UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
Adelphia Communications Corp., *et al.*,	)	Case No. 02-41729 (REG)
Debtors.	)	Jointly Administered
Adelphia Communications Corp. and its Affiliated Debtors and Debtors in Possession and Official Committee of Unsecured Creditors of Adelphia Communications Corp.,	)	Adversary No. 03-04942 (REG)
Plaintiffs,	)	
v.	)	
Bank of America, N.A., *et al.*,	)	
Defendants.	)	

DECISION AND ORDER ON MOTIONS TO DISMISS THE EQUITY COMMITTEE'S INTERVENOR COMPLAINT

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding under the umbrella of the chapter 11 cases of Adelphia Communications Corporation and its subsidiaries ("Adelphia" or "the Debtors"), the Creditors' Committee and the Equity Committee assert claims, on behalf of the Adelphia Estate, against the Debtors' bank lenders and investment banks.[1] Defendants have moved to dismiss the Equity Committee's intervenor complaint under Fed. R. Civ. P. 12(b)(6).

The motions are granted in part and denied in part, as set forth more specifically below and in the table accompanying this decision.

[1] The Court has already addressed the claims of the Creditors' Committee in a separate decision. *See In re Adelphia Commc's Corp.*, 365 B.R. 24 (Bankr. S.D.N.Y. 2007) (the "*Creditors' Committee Decision*"). This decision addresses only the Equity Committee's claims.

Background

The facts alleged in this adversary proceeding were set forth generally in the Court's decision granting the Creditors' and Equity Committees' standing to sue,[2] and need not be set out at comparable length here. In general, the Creditors' and the Equity Committees bring this suit against numerous commercial banks and their investment bank affiliates (the "Defendants"), charging wrongdoing on the part of the Defendants in their dealings with Adelphia's former management, John, Timothy, Michael and James Rigas (the "Rigases"), and Rigas family entities ("RFEs"), against whom Adelphia brought suit for the looting of the company.

The Equity Committee brings 13 claims (in addition to the Creditors' Committee's 52 claims) which are based largely on the same core facts concerning the Defendants' conduct and their roles in the Adelphia fraud as alleged in the Creditors' Committee complaint.[3] The Equity Committee argues that these facts also give rise to the additional claims contained in the intervenor complaint. The Equity Committee included additional factual allegations only insofar as they might support the Equity Committee's RICO causes of action.

In its intervenor complaint, the Equity Committee asserts:

- four claims under RICO against the commercial banks (the "Agent Banks")[4] with management or administrative agent roles in Adelphia's co-borrowing facilities and the investment banks allegedly affiliated or under common control with the Agent Banks (the "Investment Banks");

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2 *See In re Adelphia Commc'ns Corp.*, 330 B.R. 364 (Bankr. S.D.N.Y. 2005).

3 The Equity Committee has adopted almost all of the factual allegations contained in the Creditors' Committee complaint (outlined in the *Creditors' Committee Decision*), but has not adopted allegations that the Debtors were or are insolvent, nor the claims based on such allegations.

4 The definitions of the "Agent Banks" and the "Investment Banks" are set forth in greater detail in the *Creditors' Committee Decision*, 365 B.R. at 33, familiarity with which is assumed.

- two claims against Salomon Smith Barney ("SSB") in connection with the fairness opinions SSB issued in connection with private placements with the Rigases of Adelphia's securities;

- a claim against the Investment Banks for failure to independently examine Adelphia's financial condition;

- four claims against the Investment Banks for breach of contract, unjust enrichment, and breach of the implied covenants of good faith and fair dealing based on the valuation of the offerings of Adelphia's securities and the extent to which the Rigases bought into those offerings;

- a claim against the Investment Banks for fraudulent concealment; and

- a claim against all Defendants for fraud.

Rule 12(b)(6) standards

Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests."[5] While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,[6] and "[s]pecific facts are not necessary,"[7] a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do."[8]

Factual allegations must be enough to raise a right to relief "above the speculative level,"[9] and a plaintiff must "amplify a claim with some factual allegations…to render

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5 *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1964 (2007) ("*Bell Atlantic*") (internal quotations omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), effectively overruled in other respects by *Bell Atlantic*).

6 *Id.* citing *Conley*, 355 U.S. at 47.

7 *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

8 *Bell Atlantic*, 127 S. Ct. at 1964-65.

9 *Id.* at 1965.

the claim *plausible.*"[10] But Rule 12(b)(6) "does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations."[11] To the contrary, a complaint's factual allegations are presumed true, and are construed in favor of the pleader.[12] As the Supreme Court held in *Scheuer v. Rhodes:*

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.[13]

Once a claim has been stated adequately, it may be supported by showing "any set of facts consistent with the allegations in the complaint."[14] However, "a complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense if the defense appears on the face of the complaint."[15] Furthermore, on a motion to dismiss, a court may consider certain documents in addition to the complaint, including the contents of any documents attached to the complaint or incorporated by reference; matters as to which the court can take judicial notice; and documents in the possession of the non-moving party (the Equity Committee here) or

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10 *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (emphasis in the original).

11 *Bell Atlantic*, 127 S. Ct. at 1965 (quoting *Nietzke v. Williams*, 490 U.S. 319, 327 (1989)).

12 *See, e.g., Luedke v. Delta Air Lines, Inc.*, 159 B.R. 385, 389 (S.D.N.Y.1993) (applying this standard, denying motion to dismiss third-party complaint).

13 416 U.S. 232, 236 (1974), *abrogated on other ground by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

14 *Bell Atlantic*, 127 S. Ct. at 1960.

15 *Buckley v. Deloitte & Touche USA LLP*, 2007 WL 1491403, *4 (S.D.N.Y. May 22, 2007) (citing *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003)) (internal quotations omitted).

documents which the non-moving party knew of or relied on in connection with its complaint.[16]

I.

State Law Claims

In its intervenor complaint, the Equity Committee alleges a number of state law claims against the Defendants. The Defendants move to dismiss all state law claims on various grounds. Defendants SSB and Bank of America Securities ("BAS") also argue that all of the Equity Committee's state law claims are preempted by the Securities Litigation Uniform Standards Act ("SLUSA"). The Court's determinations with respect to each claim are set forth below.

A. Threshold Issue -- Securities Litigation Uniform Standards Act of 1998 (SLUSA)

As the SLUSA arguments are threshold issues apart from those relating to the underlying claims merits, the Court considers them first. Defendants SSB and BAS argue that the Equity Committee's state law claims are preempted by SLUSA because the intervenor complaint constitutes a "covered class action" and the intervenor complaint's state law claims are based on allegations of the Defendants' misrepresentations in connection with the purchase or sale of Adelphia's securities.[17] The Equity Committee argues that the Defendants are misreading the statute, and that the intervenor complaint is not subject to SLUSA because it does not satisfy the elements of a SLUSA action.

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16 *See In re Granite Partners, L.P.*, 210 B.R. 508, 514 (Bankr. S.D.N.Y. 1997).

17 In a footnote to their Motion to Dismiss Intervenor Complaint, the Investment Banks also asserted this SLUSA defense against the Creditors' Committee's state law claims. *See* Motion of Investment Banks to Dismiss Intervenor Complaint at 21. This defense was not asserted in these Defendants' motions to dismiss the Creditors' Committee's complaint, and was not briefed before the Court by the Creditors' Committee. Therefore, the Court did not decide the applicability of this defense to the claims of the Creditors' Committee in the *Creditors' Committee Decision*. However, had this defense been brought properly before the Court, the Court would have rejected it for the same reasons as are set forth in this decision.

