MICHAEL GREENLEAF (as Trustee for The Trust F/B/O John S. Johnson III U/A 7/10/92 and The Trust F/B/O Clelia Johnson U/A/ 7/10/92)

Index No.: 652075/2011

Plaintiffs,

- against -

PROSKAUER ROSE, LLP, JAY WAXENBERG and IRA AKSELRAD,

Defendants.
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LAWRENCE K. MARKS, J.:

In this action for fraud, legal malpractice and other claims arising from plaintiffs' participation in a failed tax shelter, defendants Proskauer Rose LLP ("Proskauer") and Jay Waxenberg ("Waxenberg") move, pursuant to CPLR 3211(a)(1), (5) and (7) (motion sequence 005), for an order dismissing the first amended verified complaint ("complaint") as to them. Defendant Ira Akselrad ("Akselrad") also moves, pursuant to CPLR 3211(a)(1) and (7), for dismissal of the complaint as to him (motion sequence 004).

For the reasons set forth below, motion sequence 004 is granted and the complaint is dismissed in its entirety as against Akselrad. Motion sequence 005 is granted in part and denied in part: (1) the second and third causes of action (for legal malpractice and a declaratory judgment) are dismissed as against Proskauer, and (2) on the first cause of action (for fraud), plaintiffs' demands for back taxes and interest, lost opportunity, lost dividends, and stock appreciation are stricken. Motion sequence 005 is otherwise denied.

BACKGROUND

The facts as alleged in the complaint and other averments submitted in opposition to the motions to dismiss are as follows. Plaintiffs John Seward Johnson, Jr. ("Johnson") and his wife Joyce H. Johnson are Johnson & Johnson, Inc. stockholders who, along with other close affiliates and related entities, were clients of defendants at certain times relevant to the complaint.[1]

Through their attorney-client relationship with Johnson, defendants were aware of material aspects of plaintiffs' financial affairs, including plaintiffs' ownership of substantial amounts of Johnson & Johnson stock. Defendants approached Johnson (through Matthews) to offer him the opportunity to enter into a tax avoidance transaction with another Proskauer client, nonparty Diversified Group, Inc. ("Diversified"), which

[1] The remaining plaintiffs, including Robert Matthews, a Certified Public Accountant, are trustees of certain trusts created for the benefit of the Johnsons' children. Matthews is also a representative of the individual plaintiffs.

was in the business of selling tax planning strategies to high income parties. Defendants told Johnson that the transaction would allow plaintiffs to sell a large block of Johnson & Johnson stock in a manner that would minimize the payment of capital gains taxes. Johnson was realizing significant dividends on the stock up to that time, and had no plans to sell the stock before defendants approached him with the idea. Compl, ¶¶ 17-33.

On October 2, 2000, Johnson and Matthews met with Waxenberg and Akselrad for Proskauer, along with nonparty James Haber for Diversified. Defendants ultimately persuaded plaintiffs to engage in the transaction proposed by Diversified. Compl, ¶¶ 34-82.

Plaintiffs allege that defendants' sales technique included the following intentionally false representations:

- the transaction was legal (Compl, ¶¶ 36-39);
- plaintiffs would be "foolish" to pass up the opportunity to participate (Compl, ¶¶ 53-55);
- it was highly unlikely that the transaction would be questioned by the Internal Revenue Service (Compl, ¶¶ 44-45);
- plaintiffs must nonetheless act quickly to take advantage of the opportunity before the legal loophole or quirk in the tax law was closed (Compl, ¶¶ 49-50);
- Proskauer would continue to represent plaintiffs in the unlikely event that the IRS did question the transaction (Compl, ¶¶ 46-47).

Plaintiffs further allege that defendants, as part of their sales strategy, intentionally failed to disclose the true nature of their business relationship with Haber and Diversified. They allege that defendants were effectively acting in their capacity as Haber's and Diversified's business partners and joint venturers in promoting the tax shelter, with a substantial financial stake in the successful marketing of the program, rather than as attorneys giving a good-faith legal opinion to plaintiffs. Compl, ¶¶ 59-67.

As proposed and implemented, the transaction required plaintiffs to contribute funds to several limited liability companies that would engage in stock option transactions. Plaintiffs contributed their ownership interests in those companies to Drawes Holding Company, an entity to which they had contributed Johnson & Johnson shares. Plaintiffs then sold their membership interests in Drawes to Diversified, and received in exchange a cash equivalent to the value of the Johnson & Johnson shares. Plaintiff paid $1,379,650 in fees to Diversified, of which $425,000 went to Proskauer. Compl, ¶¶ 83-98.

Before entering into the transaction, Johnson and Matthews signed a Retainer Letter with Proskauer, dated October 2, 2000 (the "Retainer Letter"). *See* David M. Lederkramer Aff, dated 12/2/2011 ("Lederkramer Aff"), Exh 2; Compl, ¶ 69. In the Retainer Letter, Proskauer stated that it would render tax advice to plaintiffs regarding the transaction with Diversified. Proskauer revealed that it had represented Diversified in the

past in "unrelated matters."[2] The Retainer Letter states that "[t]he purpose of this letter is to confirm your agreement that we are free to continue to represent [Diversified] fully in unrelated matters notwithstanding our ongoing representation of you." The Retainer Letter "further confirm[s] that you have agreed to waive any conflict of interest arising out of, and that you will not object to, our representation of [Diversified] in unrelated matters." The Retainer Letter did not disclose the true nature and extent of the business relationship between Proskauer and Diversified. Compl, ¶¶ 71-82.

In a 63-page Opinion Letter dated December 2000 (Complaint, Exh B), but sent to plaintiffs in June 2001 (Compl, ¶ 99), after the execution of the transaction, Proskauer advised plaintiffs that "it was more likely than not" that the transaction would not generate any gain or loss, or accrue any penalties if it was disallowed. However, the Opinion Letter was essentially a standard form letter which contained intentionally false representations about the legality of the transaction in order to induce defendants' clients to enter into such transactions. Compl, ¶¶ 116-126.

