

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals  
2           for the Second Circuit, held at the Thurgood Marshall United  
3           States Courthouse, 40 Foley Square, in the City of New York,  
4           on the 22<sup>nd</sup> day of May, two thousand fifteen.

5  
6           PRESENT: DENNIS JACOBS,  
7                        ROSEMARY S. POOLER,  
8                        PETER W. HALL,  
9                                       Circuit Judges.

10  
11           - - - - -X  
12           IN RE MF GLOBAL HOLDINGS LTD. INVESTMENT  
13           LITIGATION (DEANGELIS V. CORZINE)  
14           - - - - -X  
15           BEARING FUND LP, AUGUSTUS  
16           INTERNATIONAL MASTER FUND, LP, KAY P.  
17           TEE, LLC, MARK KENNEDY, THOMAS G.  
18           MORAN, ROBERT MARCIN, PARADIGM ASIA  
19           LTD., PARADIGM EQUITIES LTD.,  
20           PARADIGM GLOBAL FUND I LTD., PS  
21           ENERGY GROUP, INC., SUMMIT TRUST  
22           COMPANY, HENRY ROGERS VARNER, JR.,  
23           THOMAS S. WACKER,  
24                        Plaintiffs-Appellants,

25  
26                        -v.-

14-1249-cv

1 PRICEWATERHOUSECOOPERS LLP,  
2 Defendant-Appellee.\*

3 - - - - -X

4  
5 **FOR APPELLANTS:** ANDREW J. ENTWISTLE (Merrill G.  
6 Davidoff, Berger &  
7 Montague, P.C., Philadelphia,  
8 Pennsylvania, Charles R.  
9 Eskridge III, Susman  
10 Godfrey LLP, Houston, Texas, on  
11 the brief), Entwistle & Cappucci  
12 LLP, New York, New York.

13  
14 **FOR APPELLEE:** JAMES J. CAPRA, JR. (James P.  
15 Cusick & David M. Fine, on the  
16 brief), King & Spalding LLP, New  
17 York, New York.

18  
19 Appeal from a judgment of the United States District  
20 Court for the Southern District of New York (Marrero, J.).

21  
22 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
23 **AND DECREED** that the judgment of the district court be  
24 **AFFIRMED.**

25  
26 Plaintiffs--representatives of a class of former  
27 commodities customers of MF Global Inc. ("MFGI")--appeal  
28 from the judgment of the United States District Court for  
29 the Southern District of New York (Marrero, J.), dismissing  
30 their claims against PricewaterhouseCoopers LLP ("PwC"). We  
31 assume the parties' familiarity with the underlying facts,  
32 the procedural history, and the issues presented for review.

33  
34 In 2010 and 2011, MFGI allegedly raided commodities  
35 customer accounts, which it maintained in its capacity as a  
36 futures commission merchant, in an effort to stave off  
37 collapse. See generally In re MF Global Holdings Ltd. Sec.  
38 Litig. ("MF Global I"), 982 F. Supp. 2d 277, 288-300  
39 (S.D.N.Y. 2013) (describing collapse of MFGI). In so doing,  
40 MFGI violated the Commodity Exchange Act ("CEA") and  
41 regulations promulgated by the Commodity Futures Trading  
42 Commission ("CFTC"). See 7 U.S.C. § 6d(a)(2); 17 C.F.R.

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\* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 § 30.7(a). Plaintiffs allege that PwC, which conducted  
2 audits of MFGI in 2010 and 2011 pursuant to 17 C.F.R.  
3 § 1.16, enabled MFGI's unlawful conduct by failing to detect  
4 deficiencies in MFGI's accounting and internal control  
5 procedures. In re MF Global Holdings Ltd. Inv. Litig. ("MF  
6 Global II"), 998 F. Supp. 2d 157, 174 (S.D.N.Y. 2014).  
7 Plaintiffs sued PwC for breach of fiduciary duty on behalf  
8 of MFGI and for professional negligence on behalf of MFGI  
9 and customers.<sup>1</sup>

10  
11 The district court granted PwC's motion to dismiss,  
12 holding that: (1) the claims on behalf of MFGI were barred  
13 by in pari delicto and (2) the professional negligence claim  
14 on behalf of customers failed as a matter of law because PwC  
15 was not in privity or "near-privity" with customers. MF  
16 Global II, 998 F. Supp. 2d at 187-91. Plaintiffs appealed.