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA") "to prevent abuses in private securities fraud lawsuits."[18] To avoid the new, more stringent, requirements of federal courts in connection with securities fraud litigation, plaintiffs started bringing their securities fraud litigation to state courts. Congress passed SLUSA in 1998 primarily to close the perceived loophole in PSLRA by "making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law."[19] The relevant provision of SLUSA provides:

> [n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging-
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> > (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[20]

The arguments of BAS and SSB that the present litigation falls under SLUSA's definition of "covered class action" are unpersuasive. "Covered class actions" which Congress intended to bar from state courts include "actions brought on behalf of more than 50 persons, actions brought on behalf of one or more unnamed parties, and so-called 'mass actions,' in which a group of lawsuits filed in the same court are joined or otherwise proceed as a single action."[21] Defendants argue that the intervenor complaint is a "covered class action" because it was brought on behalf of 230 debtors. Such an

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18 H.R. Conf. Rep. 105-803, *1 (1998).

19 *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001).

20 15 U.S.C. § 78bb(f)(1).

21 H.R. Conf. Rep. 105-803, *13.

argument leads to an absurd result. Although a "covered class action" under SLUSA is not limited to class actions certified under Fed. R. Civ. P. 23, BAS and SSB have not pointed to any case, and the Court is not aware of any, where an action brought on behalf of a corporation and its individual subsidiaries was considered a "covered class action" for the purposes of SLUSA because of the happenstance that the corporate family involved more than 50 entities. The argument is just a play on words.

Just as textual analysis does not warrant dismissal, neither does consideration of the legislative purpose. Congress intended for SLUSA to be a shield against meritless "strike" suits.[22] BAS and SSB, ignoring the purpose of this legislation, seek to use SLUSA to prevent the representatives of the Adelphia estate from pursuing allegations against the parties who allegedly injured or assisted in injuring the estate—when here, as in the case of many large corporations, the estate consists of more than 50 individual entities. The Court sees no nexus between this lawsuit and the ills intended to be addressed by SLUSA, and does not believe that the asserted construction of SLUSA furthers the Congressional intent in enacting this legislation.

For these reasons the Court holds that SLUSA does not bar the Equity Committee from proceeding with its state law claims.

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[22] *Id.* (SLUSA was "designed to protect the interests of shareholders and employees of public companies that are the target of meritless 'strike' suits. The purpose of these strike suits is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating.").

B. State Law Claims Merits

1. Breach of Contract and Contract-Related Claims (Investment Banks)

In its intervenor complaint, the Equity Committee brings a number of contract and contract-related claims against the Investment Banks. Thus, the Equity Committee alleges

- a breach of contract claim against the Investment Banks in their capacity as underwriters for failure to independently examine Adelphia's financial condition

- two breach of contract claims against the Investment Banks based on the valuation of the offerings and the extent to which the Rigases bought into those offerings and, in the alternative, an unjust enrichment claim and a claim for breach of implied covenants of good faith and fair dealing based on the same facts; and

- a breach of contract against SSB in connection with the fairness opinions SSB issued regarding private placements with the Rigases of Adelphia's securities;

At least most of the contracts alleged to have been breached have choice of law clauses which provide that they will be governed by the law of New York[23]—a choice that has sufficient nexus with the matter it covered (typically transactions with entities in NewYork) to be enforceable. To state a claim for breach of contract under New York law**,** a party must allege: (i) the existence of an agreement between the plaintiff and defendant; (ii) due performance of the contract by the plaintiff; (iii) a breach by the defendant; and (iv) damages resulting from the breach.[24] "[A] short and plain statement

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[23] All the contracts reviewed by the Court have a New York choice of law clause, and no contract with a different choice of law clause has been brought to the Court's attention.

[24] *See, e.g., Reuben H. Donnelley Corp. v. Mark I Marketing Corp.*, 893 F. Supp. 285, 290 (S.D.N.Y. 1995). Although the Equity Committee does not dispute that New York law will apply to breach of contract claims, the Court notes that elements of breach of contract relevant to the Court's analysis are similar under New York and Pennsylvania law, with the latter requiring a plaintiff to demonstrate (i) the existence of a contract, including its essential terms, (ii) a breach of a duty

of the claim showing that the pleader is entitled to relief'"[25] will suffice to state a contract claim under Rule 8(a). However, the failure to allege all four elements required under New York law to state a breach of contract claim will result in dismissal.[26]

In order to adequately allege the existence of an agreement, "a plaintiff must 'plead the provisions of the contract upon which the claim is based.'"[27] A plaintiff need not attach a copy of the contract to the complaint or quote the contractual provisions verbatim.[28] However, the complaint must at least "set forth the terms of the agreement upon which liability is predicated ... by express reference."[29]

The Equity Committee also brings a negligence claim against SSB, a fraud claim against all Defendants and a fraudulent concealment claim against the Investment Banks. The Defendants move to dismiss each of the state law claims.

(a). Breach of Contract (Investment Banks) -- Failure to Independently Examine Adelphia's Financial Condition (Claim 59)

The Equity Committee alleges that the Investment Banks entered into written contracts with Adelphia to provide underwriting services and perform the tasks customarily performed by underwriters in connection with public debt or equity offerings and private placements. The Equity Committee further alleges that these contracts obligated the Investment Banks to independently examine Adelphia's finances in

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imposed by the contract, and (iii) resultant damages. *Chicago Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC*, 2007 WL 1118322, *8 (E.D. Pa. Apr. 13, 2007) (citing *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003)).

25 *Howell v. Am. Airlines, Inc*., 2006 WL 3681144, *3 (E.D.N.Y. Dec. 11, 2006) (citations omitted).

26 *Id.*

27 *Id.* citing *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 399396, at *10 (S.D.N.Y. Feb. 21, 2006) (quotations omitted).

28 *Id.*

29 *Id.* at *3; *see also Phoenix Four*, 2006 WL 399396 at *10.

accordance with standards in the industry, and to report the results of their investigations to Adelphia, all of which the Investment Banks allegedly failed to do.

The Investment Banks argue that the Equity Committee fails to adequately plead essential elements of a breach of contract, because it fails to identify contracts or any terms of contracts that the Investment Banks are alleged to have breached. The Court agrees.

To survive a motion to dismiss, the Equity Committee must, at a minimum, allege the terms of the contract and elements of the alleged breach[30] with respect to each defendant.[31] The Equity Committee failed to do so. The intervenor complaint did not name any contract nor did it identify any term of any agreement with any of the Defendants that the Defendants purportedly breached. The Equity Committee instead alleges that the Investment Banks agreed to perform "tasks customarily performed by underwriters,"[32] and, as a result, to independently examine Adelphia's financial condition. But it fails to point to any provision of any contract where the latter obligation appears. The vague allegations of the Equity Committee's complaint fall short of the "short and plain statement of the claim showing that the pleader is entitled to relief."[33]

In its response to the Defendants' motion to dismiss the intervenor complaint, the Equity Committee points to one engagement letter between Adelphia and SSB and BAS

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30 *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 286 (S.D.N.Y. 1991).

31 *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young*, 1994 WL 88129, *15 (S.D.N.Y. Mar. 15, 1994) ("Even Rule 8(a) pleading requires plaintiffs to identify the specific defendant charged with committing a particular predicate act, rather than collectivizing a group of defendants as plaintiffs have done here.").

32 Intervenor Cmplt. ¶ 1141.

33 Fed. R. Civ. P. 8(a).

under which the investment banks agreed to "perform such financial advisory and investment banking services for Company in connection with the proposed Transaction as are customary and appropriate in transactions of this type and as Company reasonably requests."[34] The Equity Committee then argues that the Court should not dismiss this breach of contract claim because a determination of what is "customary" is a factual one.