On or after April 5, 2001, on receiving a Form K-1 with respect to plaintiffs' interests in Drawes, Matthews spoke with defendant Waxenberg about plaintiffs' reporting obligations for their 2000 tax returns. Waxenberg relayed advice from Akselrad relating to how to report the transaction. Compl, ¶¶ 107-111.

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[2] Plaintiffs allege that this statement was false when made, and that Proskauer actually represented Diversified in matters that were so closely related to the transaction that Proskauer could not continue to represent Johnson when the IRS questioned the transaction.

Although the IRS announced a tax amnesty program in January 2002 which would have applied to plaintiffs (Compl, ¶¶ 127-135), the parties did not communicate again about the transaction until April 2006, when the Johnsons received a letter and request for documents from the IRS concerning the transaction (the "IRS Notice"). Compl, ¶¶ 136-40; Compl, Exh E. The IRS Notice requested detailed information about the transaction. At that time, the Johnsons contacted Waxenberg for legal assistance. Proskauer declined, claiming a conflict of interest arising from its representation of Diversified. Plaintiffs then sought other counsel. Compl, ¶¶ 173-76. The IRS subsequently found the transaction to be abusive, and charged plaintiffs with excessive back taxes, penalties and interest, amounting to many millions of dollars. Compl, ¶¶ 160-64.

On May 3, 2007, plaintiffs and Proskauer entered into a Standstill and Tolling Agreement (the "Tolling Agreement") (Lederkramer Aff, Exh 3; Compl, ¶ 141) providing that, if plaintiffs find that they have any claims against Proskauer, "such proceeding shall be deemed to have been commenced as of the Effective Date of this Agreement," but that the Tolling Agreement would not "revive any claims which, prior to the Effective Date, may have been barred by limitations, laches or any other doctrine." The Tolling Agreement states that it "shall bind and benefit each of the undersigned parties and their respective affiliates, executors, trustees, partners, employees, predecessors, successors and assigns."

In December 2010, on becoming aware of a federal case in Massachusetts decided earlier that year (Compl, ¶ 142), plaintiffs learned that Proskauer and Akselrad had been involved in a fraudulent tax shelter scheme in concert with Diversified, targeting defendants' high-income clients. Compl, ¶¶ 51, 61, 67, 75, 116, 118-21, 123; Compl, Exh A.

The Tolling Agreement was ultimately extended to July 31, 2011, and the present action was commenced on July 29, 2011. In their First Amended Complaint, plaintiffs assert claims for fraud (first cause of action); legal malpractice (second cause of action); declaratory judgment (third cause of action); excessive and illegal fees (fourth cause of action); and unjust enrichment (fifth cause of action).

All defendants filed pre-answer motions to dismiss. In motion sequence 005, Proskauer and Waxenberg argue that the malpractice claim was time-barred prior to the execution of the Tolling Agreement and that the continuous representation doctrine does not apply to save it; that the remaining causes of action are duplicative of the malpractice claim; that the Tolling Agreement is not binding on Waxenberg; that plaintiffs cannot establish fraud in any event, as there was no justifiable reliance; and that plaintiffs' demands for back taxes, interest, lost opportunities, lost dividends, stock appreciation and punitive damages should be stricken as unrecoverable.

In motion sequence 004, Akselrad similarly argues that all of the causes of action as against him are time-barred; that he is not bound by the Tolling Agreement; that

plaintiffs' causes of action for fraud, unjust enrichment, excessive fees, and declaratory judgment are duplicative of the malpractice claim; that Akselrad received no fees, and so was not unjustly enriched or subject to a claim for excessive fees; that plaintiffs cannot establish justifiable reliance for fraud; and that the damages they seek should be stricken.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the Court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *see also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Ginsburg Dev. Cos., LLC v. Carbone*, 85 A.D.3d 1110, 1111 (2d Dep't 2011), *quoting EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

A motion brought pursuant to CPLR 3211(a)(1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v. Kaufman*, 91 N.Y.2d 425, 430-431 (1998), *quoting Leon*, 84 N.Y.2d at 88; *Foster v. Kovner*, 44 A.D.3d 23, 28 (1st Dep't 2007) ("[t]he

documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

1. Challenges to the First Cause of Action (Fraud)

A. Duplicativeness

Defendants seek to dismiss plaintiffs' first cause of action as duplicative of the legal malpractice claim. It is well-settled that failure to disclose one's own malpractice, standing alone, does not give rise to a fraud claim separate from the customary malpractice action. *See, e.g., Weiss v. Manfredi*, 83 N.Y.2d 974, 977 (1994); *Baystone Equities, Inc. v. Handel-Harbour*, 27 A.D.3d 231, 231 (1st Dep't 2006); *Roswick v. Mount Sinai Med. Ctr.*, 22 A.D.3d 409, 410 (1st Dep't 2005).

Thus, a fraud claim asserted in connection with a claim for legal malpractice "is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations -- that is, something more egregious than mere concealment or failure to disclose [one's] own malpractice." *White of Lake George v. Bell*, 251 A.D.2d 777, 778 (3d Dep't 1998) (internal quotation marks and citation omitted); *accord Carl v. Cohen*, 55 A.D.3d 478, 478-79 (1st Dep't 2008) (fraud claim may be dismissed as duplicative of a malpractice claim if it is "'not based on an allegation of independent, intentionally tortious' conduct" and "fail[s] to allege 'separate and distinct' damages"*); Atton v. Bier*, 12 A.D.3d 240, 241-42 (1st Dep't 2004) (suggesting that an alleged failure to disclose

one's own "general incompetence" is, in effect, "founded upon the same underlying allegations as the malpractice claim and seek essentially the same relief"). Mere allegations that defendants "furnished erroneous legal advice and neglected to take appropriate steps to safeguard [plaintiffs'] interests" do not suffice. *White of Lake George*, 251 A.D.2d at 778.