17  
18 "We review a district court's grant of a motion to  
19 dismiss under Rule 12(b)(6) de novo." Simmons v. Roundup  
20 Funding, LLC, 622 F.3d 93, 95 (2d Cir. 2010) (internal  
21 quotation marks omitted). We affirm the district court for  
22 substantially the reasons set forth in its thorough and  
23 well-reasoned opinion.

24  
25 **1. In Pari Delicto.** Plaintiffs' claims on behalf of  
26 MFGI are barred by in pari delicto, an affirmative defense  
27 which "mandates that the courts will not intercede to  
28 resolve a dispute between two wrongdoers." Kirschner v.  
29 KPMG LLP, 15 N.Y.3d 446, 464 (2010). In "appropriate"  
30 cases, the defense may be applied at the pleading stage.  
31 Id. at 459 n.3.

32  
33 Plaintiffs allege that MFGI, acting through directors  
34 and officers who have also been sued (the "D&O Defendants"),  
35 violated the segregation requirements of Section 4d of the  
36 CEA, 7 U.S.C. § 6d(a)(2) ("Section 4d"), and 17 C.F.R.  
37 § 30.7(a) ("Regulation 30.7"). The allegation defeats the  
38 claim: a corporation that engages in malfeasance cannot sue  
39 outside accountants who negligently failed to detect or  
40 prevent that malfeasance. Kirschner, 15 N.Y.3d at 463, 477.

41  

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<sup>1</sup> The trustee appointed to oversee the liquidation  
of MFGI under the Securities Investor Protection Act  
assigned MFGI's claims to Plaintiffs. MF Global II, 998 F.  
Supp. 2d at 168-69.

1 Plaintiffs attempt to avoid in pari delicto by arguing,  
2 first, that PwC performed a special regulatory function  
3 pursuant to 17 C.F.R. § 1.16. Relying on Bateman Eichler,  
4 Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985), and  
5 Pinter v. Dahl, 486 U.S. 622 (1988), Plaintiffs assert that  
6 in pari delicto cannot be applied if its application would  
7 undermine a federal regulatory scheme. However, those cases  
8 addressed the federal common law of in pari delicto and  
9 discussed the circumstances under which that doctrine could  
10 be invoked to preclude federal claims. Bateman Eichler, 472  
11 U.S. at 301; Pinter, 486 U.S. at 635. This case concerns  
12 the application of New York's doctrine of in pari delicto to  
13 New York claims. Absent federal preemption, the application  
14 of a state law defense to state law claims is governed  
15 exclusively by state law. See, e.g., Kirschner v. KPMG LLP,  
16 590 F.3d 186, 194-95 (2d Cir. 2009) (certifying such  
17 questions to the New York Court of Appeals). Plaintiffs  
18 have identified no federal statute that preempts the New  
19 York law of in pari delicto.<sup>2</sup> Nor have they cited any New  
20 York authority that adopts the principle articulated in  
21 Bateman Eichler and Pinter.

22  
23 Second, Plaintiffs argue that PwC's wrongful conduct  
24 was unrelated to MFGI's because the negligent audits were  
25 performed prior to MFGI's violations of Section 4d and  
26 Regulation 30.7. However, the gist of the claims against  
27 PwC is that PwC should have--but failed to--detect  
28 deficiencies in MFGI's accounting and internal control  
29 procedures, and that these deficiencies later enabled MFGI  
30 to misuse customer funds. See Compl. ¶¶ 374-375. MFGI's  
31 misuse of customer funds is thus sufficiently linked with  
32 PwC's auditing failures: but for MFGI's wrongful conduct,  
33 there would have been no violations of Section 4d or  
34 Regulation 30.7 for PwC to prevent. Plaintiffs assert that  
35 in pari delicto bars claims based on failures to detect  
36 wrongdoing, but not claims based on failures to prevent  
37 wrongdoing. The case law makes no such distinction. See  
38 Kirschner, 15 N.Y.3d at 464.

39  
40 Finally, Plaintiffs argue that it is premature to apply  
41 in pari delicto because there has been no definitive ruling  
42 that MFGI engaged in wrongdoing. That argument is self-

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<sup>2</sup> The CEA provides a federal cause of action, but that cause of action cannot be brought against an auditor like PwC. See 7 U.S.C. § 25(a)(1).