But in response to the Equity Committee's objection to motion to dismiss, the Defendants argue that this engagement letter, while stating that SSB would perform "customary" financial advisory and investment banking services, specifically disclaims any duty to independently investigate Adelphia's financial condition.[35] Whatever contractual rights might exist with respect to other matters, rights based on what is "customary" could not trump express agreement to the contrary. Under New York law, where, as here, a contract clearly and exhaustively sets forth the rights and obligations of both parties, evidence of industry practice may not be used to vary the terms of the

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[34] The Equity Committee did not bring to the Court's attention any other agreements between Adelphia and any of the other Investment Banks with similar language.

[35] The engagement letter between Adelphia and BAS and SSB, dated Dec. 21, 2000, states in relevant part:

> In connection with its engagement hereunder, the Investment Banks shall assist Company in preparing a prospectus, offering circular, private placement memorandum or other document to be used in connection with each Offering in which the Investment Banks participate…Company shall furnish the Investment Banks with all financial and other information concerning Company and related matters (the "Information") which the Investment Banks may reasonably request for inclusion in any Offering Document or otherwise. The Investment Banks may rely, without independent verification, upon the accuracy and completeness of the Information and any Offering Document and the Investment Banks do not assume any Responsibility therefor.

contract[36] nor can it be used to add or expand upon the parties' express obligations under their agreements.[37] To prevent that from occurring, the companies use integration or merger clauses, such as the one used in the engagement letter at issue.[38] The Equity Committee cannot create an issue of fact where SSB and BAS in their agreement explicitly disclaimed any duty to independently verify Adelphia's financial and other information.

The Equity Committee's breach of contract claims against the Investment Banks for failure to independently examine Adelphia's financial condition are dismissed.

(b). Breach of Contract – Underwriting Fees (Investment Banks) (Claim 60) – Valuation of Offerings (Claim 62)

The Equity Committee alleges that the Investment Banks received fees for underwriting Adelphia's securities in the amount determined as a percentage of the capital raised and provided to Adelphia in these offerings. The Equity Committee further alleges that to the extent that the Rigas Management and the RFEs acquired Adelphia's stock in these offerings using the proceeds of the co-borrowing facilities, Adelphia did not receive any capital equal to the price of the securities it sold, because the purchases only increased the debt on the co-borrowing facilities. Thus, the Equity Committee alleges that the Investment Banks failed to provide Adelphia with capital equal to the offering price of the securities they underwrote, while collecting underwriting fees – all allegedly in breach of their underwriting contracts with Adelphia.

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36 *See Jofen v. Epoch Biosciences, Inc.* 2002 WL 1461351, *9 (S.D.N.Y. Jul. 8, 2002) ("Extrinsic evidence of industry custom and practice is not relevant to the question of contractual interpretation where, as here, the parties have expressed their intent clearly in a written contract.").

37 *Travelers Indem. Co. v. AMR Servs. Corp.*, 921 F. Supp. 176, 187 fn. 9 (S.D.N.Y. 1996).

38 The engagement letter between Adelphia and BAS and SSB, dated Dec. 21, 2000, § 9 provides: "This Engagement Letter contains the entire agreement between the parties relating to the subject matter hereof and supercedes all oral statements and prior writings with respects thereto."

The Defendants move to dismiss these claims because, among other reasons, the Investment Banks entered into underwriting agreements with Adelphia for the sale of securities to the *public*, but not to the Rigases. The underwriting agreements obligated the Investment Banks, in their capacity as underwriters, to purchase a fixed number of shares from Adelphia, which they did. As a result, the Investment Banks argue, Adelphia received all of the capital from the Investment Banks, and the Investment Banks rightly received their commission. The Court agrees.

Under the Supreme Court's recent pronouncements in *Bell Atlantic*, it is no longer the case that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleading."[39] Without some factual allegations in the complaint, "it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[40]

The Equity Committee—even in its response to the motions to dismiss—fails to put forth any facts that would support the proposition that *any* of the Defendants sold securities to the Rigases pursuant to the underwriting agreements. Instead, separate agreements between Adelphia and the RFEs (to which the Investment Banks are not parties) governed the purchases of Adelphia's securities by the Rigases.[41] The

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39 *Bell Atlantic*, 127 S. Ct. at 1968.

40 *Id*. at 1965 fn. 3.

41 *See, e.g.*, letter agreement between Adelphia and Highland Holdings, dated Oct. 1, 1999, regarding the purchase of 2,500,000 shares of Adelphia's Class B Common Stock. In fact, an engagement letter between BOA, SSB and Adelphia, dated Dec. 21, 2000, for example, specifically carved out transactions with the Rigases or RFEs from the services to be performed by the investment banks by excluding from the investment banks' services "any sale, transfer, joint venture or other disposition of any System to the Company or any of its subsidiaries or any of the Rigas family entities."

Investment Banks cannot be held liable for breach of contracts to which they were not parties.[42]

The underwriting agreements between Adelphia and the Investment Banks obligated the underwriters to purchase an agreed upon number of securities and to pay Adelphia for those securities.[43] So far as the Court can determine from the allegations of the complaint, the underwriters did so; the Equity Committee does not argue that they failed to pay for the shares they were obligated to purchase under the underwriting agreements.[44] Therefore, the Court must hold that the Investment Banks fulfilled their part of the bargain in providing capital for the securities they were obligated to purchase, and were entitled to receive their underwriting fees. The Equity Committee's breach of contract claims based on valuation of offerings and underwriting fees are dismissed.

(c). Unjust Enrichment (Investment Banks) – Underwriting Fees (Claim 61)

In the alternative to its breach of contract claims, the Equity Committee argues that to the extent the Investment Banks collected underwriting fees in connection with their sale of Adelphia's securities to the Rigases, they have been unjustly enriched in the amount of those fees.

The Federal Rules of Civil Procedure allow pleading in the alternative, and courts in both New York and Pennsylvania permit plaintiffs to plead breach of contract and

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42 *See, e.g. Lakeville Pace Mech., Inc. v. Elmar Realty Corp.*, 714 N.Y.S.2d 338, 341-42 (2d Dept. 2000) (dismissing breach of contract claim where a defendant was not a party to the contract allegedly breached.).

43 The underwriting agreements (most of which are examples of firm commitment underwriting) provide, generally: "Adelphia Communications Corporation…proposes to issue and sell [amount] of its [name of security to be sold] to the several underwriters."

44 Adelphia received the capital for its shares from the underwriters, not the Rigases. Even if the underwriters then sold some securities to the Rigases, Adelphia had already received its funds from the underwriters themselves for those shares.

unjust enrichment in the alternative, even when the existence of a contract would preclude recovery under unjust enrichment.[45] To adequately allege unjust enrichment under New York law, the plaintiff must allege that "(1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) ... it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff."[46]

As discussed above, the Court has ruled that the Investment Banks performed their obligations under their underwriting agreements and paid for all the shares that they were obligated to purchase. For this they received their underwriting fees. Therefore, the Court rules that the Investment Banks were not unjustly enriched, and dismisses the Equity Committee's unjust enrichment claim.

(d). Breach of Implied Covenants of Good Faith and Fair Dealing (Investment Banks) (Claim 63)

The Equity Committee further alleges that the Investment Banks breached their duties of good faith and fair dealing by purporting to assist Adelphia in raising capital through sales of Adelphia's securities when, in fact, such sales did not actually raise money for Adelphia because the securities were purchased with funds from the co-borrowing facilities, increasing Adelphia's debt. The Investment Banks argue that this claim must be dismissed because it is based on identical facts as the contract claims

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[45] See, e.g. *Surety Adm'rs, Inc. v. Pacho's Bail Bonds*, 2007 WL 1002136, *4 (E.D. Pa. Mar. 30, 2007); *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F. Supp. 2d 251, 261 (S.D.N.Y. 2002), *abrogated on other grounds by Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258 (S.D.N.Y. 2004).