However, not every claim for fraud is duplicative of a professional malpractice claim, even when both are asserted in the same action. For example, it is proper to deny a motion to dismiss a fraud claim as duplicative of a legal malpractice claim where "the fraud cause of action was based upon tortious conduct independent of the alleged malpractice, i.e., an alleged misrepresentation as to the eligibility of the defendant [attorney] to practice law in the State of Florida, and the plaintiffs alleged that damages flowed from this conduct." *Rupolo v. Fish*, 87 A.D.3d 684, 685-86 (2d Dep't 2011); *see also Burke, Albright, Harter & Rzepka, LLP v. Sills*, 83 A.D.3d 1413, 1414 (4th Dep't 2011) (fraud counterclaim not duplicative of legal malpractice counterclaim where "[t]he proposed counterclaims are based on allegations that plaintiffs intended to deceive decedent, whereas the 'legal malpractice [counterclaim] is based on negligent conduct'"); *Dischiavi v. Calli*, 68 A.D.3d 1691, 1693 (4th Dep't 2009) (fraud claims not duplicative of legal malpractice claims where "plaintiffs have alleged that the fraud caused additional damages, separate and distinct from those generated by the alleged malpractice") (internal quotations omitted).

The Second Department recently held that an allegation that defendants "committed fraud by misrepresenting that they 'made a motion for a default judgment' when they 'never made, filed, or drafted' such a motion, and that they billed the plaintiff for drafting the motion" was not duplicative or redundant of the allegation that defendants "committed legal malpractice in failing to timely pursue [the] default judgment." *Vermont Mut. Ins. Co. v. McCabe & Mack, LLP*, 105 A.D.3d 837, 839 (2d Dep't 2013). The court noted that "[w]here, as here, tortious conduct independent of the alleged malpractice is alleged, a motion to dismiss a cause of action as duplicative is properly denied." *Id.* at 840. Moreover, the apparent overlap in the amount of damages sought on both counts of action did not require dismissal. *Id.* at 838, 840.[3] *See also Simcuski v. Saeli*, 44 N.Y.2d 442, 451-52 (1978) (determining that fraud claim was distinct from malpractice claim where defendant, "knowing it to be untrue yet expecting his patient to rely on his advice, advised her that physiotherapy would produce a cure, in consequence of which fraudulent misrepresentation the patient was deprived of the opportunity for cure of the condition initially caused by the doctor's alleged malpractice").

Particularly instructive is the First Department's decision in *Mitschele v. Schultz*, 36 A.D.3d 249, 254 (1st Dep't 2006). In that case, the plaintiff retained the accountant defendants to advise her regarding her tax status and tax liability as a United States

[3] The fraud claim "sought damages in the sum of $216,632.25, the same sum sought in the causes of action alleging legal malpractice, in addition to 'additional damages, separate and distinct from the underlying malpractice.'" *Vermont Mut.*, 105 A.D.3d at 838. The court found that "[t]he evidence submitted by the defendants does not establish that the plaintiff sustained no other damages, separate and apart from those sought as a result of the alleged legal malpractice, as a result of the defendants' alleged fraudulent conduct." *Id.* at 840.

citizen living and working abroad. The defendants advised plaintiff that her employer, whose president had introduced plaintiff to the defendants (one of whom was his cousin), should compensate plaintiff as an "outside contractor" and therefore withhold no taxes. When it was later revealed that this advice was erroneous and plaintiff incurred tax liabilities as a result, plaintiff sued, alleging a number of causes of action including accounting malpractice and fraud. Plaintiff's fraud cause of action alleged that defendants' advice was made not in an effort to serve her interests but for the sole benefit of her employer, to allow it to avoid payroll and other taxes and costs. On these facts, the First Department rejected the defendants' contention that plaintiff's fraud claim was duplicative of her malpractice claim. As the court stated, "[D]efendants' alleged fraud is not simply the failure to disclose the malpractice based upon accounting errors. Rather, defendants are alleged to have perpetrated a fraud on plaintiff from the time they were retained to provide accounting services, in failing to disclose their concern with protecting the interests of another entity, namely, plaintiff's employer." *Id.* at 254.

Here, plaintiffs have alleged numerous intentional misrepresentations and failures to disclose, as part of defendants' alleged sales pitch to plaintiffs. According to plaintiffs, defendants intentionally misrepresented both the legality of the transaction and the true nature of their relationship with Diversified -- that they were effectively acting as business partners and had a direct financial interest in promoting the transaction, rather than as lawyers providing bona fide legal advice. *Cf. Access Poing Medical, LLC v. Mandell,* 106 A.D.3d 40 (1st Dep't 2013) (law firm's failure to disclose that it was

representing both sides to a financial transaction whose interests conflicted did not in itself constitute fraud). Indeed, plaintiffs have alleged that defendants were participants in a larger fraudulent scheme with Diversified to promote such transactions to numerous clients. *See* Compl, ¶¶ 51, 61, 67, 75, 116, 118-21, 123; Compl, Exh A.

Plaintiffs are not required, at this stage, to submit evidence in support of their allegations, and the likelihood of success on the merits is not part of the calculus in deciding this motion. Nonetheless, the Court notes that plaintiffs' Exhibit A consists of excerpts from a 200-page federal district court decision which concluded that Akselrad and an attorney from another law firm "knew, or reasonably should have known," that Diversified and a related company "used the names and reputations" of the attorneys' respective law firms, as well the attorneys' legal opinions, in marketing an improper tax avoidance strategy. *Fidelity Intern. Currency Advisor A Fund, LLC v. United States of America*, 747 F. Supp.2d 49, 212 (D. Mass. 2010).[4] The federal court also concluded after trial that the attorneys "agreed in advance to provide favorable legal opinions in order to induce taxpayer-investors" to use the strategy, and that Proskauer and the other firm "derived substantial profit from the promotion and sale of the tax shelter strategy, and therefore had a financial interest in upholding the strategy." *Fidelity*, 747 F. Supp.2d at 212.