1 defeating: if MFGI is ultimately found to have complied with  
2 Section 4d and Regulation 30.7, any negligence by PwC will  
3 have caused no injury.  
4

5 Plaintiffs argue that the application of in pari  
6 delicto must await the outcome of the claims against the D&O  
7 Defendants. We disagree. "An affirmative defense may be  
8 raised by a pre-answer motion to dismiss under Rule 12(b)(6)  
9 . . . if the defense appears on the face of the complaint."  
10 Iowa Pub. Employees' Ret. Sys. v. MF Global, Ltd., 620 F.3d  
11 137, 145 (2d Cir. 2010) (internal quotation marks omitted).  
12

13 The district court properly dismissed the claims  
14 asserted on behalf of MFGI as barred by in pari delicto.<sup>3</sup>  
15

16 **2. Professional Negligence.** Under New York law, an  
17 accountant cannot be sued for professional negligence by a  
18 party with whom it did not contract unless the relationship  
19 between the plaintiff and the accountant was "so close as to  
20 approach that of privity." Credit Alliance Corp. v. Arthur  
21 Andersen & Co., 65 N.Y.2d 536, 546 (1985) (citation and  
22 internal quotation marks omitted). "Near-privity" has the  
23 following elements: "1) the accountant must have been aware  
24 that the reports would be used for a particular purpose;  
25 2) in furtherance of which a known party was intended to  
26 rely; and 3) some conduct by the accountant 'linking' him or  
27 her to that known party." Sec. Investor Prot. Corp. v. BDO  
28 Seidman, LLP, 222 F.3d 63, 73 (2d Cir. 2000) (citing Credit  
29 Alliance, 65 N.Y.2d at 551).  
30

31 BDO Seidman controls this case. In that case, the  
32 customer-plaintiffs of a bankrupt broker-dealer were not  
33 "known parties"; although the accountant-defendant knew that  
34 the broker-dealer's customers would, as a class, rely on the  
35 audits, it did not know that the "*particular plaintiffs*  
36 bringing the action would rely on its representations." BDO  
37 Seidman, 222 F.3d at 75. And the requisite "linking  
38 conduct" was absent because the accountant never directly  
39 communicated with customers. Id. at 75-76.

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<sup>3</sup> Because we affirm on this basis, we need not consider whether the breach of fiduciary claim could have been dismissed on the additional ground that "[g]enerally, there is no fiduciary relationship between an accountant and his client." Friedman v. Anderson, 803 N.Y.S.2d 514, 516 (App. Div. 1st Dep't 2005).

1 Here, Plaintiffs do not allege that PwC knew the  
2 specific identities of the "*particular plaintiffs* bringing  
3 the action" or "even . . . the number of customers [MFGI]  
4 had at any one time." BDO Seidman, 222 F.3d at 75.  
5 Furthermore, as in BDO Seidman, there is no allegation that  
6 PwC engaged in any "linking conduct" with MFGI's customers:  
7 the audit reports it prepared were delivered to MFGI, not  
8 customers.<sup>4</sup>

9  
10 The district court properly dismissed Plaintiffs'  
11 professional negligence claim on behalf of customers.

12 \* \* \*

13  
14  
15 For the foregoing reasons, and finding no merit in  
16 Plaintiffs' other arguments, we hereby **AFFIRM** the judgment  
17 of the district court.

18  
19 FOR THE COURT:  
20 CATHERINE O'HAGAN WOLFE, CLERK  
21

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<sup>4</sup> Relying on Dorking Genetics v. United States, 76 F.3d 1261 (2d Cir. 1996), and Kidd v. Havens, 577 N.Y.S.2d 989 (App. Div. 4th Dep't 1991), Plaintiffs argue that "linking conduct" does not always require direct communication between the accountant and the relying party. Neither case assists Plaintiffs. In Dorking Genetics, linking conduct was present because the defendant's report was allegedly "tailored to the plaintiffs' requirements." 76 F.3d at 1270. Here, PwC's reports were tailored to the requirements of the CFTC and other regulators. In Kidd, the buyer received and read the title company's report, even if he did not directly receive the report from the company. 577 N.Y.S.2d at 990. Here, there is no allegation that Plaintiffs even received or read PwC's audit reports.