[46] *Baron v. Pfizer, Inc.*, 2007 WL 1932068, *2 (3d Dept. 2007) (citations omitted). The elements of unjust enrichment are similar in Pennsylvania, where the plaintiff must allege (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *See Mitchell v. Moore*, 729 A.2d 1200, 1203 (Pa. Super. 1999).

asserted by the Equity Committee. The Equity Committee argues that it may plead these causes of action in the alternative.

The covenant of good faith and fair dealing "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement."[47] Under New York law, "parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract."[48] Therefore, New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when it is based on the same facts as the breach of contract claim also pled in the same complaint.[49] Raising both claims based on the same set of facts in a single complaint is, therefore, duplicative and "[c]ourts have dismissed claims for breach of the implied covenant of good faith as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach ... of an express provision of the underlying contract."[50] A claim for breach of the implied covenant of good faith can survive a motion to dismiss "only if it is based on allegations different from those underlying the accompanying breach of contract claim."[51]

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47 *Leberman v. John Blair & Co.*, 880 F.2d 1555 (2d Cir. 1989) (internal quotations and citation omitted).

48 *Harris v. Provident Life and Acc. Ins. Co.*, 310 F.3d 73, 80 (2d. Cir. 2002) (quoting *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2d Cir.1992)).

49 *Id. at* 81.

50 *Goldblatt v. Englander Commc'ns, L.L.C.*, 2007 WL 148699, *5 (S.D.N.Y. Jan. 22, 2007) (citations omitted). *See also W. S.A., Inc. v. ACA Corp.*, 1996 WL 551599, *9 (S.D.N.Y. Sept. 27, 1996) ("Every court confronted with such a complaint brought under New York law has dismissed the claim for breach of the covenant of fair dealing.") (citing cases).

51 *Goldblatt*, 2007 WL 148699 at *5 (citations omitted). Similarly, Pennsylvania law does not recognize a separate claim for breach of the implied covenant of good faith and fair dealing. *See Lyon Fin. Servs., Inc. v. Woodlake Imaging, LLC*, 2005 WL 331695, *8 (E.D. Pa. Feb. 9, 2005) ("Any claim for breach of the covenant of good faith and fair dealing is maintained as a breach of contract action.").

The Equity Committee relies on *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc*.[52] for the proposition that while the same operative facts cannot simultaneously give rise to claims for both implied and express covenants, the plaintiffs may, nevertheless, plead in the alternative. While *Xpedior* supports that argument, *Xpedior* is thin in its support for what it said, and numerous cases in this district have held the opposite: a claim for breach of implied covenant of good faith and fair dealing based on the same facts as a breach of contract claim asserted in the same complaint is redundant and must be dismissed on a motion to dismiss.[53] The Court must agree with the majority of courts in this district, and dismiss the Equity Committee's claim for breach of the implied covenants of good faith and fair dealing against the Investment Banks.

(e). Breach of Contract (SSB) (Claim 57)

The Equity Committee also alleges a breach of contract claim against SSB in connection with three fairness opinions issued by SSB to Adelphia for sale of securities to Rigas-owned Highland entities in private placements. The Equity Committee alleges that when SSB issued its fairness opinions, SSB knew that Highland paid for securities with money borrowed under the co-borrowing facilities, and that SSB knew that Adelphia received no outside income for the sale of its securities to Highland. The Equity Committee alleges that SSB therefore breached its agreement to provide accurate

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[52] 341 F. Supp. 2d at 272 (holding that while the plaintiff "may not press both claims *to judgment*, it is free to litigate them") (emphasis in the original).

[53] *See e.g. Goldblatt*, 2007 WL 148699 at *5; *Alter v. Bogoricin*, 1997 WL 691332, *7 (S.D.N.Y. Nov. 6, 1997) (quoting *OHM Remediation Servs. Corp. v. Hughes Envtl. Sys, Inc.*, 952 F. Supp. 120, 124 (S.D.N.Y. 1997) ("[a]s a general rule, [t]he cause of action alleging breach of good faith is duplicative of a cause of action alleging breach of contract...") (internal quotations omitted)); *W. S.A.*, 1996 WL 551599 at *9.

fairness opinions when it represented to Adelphia that the share price was fair for each transaction.

SSB argues that the Equity Committee's contract claim against it should be dismissed because SSB's sole duty under the fairness opinions was to opine to the fairness of the share price, which SSB did. SSB further argues that because the Equity Committee does not dispute that the *share price* itself, from a financial point of view, was incorrect, this breach of contract claim against SSB must be dismissed. The Court agrees with SSB to the extent that the terms of the engagement letters submitted by SSB to the Court are in fact the agreements executed between SSB and the Debtors, or have the same material terms.[54]

The Court notes that the engagement letters called for SSB to opine only on the fairness of share price, and that is what SSB did.[55] The Equity Committee alleges only

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[54] SSB submitted to the Court two out of three engagement letters (although only one of the submitted letters is executed by Adelphia) and two out of three fairness opinions (both fully executed) on which the Equity Committee bases its allegations.

[55] The engagement letters state that SSB was retained "to render an opinion relating to the fairness, from a financial point of view, to the Company of the share price…to be paid by the Highland Holdings in its proposed stock purchase…" Engagement letter dated April 7, 1999; "to render an opinion relating to the fairness, from a financial point of view, to the Company of the price per share to be paid by the Rigas Family in their proposed stock purchase…" Engagement letter dated January 4, 2001. Similarly, the fairness opinion dated April 9, 1999 stated "…it is our opinion that, as of the date hereof, the Share Price is fair to the Company from a financial point of view." Fairness opinion dated January 17, 2001 stated "…we are of the opinion that, as of the date hereof, the Consideration to be received by Adelphia in the Purchase Transactions is fair, from a financial point of view, to Adelphia." Thus, SSB was to opine on fair price per share "to be paid" in the future to Adelphia, not on whether the amount actually received by Adelphia was fair.

that Adelphia never received actual consideration for its shares.[56] But that goes beyond the financial valuation of a share price on which SSB was retained to opine.[57]

The Equity Committee also disputes the existence of final binding engagement letters covering each of the fairness opinions. It points out that the April 7, 1999, engagement letter was signed only by SSB, and not by Adelphia, and that SSB failed to attach as an exhibit any agreement governing the September 30, 1999, fairness opinion. However, the Equity Committee cannot "create an issue of fact by explicitly referring to and relying on a document in its complaint, without providing that documents or its full text, and then, when defendants supply the missing document, objecting to it without any evidentiary basis."[58] Both fully executed fairness opinions—dated April 9, 1999, and January 17, 2001—presented to the Court include language limiting them to opinions as to price per share, and are sufficient to require a dismissal of the breach of contract claim against SSB. However, if the language of the fairness opinion dated September 30, 1999 (or the engagement letter covering that transaction) does not similarly reflect that the opinion was rendered only with respect to the price per share, then the Equity Committee may replead with respect to that opinion.

2. Negligence (SSB) (Claim 58)

The Equity Committee also asserts a negligence claim against SSB, claiming that SSB was negligent in its duties as an advisor to Adelphia. Specifically, the Equity

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[56] The Equity Committee states in its Objection to Investment Banks' Motion to Dismiss at 38: "…the Intervenor Complaint alleges that SSB rendered an improper opinion as to the fairness of the consideration *received*" (emphasis added).

[57] The engagement letter dated Apr. 7, 1999 also states: "The Opinion shall not address the Company's underlying business decision to effect the Highland Holdings Stock Purchase or the Company's proposed use or uses of the proceeds of the Highland Holdings Stock Purchase."