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[4] Defendants were not parties to the *Fidelity* proceeding, a case tried over 44 days beginning in late 2008 during which the court received more than 3,700 exhibits and heard extensive testimony from multiple experts. *Fidelity*, 747 F. Supp.2d at 57.

Plaintiffs' allegations that defendants intentionally deceived them into entering a transaction that defendants knew was improper, as part of a fraudulent business scheme, are entirely independent from the negligence standard applicable to a claim for legal malpractice. Moreover, plaintiffs allege different damages on the fraud claim ($40 million plus punitive damages) than on the legal malpractice claim ($5 million). Thus, the Court concludes that, on the present motion to dismiss, defendants have failed to establish that plaintiffs' fraud claims are duplicative of the malpractice claims.

B. Justifiable Reliance

Defendants argue that, as a matter of law, plaintiffs cannot establish any reasonable reliance upon their representations, based on the Opinion Letter sent in 2001.

A cause of action for fraud requires a showing of a representation of a material fact, falsity of that representation, scienter, justifiable reliance and damages. *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012). The Opinion Letter states that "it would be more likely than not" that the tax results of the transaction would be as defendants represented them to be. The First Department has found that this very language would put "'an ordinary person on notice that the odds in favor of legality could be as slim as 51% to 49%'" and that "[w]here the odds in favor of legality are virtually equivalent to the odds in favor of illegality," even a relatively inexperienced investor "will apprehend the substantial risk that his tax avoidance strategy will not pass muster with the IRS."

Shalam v. KPMG LLP, 89 A.D.3d 155, 158 (1st Dep't 2011) (granting motion for summary judgment).

Nonetheless, defendants' arguments are unavailing. The Opinion Letter cannot establish, as a matter of law, that plaintiffs were not justified in relying on defendants' representations, because it was not sent to plaintiffs until months after defendants allegedly had already convinced plaintiffs to enter the transaction. The issue is a factual one, and sufficiently pled.

C. Statute of Limitations

Defendants also argue that the statute of limitations has run on the fraud claim. A claim for fraud must be brought either six years from the commission of the fraud, or two years from the time the fraud was discovered or, with reasonable diligence, could have been discovered. CPLR 213(8); CPLR 203(g); *Gutkin v. Siegal*, 85 A.D.3d 687, 687 (1st Dep't 2011); *St. Clement v. Londa*, 8 A.D.3d 89, 90 (1st Dep't 2004).

The alleged fraud was committed in late 2000. If the fraud could reasonably have been discovered at that time, the statute of limitations would have expired six years later, *i.e.*, before the 2007 Tolling Agreement was executed.

The inquiry as to whether a plaintiff could with reasonable diligence have discovered the fraud turns on whether the plaintiff had knowledge of facts from which the fraud could reasonably be inferred. *Gorelick v. Vorhand*, 83 A.D.3d 893, 894 (2d Dep't 2011); *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532 (2009). The test is an objective one, and

ordinarily, such an inquiry presents a mixed question of law and fact. *Gorelick* , 83 A.D.3d at 894. In general, "knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." *Gorelick*, 83 A.D.3d at 894; *Sargiss*, 12 N.Y.3d at 532. For example, where plaintiffs had written a letter indicating that they "suspected mismanagement" of an investment fund, and demanding an explanation from defendants for losses the fund had experienced, this did not provide grounds to impute knowledge of the alleged fraud at that time. *CSAM Capital, Inc. v. Lauder*, 67 A.D.3d 149, 156 (1st Dep't 2009). On a motion to dismiss, if it does not "conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred," the question should be left to the trier of fact. *Gorelick* , 83 A.D.3d at 893; *Sargiss*, 12 N.Y.3d at 532.

Considering the evidence submitted in the light most favorable to plaintiffs, it appears that the earliest the alleged fraud could have been discovered was in April 2006, when defendants refused to represent plaintiffs in connection with the IRS inquiry into the transaction.[5] At least until that time, plaintiffs relied on defendants' false assurances about the propriety of the transaction and defendants' willingness to continue or resume representing them in case of IRS scrutiny. Only when faced with the IRS Notice, and compelled to acquire new counsel, were plaintiffs aware of facts sufficient to have put them on notice and created a duty of inquiry. *See generally Gutkin v. Siegal*, 85 A.D.3d

[5] Absent a showing that plaintiffs had "contemporaneous knowledge" that a complaint (or other papers revealing pertinent facts) had been filed earlier in the *Fidelity* matter, such filings are immaterial to determining when the statute of limitations began to run. *CSAM Capital*, 67 A.D.3d at 156.

687, 688 (1st Dep't 2011) (a reasonable investor who had lost millions of dollars would have investigated further, rather than accept the cursory explanation plaintiff allegedly received); *TMG-II v. Price Waterhouse & Co.*, 175 A.D.2d 21, 23 (1st Dep't 1991) (duty of inquiry arose with respect to fraud claim when IRS investigation into plaintiff's limited partner became known to plaintiff's general partner and "a series of facts became public" regarding the limited partner's fraudulent activities). At a minimum, reasonable inquiry by the plaintiffs on receipt of the IRS Notices in 2006 should have led them to defendants' non-disclosure of the tax amnesty program in 2002, which plaintiffs now believe was motivated by a desire to conceal the fraudulent tax shelter scheme. Indeed, Waxenberg's absolute refusal to explain the nature of the "problem" with Diversified that precluded Proskauer from continuing to represent plaintiffs, in derogation of defendants' prior promises (Matthews Aff, ¶ 19), should have put plaintiffs on notice that something more than mere negligence was at issue. It was not necessary that plaintiffs be aware of the full scope and extent of the scheme as set forth in *Fidelity Intern. Currency Advisor A Fund, LLC v. United States of America*, 747 F. Supp.2d 49 (D. Mass. 2010).

Starting from the date of the IRS Notice in April 2006, and applying the two-year limitations period following discovery of the fraud, the statute of limitations would have expired in April 2008. However, the limitations period was tolled from May 3, 2007 through July 31, 2011 pursuant to the Tolling Agreement, and the present action was brought on July 29, 2011. The fraud claim is therefore timely with respect to any party that is bound by the Tolling Agreement.