[58] *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 84 n.3 (S.D.N.Y. 2004).

Committee alleges that in rendering the fairness opinions, SSB "owed a duty to Adelphia to: (i) act with reasonable care in the course of its duties and responsibilities *as advisor* to Adelphia; and (ii) avoid conflicts of interest in the course of its duties advising Adelphia and Adelphia's Board of Directors."[59] The Equity Committee further alleges that SSB breached that duty by "issuing the Fairness Opinions *and otherwise recommending* that Adelphia proceed with the public offerings and private placements in which the Rigas Management acquired Adelphia's debt and equity securities."[60] The Equity Committee alleges that SSB breached its duty with knowledge or reckless disregard of "the fact that Adelphia was not receiving fair consideration and/or reasonably equivalent value for the offerings and private placements."[61] The Equity Committee finally alleges that had SSB declined to issue the fairness opinions or to recommend that Adelphia's Board of Directors approve the offerings, Adelphia's Board of Directors would not have approved such offerings.[62]

SSB argues that because it performed under its contract to opine on a fair share price, the Equity Committee's negligence claim must fail. SSB further argues that indemnity provisions in its engagement letter with Adelphia protect SSB from this negligence claim. Finally, SSB argues that the Equity Committee's negligence cause of action is barred by the economic loss doctrine. The Court cannot wholly agree with SSB, and will not dismiss this negligence claim at this stage.

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59 *See, e.g.* Intervenor Cmplt. ¶ 1132 (emphasis added).

60 *Id.* at ¶ 1134 (emphasis added).

61 *Id.* at ¶ 1137.

62 *Id.* at ¶ 1136.

The elements of a negligence claim are: (i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach.[63] The economic loss doctrine provides that for claims alleging only economic loss as injury in a negligence claim, "the usual means of redress is an action for breach of contract; a tort action for economic loss will not lie."[64] Moreover, "[a]s a general rule ... the breach of a contract is not actionable in tort in the absence of special additional allegations which amount to 'a breach of a duty distinct from, or in addition to, the breach of a contract.'"[65] "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated."[66]

To the extent SSB's alleged advisory role arose under its engagement letter or other contracts with Adelphia, the economic loss doctrine will indeed bar the Equity Committee's negligence claim. However, if SSB's advisory role was not covered by any contract, then the economic loss doctrine will not preclude the Equity Committee's negligence claim. In the latter case, the duties that SSB allegedly violated (such as duty of care, for example) will be duties allegedly *in addition* to and *distinct from* breach of

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63 *Lombard v. Booz-Allen & Hamilton, Inc.* 280 F.3d 209, 215 (2d Cir. 2002) (citing *Merino v. New York City Transit Auth.*, 639 N.Y.S.2d 784, 787 (N.Y. App. Div. 1996)). The elements of a negligence claim under Pennsylvania law are substantially similar, consisting of (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting in harm to the interests of another. *See Northwestern Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 139 (3d Cir. 2005).

64 *Netzer v. Continuity Graphic Assocs, Inc.*, 963 F. Supp. 1308, 1320 (S.D.N.Y. 1997) (citations omitted). The Pennsylvania economic loss doctrine similarly holds that "negligence theories do not apply to actions between commercial enterprises where the only damages alleged are economic losses." *Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d, 394, 402 (quotations and citations omitted.)

65 *Netzer*, 963 F. Supp. at 1320 (quoting *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp., ITT*, 725 F. Supp. 656, 662 (N.D.N.Y. 1989) quoting *North Shore Bottling Co., Inc. v. C. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 179 (1968)).

66 *Id.* (quoting *Clark-Fitzpatrick v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389 (1987)).

contract.[67] In that case, SSB's performance under its contracts with Adelphia could be irrelevant to this claim. Similarly, indemnification agreements between SSB and Adelphia would not protect SSB form liability if its alleged *advisory role* was extracontractual, as opposed to its contractual role as an *underwriter*, for which no negligence claim could be alleged.[68] Thus, with SSB allegedly having undertaken to provide the Debtors with advice (if such undertaking existed independent from SSB's duties under its written contracts), other duties to the Debtors may exist, and evaluating the existence of such duties, if any, and SSB's conduct, will involve a factual inquiry.

3. Fraudulent Concealment (Investment Banks) (Claim 64) and Fraud (*Agent Banks and Investment Banks) (Claim 65)*

The Equity Committee also alleges that the Agent Banks and the Investment Banks engaged in *fraud* together with the Rigas management, which consisted, among other misdeeds, of transfers of the Debtors' assets for the Rigases' purposes; concealing such transfers through "netting" and "reclassification" on the Debtors' books; misrepresenting Adelphia's finances on its balance sheet; permitting the use of co-borrowed proceeds for the purchase of Adelphia's stock with the effect of artificially reducing Adelphia's reported debt and artificially increasing its reported equity; falsely

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67 *See* Intervenor Cmplt. ¶ 1134 (SSB breached that duty by "issuing the Fairness Opinions *and otherwise recommending* that Adelphia proceed with the public offerings and private placements in which the Rigas Management acquired Adelphia's debt and equity securities.") (emphasis added).

68 The indemnification agreements except Adelphia's liability with respect to any losses that are finally judicially determined to have resulted primarily "from the gross negligence or willful misconduct" or from "bad faith or gross negligence" of the indemnified banks in connection with their engagement to assist Adelphia in its sale of securities to the RFEs. *See* indemnification agreements, dated Jan. 4, 2001 and Apr. 7, 1999, respectively. Any negligence claim that the Equity Committee could adequately allege would arise from the Investment Banks' extracontractual duties, if any, and a determination of whether the indemnity agreements cover such duties will require a factual inquiry. Thus, the Court does not need now to decide, and does not now decide, whether SSB's alleged conduct constitutes "bad faith" or "willful misconduct" as to preclude it from being indemnified by Adelphia.

representing that Adelphia's stock sales de-leveraged the Company; permitting the use of funds from the co-borrowing facilities to pay the Rigases personal margin calls; failing to disclose that the Rigases purchased stock with loans guaranteed by Adelphia; and permitting Highland 2000 to purchase Adelphia securities "by simply recording journal entries."[69] The Defendants allegedly participated in the Rigas management's "fraudulent schemes to siphon money and assets from the Debtors" and "knowingly provided essential assistance" in those schemes.[70]

In the alternative to the fraud claim, the Equity Committee alleges *fraudulent concealment* on the part of the Investment Banks, arguing that as a result of their roles as underwriters on behalf of Adelphia, each Investment Bank had a duty to Adelphia "to act truthfully and faithfully and disclose anything adverse to Adelphia."[71] The allegations of the Investment Banks' misconduct included in the fraudulent concealment claim are essentially the same as the allegations included in the fraud claim.

The Investment Banks argue that the fraud claim and the fraudulent concealment claims are duplicative of each other, and that both, in turn, are duplicative of the Creditors' Committee aiding and abetting fraud claim, and should be dismissed. The Defendants also argue that the Equity Committee failed to plead fraud with the particularity required under Fed. R. Civ. P. 9(b). Defendants further argue that the gist-of-the-action and economic loss doctrines preclude the Equity Committee's fraud claims,

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69 Intervenor Cmplt. ¶ 1174.

70 Intervenor Cmplt. ¶ 1175.

71 Intervenor Cmplt. ¶ 1166.

and that the fraud and other tort claims are not timely under Pennsylvania law.[72] Finally, the Investment Banks argue that the fraudulent concealment claim must fail because the Investment Banks had no duty to disclose the above information to Adelphia. The Court agrees with some of the Defendants' arguments, and that is sufficient to mandate dismissal of the causes of action for fraud and fraudulent concealment.