The Court thus declines to dismiss the fraud claim on this basis as to Proskauer, which is a party to the Tolling Agreement.

Waxenberg and Akselrad claim that, as non-signatories, they are not bound by the Tolling Agreement. The question is whether they are bound as "partners" of Proskauer under the language which states that the Tolling Agreement "shall bind and benefit each of the undersigned parties and their respective affiliates, executors, trustees, partners, employees, predecessors, successors and assigns."

In *Resolution Trust Corp. v. Bonner*, the court found that, where a tolling agreement purports to bind a law firm's "agents and attorneys," it does not bind the nonsignatory partners of the firm. 848 F. Supp. 96, 99 (S.D. Tex. 1994). Even so, the *Resolution Trust* court opined that "[i]f the individual partners were intended to be bound by the tolling contract, then the parties could easily have included a provision binding '[the law firm] and its partners.'" *Id.* Other federal courts have similarly applied standard principles of contractual interpretation and partnership law to indicate that a Tolling Agreement, which on its face purports to bind individual partners, in fact does so. *MCC Proceeds, Inc. v. Whitman & Ransom*, 1997 WL 289470, *2 (S.D.N.Y. 1997); *Carolina Cas. Ins. Co. v. Sharp*, 2013 WL 1641151, *5-6 (N.D. Ohio 2013) (finding individual partners bound where the plain language of the tolling agreement states that the agreement is binding on all partners, and the signing partner has authority to act for the partnership); *In re Keck, Mahin & Cate*, 274 B.R. 740, 749 (Bankr. N.D. Ill. 2002) (where state law allows partners to bind one another on behalf of the partnership, defendants "are

not relieved from liability simply because they did not expressly consent to the tolling or settlement agreements"); *cf. New York State Workers' Compensation Bd. v. Consolidated Risk Servs., Inc.*, 40 Misc.3d 1232(A), 2013 N.Y. Slip Op. 51403(U), *13 (Sup. Ct., Albany County 2013) (finding, under the circumstances presented, that a tolling agreement which purported to bind a now-defunct entity's "officers, agents and employees" was intended by the parties to encompass the individual former officers, agents and employees).

Although these decisions are not precedential, they are persuasive authority, particularly in light of Partnership Law § 20 ("the act of every partner, including the execution in the partnership name of any instrument ... binds the partnership....") and the principle that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) (citation omitted). Accordingly, the Tolling Agreement applies to any partner of Proskauer who held that status at the time that the Tolling Agreement was executed. It is undisputed that Waxenberg was a partner of Proskauer at the time that the Tolling Agreement was executed, and he is therefore bound by it.

Akselrad claims that he ceased being a partner of Proskauer in 2006, prior to the execution of the Tolling Agreement in May 2007. In support of his claim, Akselrad has produced the affidavit of Robert Kafin, Proskauer's General Counsel from 2003 to 2009, who avers on personal knowledge that Akselrad ceased to be a Proskauer partner on

March 27, 2006. Daniel R. Walworth Aff, dated 12/2/2011 ("Walworth Aff"), Exh 2 (Robert J. Kafin Aff, dated 9/13/2011 ["Kafin Aff"], ¶ 1). Akselrad similarly states, under the penalties of perjury, that he "withdrew as a partner" on March 27, 2006, "after which time I retained no affiliation with Proskauer." Ira Akselrad Aff, dated 2/9/2012 ("Akselrad Reply Aff"), ¶ 3. Akselrad has also submitted a copy of a "To whom it may concern" resignation letter, dated "March 2006," which states: "I withdraw from Proskauer Rose LLP effective March 27 2006." Kafin Aff, Exh A. In his reply, he has submitted a heavily redacted partnership withdrawal agreement dated "as of March 24, 2006" which states that Akselrad "withdraws as a partner in the Firm effective April 30, 2006, or such earlier date as Partner shall elect by delivering a written notice to the Firm at least 3 business days prior to such date." Akselrad Reply Aff, Exh A ¶ 1.

In opposition to Akselrad's showing, plaintiffs primarily object to the sufficiency and/or authenticity of the documentary evidence submitted. The Court concludes that the statements made by Kafin and Akselrad on personal knowledge and under the penalties of perjury, buttressed by the redacted withdrawal agreement and the one-line written notice, suffice to make a *prima facie* showing that Akselrad's membership in Proskauer terminated on or around March 27, 2006.

The only evidence the plaintiffs have offered in opposition is the statement of plaintiffs' counsel, under penalties of perjury, that his firm contacted the Office of Court Administration and learned that Akselrad provided notice of his leaving Proskauer in December 2007. Joseph P. Baratta Aff, dated 1/20/2012 ("Baratta Aff") ¶ 13. Plaintiffs

therefore argue (without citation to any authority) that "[a]bsent anything to the contrary, it is assumed that Akselrad complied with his requirement to timely notify the OCA," and therefore Akselrad must have left Proskauer "shortly before" December 2007. Baratta Aff, ¶ 13 (emphasis added).

Such unsupported speculation, however, is not sufficient to raise a triable issue of fact regarding the date of Akselrad's departure from Proskauer. Accordingly, the Court concludes that Akselrad was not a member of Proskauer in May 2007, when the Tolling Agreement was executed. Therefore, the fraud claim is time-barred as to Akselrad, and his motion to dismiss is granted.

D. Damages

Plaintiffs assert a wide variety of damages in connection with their fraud claim, including a return of the fees they paid to engage in the transaction, and reimbursement of the penalties assessed against them by the IRS. Defendants move to dismiss or strike plaintiffs' request for back taxes and interest, lost opportunity, lost dividends, stock appreciation and punitive damages in connection with the first cause of action.