(i) Fraud

The elements of a fraud claim in Pennsylvania[73] are: "1) a representation; 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) the resulting injury was proximately caused by the reliance." [74] The circumstances constituting the fraud must be stated with particularity.[75] Plaintiffs may satisfy this requirement by pleading the "date, place or time" of the fraud, or through "alternative means of injecting precision and some measure of substantiation into their allegations of

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72 The Defendants' arguments for dismissal based on contentions that the Equity Committee's fraud claims are precluded by economic loss and gist-of-the-action doctrines fail for the same reasons that the Court held them to be inadequate in the *Creditors' Committee Decision*. There, the Court stated that "the Creditors' Committee's claims, fairly read, charge the Defendants with knowing and material assistance in grievous violations of fiduciary duty, not in defective performance under a contract." *Creditors' Committee Decision*, 365 B.R. at 39 n. 35. Similarly, the Equity Committee's fraud claims charge Defendants with violation of extracontractual duties and not defective performance under credit or underwriting agreements. The Court also denies the Defendants' motion to dismiss on statute of limitations grounds for the reasons discussed in the *Creditors' Committee Decision*. *See* 365 B.R. at 57-59.

73 This Court found in the *Creditors' Committee Decision* that as a general matter, the law applicable to the tort claims in this case should be the law of Pennsylvania, where Adelphia had its principal place of business, and where the injury was suffered. *See* 365 B.R. at 39.

74 *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 540 (Pa. Super. Ct. 2003).

75 *See* Fed. R. Civ. P. 9(b).

fraud."[76] Plaintiffs also must allege who made a misrepresentation, to whom, and the general content of the misrepresentation.[77] Furthermore, the complaint must assert specific allegations against each individual defendant in order to satisfy Rule 9(b).[78]

In the *Creditors' Committee Decision*, the Court held that the Creditors' Committee's complaint failed to plead aiding and abetting of a fraud with the particularity that Fed. R. Civ. P. 9(b) requires.[79] The Court held that the primary allegations of fraud by the Rigases as against independent directors, as to which actionable nondisclosure was the underlying theory, failed to satisfy Rule 9(b) requirements.[80] The Court stated:

> Assuming, without deciding, that matters of imputation of insider knowledge could be satisfactorily addressed and that claims for fraud could lie based on nondisclosure to independent directors, the fraud claims have not been pleaded with the particularity that Rule 9(b) requires…Where the claims are based on nondisclosure, the complaint must state what was not disclosed, and to whom, when and under what circumstances…[81]

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76 *Fox Intern. Relations v. Fiserv Secs., Inc.*, 2007 WL 879419, *5 (E.D. Pa. Mar. 20, 2007) (quoting *Lum v. Bank of America*, 361 F.3d 217, 224 (3d Cir. 2004) (citations omitted)).

77 *Flood v. Makowski*, 2004 WL 1908221, *13 (M.D. Pa. Aug. 24, 2004).

78 *See, e.g., In re Balko*, 348 B.R. 684, 694 (Bankr. W.D. Pa. 2006) (quoting *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987)) ("In a case involving multiple defendants, the complaint should inform each defendant of the nature of his alleged participation in the fraud, and should not vaguely attribute allegedly fraudulent statements simply to all "defendants." (internal quotations omitted)).

79 *See* 365 B.R. at 61.

80 *Id.*

81 *Id.*

The Equity Committee bases its fraud claim on exactly the same facts on which the Creditors' Committee based its aiding and abetting fraud claim.[82] For that reason, the Equity Committee intervenor complaint suffers from the same Rule 9(b) deficiencies as the Creditors' Committee's complaint. To satisfy Rule 9(b) requirements, the Equity Committee must allege what fraudulent representations were made (or not made) by the banks, to whom and by whom, when, and under what circumstances.

(ii) Fraudulent Concealment

Under Pennsylvania law, concealment of a material fact can amount to actionable fraud "if the seller intentionally concealed a material fact to deceive the purchaser."[83] However, "mere silence without a duty to speak will not constitute fraud."[84] Pennsylvania courts have found that "a duty to speak may arise out of an agreement between parties or as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party, or the problems are not discoverable by other reasonable means."[85]

The Equity Committee alleges that the duties of Investment Banks to the Debtors stemmed from the Investment Banks' capacity as underwriters.[86] This Court has already held in the *Creditors' Committee Decision* that the Investment Banks' status as underwriters for Adelphia securities offerings did not give rise to a fiduciary

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82 Equity Committee's Objection to Investment Banks Motions to Dismiss at 60.

83 *Debbs v. Chrysler Corp.*, 810 A.2d, 137, 155 (Pa. Super. 2002) (citations omitted).

84 *Id.*

85 *See Reichhold Chemicals, Inc. v. Millennium Intern. Tech., Inc.*, 1999 WL 270391, *2 (E.D. Pa. May 5, 1999).

86 Intervenor Cmplt. ¶ 1166.

relationship.[87] Additionally, the Equity Committee does not allege, and cannot allege, that the Investment Banks were the only possible source of the allegedly concealed information. Therefore, the fraudulent concealment claim must be dismissed.

The Equity Committee requests leave to replead any claims that the Court holds to be deficient. To the extent the Equity Committee is able to allege fraud with particularity in a claim that is not duplicative of the Creditors' Committee's aiding and abetting claim, leave to replead the fraud claim is granted. The Court also grants leave to replead the fraudulent concealment claim, but only to the extent the Equity Committee can allege duties of the Investment Banks arising from the Banks' capacity *as advisors* to the Debtors (as opposed to their capacity as underwriters), and to the extent such claim would not be duplicative of the fraud claim.[88]

Finally, in its Objection to Motion to Dismiss, the Equity Committee requests leave to amend the Intervenor Complaint to include a specific conspiracy to commit fraud claim. Leave to amend is denied. If the Equity Committee had sufficient facts to substantiate its conspiracy to commit fraud claim, the Court believes it would have incorporated that claim into its 1178 paragraph intervenor complaint.

II.

RICO Claims

The Equity Committee's RICO claims, which are plainly the most dramatic, in many respects push the envelope the most. The Equity Committee states that the "essence of these RICO claims is that the RICO Defendants knowingly and intentionally

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87 *See* 365 B.R. at 65.

88 Claims against agents on the Parnassos, FrontierVision and Century-TCI non-co-borrowing facilities are dismissed without leave to replead for the reasons stated in the *Creditors' Committee Decision*. *See* 365 B.R. at 59-60. To the extent such Defendants have liability as a consequence of their participation in connection with co-borrowing facilities, that is a separate matter.

conspired with and participated in the Rigas Management's unlawful scheme and artifice to defraud the Debtors."[89] The "RICO Defendants" include Wachovia, Wachovia Securities, BMO, BMO NB, BofA, BAS, Chase, Chase Securities, Citibank, Citicorp, SBHC, and SSB. The Equity Committee alleges that *Adelphia itself* was one of the two RICO enterprises, with the Rigas management and the RFEs comprising the other RICO Enterprise.

The Equity Committee first alleges that each of the Agent Banks and its associated Investment Bank,[90] by helping to structure and by funding the Agent Banks' lending facilities, *acquired an interest* in the *Adelphia* enterprise in violation of RICO section 1962(b). The Equity Committee then alleges that each of the RICO Defendants *participated in the conduct* of *Adelphia's* and the *Rigas Enterprise's affairs* in violation of RICO section 1962(c). Finally, the intervenor complaint alleges that the RICO Defendants *conspired* with the Rigas management to establish the lending facilities and the cash management system in a way to allow the Rigas management to siphon more than $3.4 billion from the Debtors, in violation of RICO section 1962(d). Each of the Defendants moves to dismiss the RICO claims, citing pleading deficiencies in virtually every alleged element of these RICO claims.[91]

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89 Equity Committee's Motion and Memorandum of Law for Order Granting the Equity Committee Leave to Assert Certain Additional Claims, dated July 31, 2003, at 11.