In a fraud action, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong. *Continental Cas. Co. v. PricewaterhouseCoopers, LLP*, 15 N.Y.3d 264, 271 (2010); *Starr Found. v. American Intl. Group, Inc.*, 76 A.D.3d 25, 27 (1st Dep't 2010). In other words, under "New York's longstanding out-of-pocket rule" (*Starr Found.*, 76 A.D.3d at 27), damages for fraud are intended "to compensate plaintiffs

for what they lost because of the fraud, not for what they might have gained" absent the fraud. *Continental Cas. Co.*, 15 N.Y.3d at 271; *see also Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 71 (1st Dep't 1990) ("The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud.").

Plaintiffs cannot obtain a recovery of back taxes. *See Gaslow v. KPMG LLP*, 19 A.D.3d 264, 265 (1st Dep't 2005); *Alpert*, 160 A.D.2d at 71-72. Plaintiffs have had the use and benefit of the proceeds from selling their stock, and presumably owe taxes on whatever profit they have made. They are not entitled to the windfall of reimbursement for back taxes. *See Alpert*, 160 A.D.2d at 72 ("recovery of back taxes would place plaintiffs in a better position than had they never invested in [the tax shelter]"); *accord, Gaslow*, 19 A.D.3d at 265; *Shalam v. KPMG LLP*, 43 A.D.3d 752, 754 (1st Dep't 2007).

Nor may plaintiffs obtain reimbursement for interest they paid to the IRS, as interest on taxes untimely paid "does not constitute damages sustained by plaintiff but represents merely a 'payment to the IRS for his use of the money during the period of time when he was not entitled to it.'" *Shalam*, 43 A.D.3d at 754, *quoting Alpert*, 160 A.D.2d at 72; *see also Gaslow*, 19 A.D.3d at 265.

Accordingly, plaintiffs' request for back taxes and interest is disallowed. Compl, ¶¶ 160-161, 165(iii), and 166(b). The Court notes that these paragraphs are not to be stricken in their entirety, as they also contain a request for penalties imposed by state and federal tax authorities.

Plaintiffs' claims for damages stemming from other speculative uses of their monies, such as lost opportunities for investment, stock appreciation and dividends, are also unavailable. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996) ("Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud."); *Starr Found.*, 76 A.D.3d at 28 (noting that loss of an alternative contractual bargain is inherently "undeterminable and speculative"); *Alpert*, 160 A.D.2d at 72.

Accordingly, these requests are disallowed and paragraphs 162 through 164, and subparagraphs 165(iv), 165(v), 166(d), and 166(e) are stricken. Compl, ¶¶ 162-164, 165(iv)-(v), 166(d)-(e).

Punitive damages "are not available 'in the ordinary fraud and deceit case.'" *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep't 2011) (citation omitted). It is not sufficient that a defendant's wrongdoing was intentional; it must also "evinc[e] a high degree of moral turpitude that demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations." *Princes Point, LLC v. AKRF Eng'g, P.C.*, 94 A.D.3d 588, 589 (1st Dep't 2012) (denying leave to amend complaint); *see also Hoeffner*, 85 A.D.3d at 458.

For the purposes of a motion to dismiss, the Court must take the allegations of the complaint as true. Plaintiffs have sufficiently alleged that defendants' conduct was not directed solely at plaintiffs, but was part of a larger fraudulent tax shelter scheme targeting hundreds of clients to whom defendants owed a fiduciary duty. Compl, ¶¶ 51,

61, 67, 75, 116, 118-121, 123; Compl, Exh A. Moreover, construed in the light most favorable to plaintiffs, the allegations further suggest that defendants took advantage of confidential financial information of clients in selecting their targets (Compl, ¶¶ 17, 151[a]-[b]), actively sought to dissuade clients from seeking independent legal or financial advice about the transaction (Compl, ¶ 55-56), and used their status as attorneys to cloak the scheme in seeming legality. Compl, ¶ 67. At this stage of the litigation, it is not necessary for plaintiffs to prove that they will be entitled to punitive damages; it is sufficient that plaintiffs have adequately alleged morally culpable conduct directed at the public. The Court therefore declines to strike plaintiffs' request for punitive damages at this time.

2. Challenge to the Second Cause of Action (Legal Malpractice)

Defendants seek to dismiss the legal malpractice claim as time-barred. On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, the defendant has the initial burden of establishing, prima facie, that the time in which to sue has expired. *Macaluso v. Del Col*, 95 A.D.3d 959, 960 (2d Dep't 2012); *see also Hadda v. Lissner & Lissner LLP*, 99 A.D.3d 476, 476-77 (1st Dep't 2012) (applying the same standard).

The statute of limitations on malpractice is three years. CPLR 214(6); *McCoy v. Feinman*, 99 N.Y.2d 295, 300-01 (2002) (noting that the courts do not have discretion to waive the statute of limitations). A legal malpractice claim accrues "from the day an

actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury.'" *McCoy*, 99 N.Y.2d at 301, *quoting Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994). Defendants have met their initial burden. Their opinion letter was delivered no later than June 8, 2001, and it specifically disclaimed any continuing obligation to "update our opinion in light of any subsequent change in Law" or to "modify or revise this opinion as a result of any change in law or facts on which this opinion is based" (Compl, Exh B at 1, 63). The tolling agreement was not executed until more than five years later, on May 3, 2007. Lederkramer Aff, Exh 3.

Accordingly, the burden shifts to plaintiffs to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable. *Macaluso*, 95 A.D.3d at 960; *Hadda*, 99 A.D.3d at 477. Plaintiffs invoke the continuous representation doctrine, which may apply to toll the statute if the parties "mutually contemplated" that the work and representation on the specific transaction would continue. *Lytell v. Lorusso*, 74 A.D.3d 905, 907 (2d Dep't 2010). However, the representation must "pertain[] to the specific matters at issue." *Sun Graphics Corp. v. Levy, Davis & Maher, LLP*, 94 A.D.3d 669, 669 (1st Dep't 2012). Tolling does not result merely because there is a "continuing general relationship" between attorney and client, "involving only routine contact for miscellaneous legal representation..., unrelated to the matter upon which the allegations of malpractice are predicated." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 168 (2001).