90 The intervenor complaint ¶ 1068 alleges that each of the Investment Banks and their affiliated Agent Banks "functioned as a single entity and committed mail and wire fraud." In its Objection to Investment Banks' Motion to Dismiss, the Equity Committee asserts that each pair of Agent Banks and affiliated Investment Banks operated as a joint venture. However for the purposes of this decision Court does not need to decide, and does not here decide, this issue.

91 The Defendants also move to dismiss Equity Committee's RICO claims because, they argue, the Equity Committee lacks standing to bring such claims under the *Wagoner* Rule and the *in pari delicto* doctrine. The Court has held in the *Creditors' Committee Decision* that *in pari delicto* is an equitable defense and does not affect standing to bring a claim. *See* 365 B.R. at 50-54. Likewise, the *in pari delicto* defense cannot be resolved on a motion to dismiss for the reasons

A. Elements of RICO

In considering RICO claims, courts must attempt to achieve results "consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime."[92] As one district court within this circuit has stated, "[c]ivil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device."[93]

To establish a RICO claim, a plaintiff must show: "(1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962."[94] To allege a violation of section 1962, a plaintive must adequately allege, among other things, (a) the existence of a RICO enterprise; (b) a commission of two predicate acts; (c) a pattern of racketeering activity; and (d) the causal link between the predicate acts and the RICO injury.

The Defendants move to dismiss the intervenor complaint on the grounds that the Equity Committee fails to adequately allege, among other things: (1) the predicate acts of mail and wire fraud; (2) a pattern of racketeering activity; and (3) the proximate cause between the Debtor's alleged injury and the Defendants' alleged conduct. As the Court dismissed the Creditors' Committee's aiding and abetting fraud claims,[95] as well as the Equity Committee's fraud claims as discussed above, the Court agrees that the Equity Committee has failed to adequately allege the predicate acts of mail and wire fraud.

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stated in the *Creditors' Committee Decision*. *See* 365 B.R. 55-57. Similarly, the Court does not dismiss the Equity Committee's claims on *in pari delicto* grounds.

92 *U.S. v. Porcelli*, 865 F.2d 1352, 1362 (2d Cir. 1989).

93 *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)).

94 *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001) (citations omitted).

95 365 B.R. at 62.

Thus, the Court need not, and does not, address all of the other argued deficiencies of the general RICO allegations.

The Court further determines that the Equity Committee did not adequately allege violations of sections 1962(b) or (c), and did not allege a RICO conspiracy.

1. Predicate Acts

The Defendants urge the Court to dismiss the RICO claims because the Equity Committee failed to plead the predicate acts of wire and mail fraud with particularity as required by Rule 9(b).[96] The Equity Committee argues that it has adequately pleaded mail and wire fraud, because it asserted that mails and wires, although themselves routine transactions, furthered a fraudulent scheme.

A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme.[97] The RICO predicate acts, based on fraud, such as mail and wire fraud, must satisfy the pleading standards of Rule 9(b).[98] Rule 9(b) states that in averments of fraud, "the circumstances constituting fraud ... shall be stated with particularity."[99]

In the RICO context, "Rule 9(b) calls for the complaint to 'specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made,

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96 Section 1341 addresses mail fraud and section 1343 addresses wire fraud. Each, in relevant part, prohibits "devis[ing] or intending to devise any scheme…to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" and transmissions over mails or wires "for the purpose of executing such scheme." *See* 18 U.S.C. §§ 1341, 1343.

97 *See S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996).

98 *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 172-73 (2d Cir. 1999).

99 Fed. R. Civ. P. 9(b).

and identify those responsible for the statements.'"[100] The plaintiffs must also "'identify the purpose of the mailing within the defendant's fraudulent scheme.'"[101] However, in cases where the plaintiff claims that mail and wire fraud took place in furtherance of a larger scheme to defraud, the communications themselves need not have contained false or misleading information.[102] Instead, Rule 9(b) is satisfied so long as the alleged mailings and wire transfers "further an underlying scheme that itself has a fraudulent, deceptive purpose."[103] Thus, even "innocent" mailings or wire transfers may constitute predicate acts so long as they are part of the execution of the scheme.[104]

The Equity Committee argues that the overall scheme to defraud has been described in detail, and that the intervenor complaint clearly explains the relationship between the mailings and/or wire communications. It further argues that the scheme to defraud and the mailings and wires, even if "innocent" and routine business transactions, adequately allege RICO's predicate acts of mail and wire fraud in light of the detailed allegations of the fraudulent scheme. But the RICO Defendants argue that the underlying scheme to defraud has not been alleged with particularity as required by Rule 9(b), and, as a result, that the Equity Committee has failed to adequately allege the

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100 *Moore*, 189 F.3d at 173 (citing *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992)).

101 *Id.*, citing *McLaughlin*, 962 F.2d at 191.

102 *See, e.g., Stein v. New York Stair Cushion Co., Inc.*, 2006 WL 319300, *5 (E.D.N.Y. Feb. 10, 2006); *Jerome M. Sobel & Co. v. Fleck*, 2003 WL 22839799, *5 (S.D.N.Y. Dec. 1, 2003), *report and recommendation adopted*, 2004 WL 48877 (S.D.N.Y. Jan. 8, 2004).

103 *Stein*, 2006 WL 319300 at *5 (citations omitted). *See also M'Baye v. New Jersey Sports Production, Inc.*, 2007 WL 431881, *7 (S.D.N.Y. Feb. 7, 2007) ("if plaintiff claims that the mail or wire transmissions were themselves fraudulent, i.e., themselves contained false or misleading information, the complaint should specify the fraud involved, identify the parties responsible for the fraud, and where and when the fraud occurred…If, however, the plaintiff claims that the mail or wire fraud was only used in furtherance of a scheme to defraud, then the complaint does not have to be as specific with respect to each allegation of mail or wire fraud, so long as the RICO scheme is sufficiently pled to give notice to the defendants."(internal citations omitted)).

104 *Stein*, 2006 WL 319300 at *5 (citation omitted).

predicate acts of mail and wire fraud. The Court agrees with the RICO Defendants, concluding that these are insufficient allegations of fraud to underpin the Equity Committee's allegations of mail and wire fraud.

Numerous courts in this district have found that "[w]here the fraudulent scheme is premised upon inadequate pleading of common law fraud, the allegations of mail and wire fraud must also fall."[105] In *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*,[106] the Second Circuit similarly held that where the scheme to defraud was premised on common law fraud, the complaint must specify the circumstances constituting fraud with particularity.[107] The Circuit ruled that the plaintiff failed to meet the heightened pleading standards of Rule 9(b) in alleging common law fraud, and, consequently, upheld the district court's dismissal of common law fraud claims and RICO.[108]

The Equity Committee's fraudulent scheme is based on the same facts as its common law fraud claims, which, in turn, are based on the same facts as the Creditors' Committee's aiding and abetting fraud claim. The Court has ruled above that the Equity Committee failed to adequately plead common law fraud. The Court also ruled in the

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105 *Morin v. Trupin*, 711 F. Supp. 97, 105 (S.D.N.Y. 1989). *See, accord*, *M'Baye*, 2007 WL 431881 at *7; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young*, 1994 WL 88129, **10-11 (S.D.N.Y. Mar. 15, 1994).

106 84 F.3d 629.