Plaintiffs have pointed to the phrase "ongoing representation" in the Retainer Letter, which "confirm[s]" plaintiffs' "agreement that we are free to continue to represent

[Diversified] fully in unrelated matters notwithstanding our ongoing representation of you." Lederkramer Aff, Exh 2. Plaintiffs have also submitted the affidavit of Seward Johnson, made on personal knowledge, who avers that Proskauer "represented, in substance, that they would continue to represent us going forward in the possible event that the IRS had any question or objection to the Tax Program and related transactions, and that it did not make any difference as to when the IRS might make such inquiry or pose any objection, as Proskauer would be representing us in this regard, and continue to protect our interests." Johnson Aff, ¶ 19; *see also* Compl, ¶¶ 46, 82(iv). They have also submitted the affidavit of plaintiff Matthews, made on personal knowledge, that defendants gave "[f]ull and complete assurances" that Proskauer would "be available and continuously represent us on this specific matter." Robert Matthews Aff, dated 1/20/2012 ("Matthews Aff"), ¶ 11. Moreover, defendants represented that, "[i]f perchance there were any questions or issues of any kind at any time raised by the IRS in the future with respect to the validity of the Tax Program, its goals and transactions, Proskauer, as part of the large legal fee they were to receive, would be continuing to represent us in respect to such." *Id.* There would be no additional fee for such continued representation, unless "an unanticipated Tax Court case ... requir[ed] their attendance in Court." *Id.* Plaintiffs' theory is that defendants' representation continued until Proskauer affirmatively refused to represent them in April 2006.

The key to the continuing representation doctrine is found in its "underlying purpose ... to avoid undermining the continuing trust developing between a professional

and his or her client or patient." *Shumsky*, 96 N.Y.2d at 169. Thus, for example, the continuing representation doctrine applies when the clients "were acutely aware of [the] need for further representation on the specific subject matter underlying the malpractice claim" and "were left with the reasonable impression that [the lawyer] was, in fact, actively addressing their legal needs." *Id.* It does not apply where a client is unaware that further legal services will be needed. *Id.*

Here, it appears from the evidence submitted by plaintiffs, favorably construed, that plaintiffs believed that Proskauer had promised, in effect, to remain on "standby," ready to address any follow-up issues in the event that the IRS later questioned the transaction. Unfortunately for plaintiffs, it is precisely because they relied on Proskauer's alleged misrepresentations that it was "highly unlikely" that the IRS would question the transaction (Johnson Aff, ¶ 17; Matthews Aff, ¶¶ 11-12), that they did not in fact have an acute awareness "of [the] need for further representation" or any reasonable impression that Proskauer "was, in fact, actively addressing their legal needs." *Cf. Shumsky*, 96 N.Y.2d at 169.[6]

Finally, plaintiffs have not alleged that they dealt in any way with defendants from July 2001 until 2006 with regard to the specific transaction at issue. They have identified no telephone calls, no requests for advice, updates, or changes to documents. Even

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[6] Had defendants represented to plaintiffs that the IRS was <u>likely</u> to question the transaction, plaintiffs might have been in a better position to assert the continuing legal representation doctrine. One might quarrel with the wisdom of a legal principle that enables the defendants here to benefit from their own (allegedly false) representations. The case law, however, provides no support for application of the continuous representation rule to these facts.

"intermittent" contact has been found to fall short of the required "clear indicia of an ongoing, developing and dependent relationship between the client and the attorney" or of a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *Hadda*, 99 A.D.3d at 477 (citation omitted). Thus, plaintiffs have failed to establish that there was continuous representation, and their cause of action for malpractice expired before the Tolling Agreement was executed. The malpractice claims must be dismissed.

3. Challenge to the Third, Fourth, and Fifth Causes of Action

As previously discussed with regard to the first cause of action (fraud), causes of action which arise from the same facts as those making up a legal malpractice action, and which allege the same damages, are subject to dismissal as duplicative of the malpractice cause of action. *Financial Servs. Veh. Trust v. Saad*, 72 A.D.3d 1019, 1020-21 (2d Dep't 2010) (dismissing claims for breach of contract, breach of fiduciary duty, and fraud). "[I]t is not the theory behind a claim that determines whether it is duplicative." *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 400 (1st Dep't 2002) (dismissing "redundant claims" for breach of contract and breach of fiduciary duty on motion for summary judgment).

However, the First Department has also recognized that "when evidence is submitted on a motion to dismiss, we look to whether plaintiff has a cause of action, rather than whether it is pleaded." *Braun v. Lewis*, 99 A.D.3d 574, 575 (1st Dep't 2012).

Of particular relevance here, the *Braun* court held that, although the complaint was "framed in terms of medical malpractice" – and the medical malpractice claim was untimely – plaintiff's allegations nonetheless also supported a "potentially meritorious claim for ordinary common-law negligence," which had not expired. *Id.*

A. Declaratory Judgment (Third Cause of Action)

Defendants seek to dismiss plaintiffs' third cause of action as duplicative of the legal malpractice claim. "The primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538 (1984). Under the circumstances presented here, the claim for declaratory judgment is subject to dismissal because plaintiffs have an adequate remedy under the other causes of action they have alleged in the complaint. *Watson v. Sony Music Entertainment*, 282 A.D.2d 222, 223 (1st Dep't 2001); *Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1st Dep't 1988). The adequacy of these other causes of action in addressing plaintiffs' claims for prospective relief is entirely distinct from the question of whether or not such causes of action have merit. *Watson*, 282 A.D.2d at 223. Accordingly, the cause of action for declaratory judgment is dismissed.

B. Excessive and Illegal Fees (Fourth Cause of Action)

Defendants seek to dismiss plaintiffs' fourth cause of action as duplicative of the legal malpractice claim. Indeed, it is sometimes the case that claims for breach of fiduciary duty are duplicative of a legal malpractice claim. *See, e.g., Delgado v. Bretz & Coven, LLP*, 109 A.D.3d 38, 47 (1st Dep't 2013). However, claims for excessive and illegal fees (whether asserted under a breach of fiduciary theory or a breach of contract theory) are not always duplicative of a malpractice cause of action. *See, e.g., Sobel v. Ansanelli*, 98 A.D.3d 1020, 1022 (2d Dep't 2012) (finding that the motion court properly dismissed portions of the legal malpractice claims as time-barred, but should not have dismissed the "causes of action alleging, in effect, breach of fiduciary duty premised on the theory that the defendants charged excessive legal fees"); *O'Connor v. Blodnick, Abramowitz and Blodnick*, 295 A.D.2d 586, 586-87 (2d Dep't 2002) (in an action asserting both breach of contract based on allegedly excessive fees, and legal malpractice, trial court improperly dismissed breach of contract claim after the plaintiff "established a prima facie case that the fees assessed were excessive").

Here, as plaintiffs have clarified in their memorandum of law in opposition to Proskauer and Waxenberg's motion to dismiss, their claim for illegal and excessive fees is based on the theory that defendants' $425,000 fee was excessive for issuing what plaintiffs are now alleging was merely a "'cookie cutter' type" opinion. *See* Opp Br (mot. 005) at 23; *see also* Compl, ¶ 116 (alleging that Proskauer issued approximately 380 such opinions in furtherance of a tax shelter scheme); *id.* at ¶ 123 (alleging that defendants'

purported legal fee "was, in fact, a disguised 'finders fee' or commission" rather than a bona fide legal fee for legal services rendered).

Plaintiffs' claim that the fees were excessive is thus distinct from plaintiffs' legal malpractice claim, because it does not depend on the quality or content of the legal advice that defendants rendered to plaintiffs, let alone a finding that the defendants failed to meet professional standards in rendering legal advice to plaintiffs. Accordingly, under the circumstances presented, the Court declines to dismiss the claim for excessive fees as duplicative of the legal malpractice claim. *See Loria v. Cerniglia*, 69 A.D.3d 583, 583 (2d Dep't 2010); *Boglia v. Greenberg*, 63 A.D.3d 973, 976 (2d Dep't 2009).

C. Claim for Unjust Enrichment (Fifth Cause of Action)

Defendants also seek to dismiss plaintiffs' fifth cause of action as duplicative of the legal malpractice claim. *See, e.g., Spinale v. Tenzer Greenblatt*, 309 A.D.2d 632, 632 (1st Dep't 2003) (cause of action nominally pleaded as a claim for unjust enrichment, but based on the same allegations as claim for legal malpractice, was subject to the three-year limitations period for malpractice).

Under the circumstances presented, however, it appears that the unjust enrichment claim is likewise based on the theory that defendants' $425,000 fee was excessive for issuing what plaintiffs are now alleging was merely a "'cookie cutter' type" opinion. *See* Opp Br (mot. 005) at 23; *see also* Compl, ¶¶ 116, 123. It therefore is not duplicative of the plaintiffs' legal malpractice claim, for the reasons set forth above. Accordingly, the

Court declines to dismiss the cause of action for unjust enrichment as duplicative of the legal malpractice claim.

D. Alternative Argument of Defendant Akselrad

Defendant Akselrad raises the claim that the excessive and illegal fee claim and unjust enrichment claim against him are independently time-barred, even if they are not duplicative of the legal malpractice claim, and even if the Court applies a six-year statute of limitations. CPLR 213(1); *Boardman v. Kennedy*, 105 A.D.3d 1375, 1376 (4th Dep't 2013) (six-year statute of limitations started to run from occurrence of the wrongful act giving rise to a duty of restitution); *Knobel v. Shaw*, 90 A.D.3d 493, 495 (1st Dep't 2011) (applying six-year statute of limitations both to unjust enrichment claims and to "similar" claim for money had and received); *RHI Holdings v. Debevoise & Plimpton*, 209 A.D.2d 344, 344 (1st Dep't 1994) (applying six-year statute of limitations to claim for recovery of an allegedly excessive legal fee). The Court concludes that, based on the allegations of the complaint viewed in the light most favorable to the plaintiffs, it appears that these claims must have arisen no earlier than the date on which plaintiffs received defendants' "cookie cutter" Opinion Letter, *i.e.*, June 8, 2001. Applying a six-year statute of limitations, the claim would be time-barred as of June 8, 2007, unless the May 3, 2007 Tolling Agreement applies. For the reasons previously set forth in detail at section 1.C,

the Court concludes that the Tolling Agreement does not apply to defendant Akselrad, and therefore the fourth and fifth causes of action are dismissed as to him.[7]

The Court has considered the parties' other arguments, and finds them unavailing. Accordingly, it is

ORDERED that motion sequence 004 is granted and the complaint is dismissed as to defendant Ira Akselrad; and it is further

ORDERED that the portions of motion sequence 005 that seek dismissal of the second and third causes of action against defendants Proskauer Rose LLP and Jay Waxenberg are granted, and the respective causes of action for legal malpractice and declaratory judgment are dismissed; and it is further

ORDERED that the portions of motion sequence 005 that seek to strike plaintiffs' demands for back taxes and interest, lost opportunity, lost dividends, and stock appreciation on the first cause of action are granted; and it is further

ORDERED that the remainder of motion sequence 005 is denied.

This constitutes the Decision and Order of the Court.

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[7] Even if defendants Proskauer and Waxenberg had joined defendant Akselrad in this particular argument, the Court notes that they (unlike Akselrad) are bound by the Tolling Agreement. Section 1.C, *supra*.

Dated: January 23, 2014

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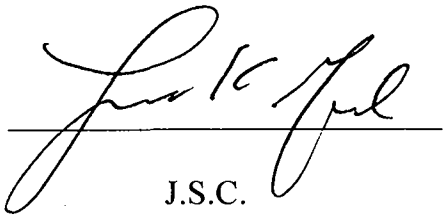

J.S.C.

HON. LAWRENCE K. MARKS