107 *Id.* at 633-34.

108 *Id.* at 636. In *In re Sumitomo Copper Litig*., the court held that defendants need not plead each element of the common law fraud to allege the existence of a scheme to defraud because the term "scheme to defraud" is measured by a nontechnical standard. 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (citations omitted). It observed that because "[the mail and wire fraud statutes] are broader than common law fraud, it is possible for a plaintiff sufficiently to plead mail or wire fraud while nevertheless failing to plead common law fraud. *Id.* citing *Ray Larsen Associates, Inc. v. Nikko America, Inc.*, 1996 WL 442799, *5 (S.D.N.Y. Aug. 5, 1996). However, the majority of cases, including the Second Circuit in *S.Q.K.F.C.*, hold otherwise where the fraudulent scheme is premised on common law fraud.

Creditors' Committee Decision, that the Creditors' Committee failed to adequately allege a claim for aiding and abetting fraud.[109] Thus, because neither the original nor the intervenor complaint adequately alleged common law fraud, the Equity Committee's allegations of mail and wire fraud must also fail.

Because the Equity Committee failed to adequately allege RICO predicate acts, it cannot state a claim under section 1962. The Court also must rule that even if the Equity Committee were able to establish the requisite RICO predicates, it nevertheless fails to allege a violation of the substantive provisions of RICO -- sections 1962(b) and (c).

B. Section 1962(b) (Claim 53)

The Equity Committee alleges that each RICO Defendant violated section 1962(b) by acquiring or maintaining an interest in the Adelphia Enterprise "by arranging the financing for the continued operation of Adelphia and receiving security interests in the stock of the subsidiaries of Adelphia."[110] The RICO Defendants argue that the Equity Committee failed to adequately plead the requisite "acquisition injury," and move to dismiss this cause of action.

Section 1962(b) of the RICO statute states in relevant part:

> It shall be unlawful for any person through a pattern of racketeering activity…to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.[111]

The purpose of 18 U.S.C. § 1962(b) is "to prohibit the takeover of a legitimate business through racketeering, typically extortion or loansharking."[112] In order to state a

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109 365 B.R. at 62.

110 Intervenor Cmplt. ¶ 1082.

111 18 U.S.C. § 1962(b).

112 *Allen v. New World Coffee, Inc.*, 2002 WL 432685, *5 (S.D.N.Y. 2002) (citation omitted).

claim under Section 1962(b), the plaintiff must allege that (1) the defendants acquired or maintained an interest in the alleged enterprise (2) through a pattern of racketeering activity (3) causing injury to the plaintiff as a result of the acquisition of the enterprise.[113] "Without a distinct 'acquisition injury,' [a plaintiff] cannot state a cause of action under subsection 1962(b)."[114] Acquisition injury must be caused by the defendant's "acquisition of an interest in an enterprise, as distinct from an injury resulting from the pattern of racketeering activity, or the commission of predicate acts."[115]

The RICO Defendants argue that the Equity Committee failed to state a requisite acquisition injury, because (i) acquisitions of security interests by the RICO Defendants do not constitute acquisition of interest in the enterprise; (ii) the security interests were not acquired through the pattern of racketeering activity; and (iii) the alleged injury resulted from the predicate acts themselves, and not from the acquisition of security interests. The Court agrees. The Equity Committee failed to plead an *acquisition injury*—distinct from the injury resulting from the predicate acts themselves—and, therefore, does not adequately plead violation of section 1962(b).

As noted, the "acquisition or maintenance injury" must be separate and apart from the injury suffered as a result of the predicate acts of racketeering to constitute a violation of RICO section 1962(b).[116] The Equity Committee states in its intervenor complaint: "*Solely because of the predicate acts and pattern of racketeering*, the Rigas Management and the RICO Defendants were able to loot the Debtors of more than $3.665 billion

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113 *See, e.g., Wood v. Inc. Village of Patchogue of New York*, 311 F. Supp. 2d 344, 355 (E.D.N.Y. 2004).

114 *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir.1996), *rev'd on other grounds*, 525 U.S. 128 (1998).

115 *Redtail Leasing, Inc. v. Belleza*, 1997 WL 603496, *3 (S.D.N.Y. Sept. 30, 1997).

116 *See Katzman*, 167 F.R.D. at 657.

dollars, which looting, when disclosed, caused the Debtors' bankruptcy."[117] In the next paragraph, the Equity Committee alleges that "[t]he Debtors suffered the RICO Damages by reason of the RICO Defendants' *acquisition of their interest in the Adelphia Enterprise* as alleged herein in that the Co-Borrowing Facilities and the Cash Management System were the means by which the RICO Defendants knowing facilitated the Rigas Management's looting more than $3.4 billion from the Debtors…"[118] The alleged acquisition injury, to the extent it has been alleged at all, is the same as the alleged injury caused by the predicate acts. The Equity Committee has failed to plead a separate injury caused by the acquisition of the security interests in the Debtors' stock.

In its response to the Defendants' Motion to Dismiss, the Equity Committee asserts that the injury from the acquisition of the security interests is "the additional liens and encumbrances on Adelphia's assets."[119] However, the Equity Committee did not allege this specific acquisition injury anywhere in the intervenor complaint, and "memoranda…in opposition to a motion to dismiss cannot be used to cure a defective complaint."[120] The Equity Committee has failed to plead how acquisition of interest in the Debtors caused injury to the Debtors, separate and apart from injury suffered from the predicate acts, and its claim under RICO section 1962(b) must be dismissed.[121]

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117 Intervenor Cmplt. ¶ 1085 (emphasis added).

118 Intervenor Cmplt. ¶ 1086 (emphasis added).

119 Equity Committee's Objection to Investment Banks' Motion to Dismiss at 25.

120 *Branch v. Tower Air, Inc*., 1995 WL 649935, *6 (S.D.N.Y. 1995).

121 Some courts in this district have held that to state a claim for a violation of section 1962(b), plaintiffs must allege "that the *object* of defendants' racketeering activity was to gain an interest in or maintain control of the enterprise." *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d, 565, 579 (S.D.N.Y. 1999) (emphasis added). *See also Tuscano v. Tuscano*, 403 F. Supp. 2d 214, 228 (E.D.N.Y. 2005) (same). But here the intervenor complaint alleges that the banks' motivation for entering into co-borrowing facilities were the "extraordinary fees" that the banks generated from these transactions. *See, e.g.* ¶¶1010, 1029. It is not alleged that the Defendants

C. Section 1962(c) (Claims 54 and 55)

The Equity Committee alleges that each RICO Defendant "participated through a pattern of racketeering activity" in the Rigas and Adelphia Enterprises "in order to reap tens of millions of dollars of extraordinary fees."[122] in violation of RICO section 1962(c), causing damages to the Debtors in the amount of at least $10.995 billion. The RICO Defendants move to dismiss this claim based on, among other reasons, the Equity Committee's failure to allege facts that the RICO Defendants operated or directed the affairs of either Adelphia or the Rigas Enterprises.

Section 1962(c) states in relevant part:

> It shall be unlawful for any person…associated with any enterprise engaged in…interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity…[123]

In order to state a claim under § 1962(c), the plaintiff must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce."[124] The requirements of section 1962(c) must be established as to each individual defendant.[125]

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entered into transactions with the purpose of acquisition. Section 1962(b) allegations must be dismissed for these reasons as well.

122 Intervenor Cmplt. ¶¶ 1090, 1100.

123 18 U.S.C. §1962(c).

124 *Medinol Ltd. v. Boston Scientific Corp.*, 346 F. Supp. 2d 575, 613 (S.D.N.Y. 2004) (citations omitted).

125 *DeFalco*, 244 F.3d at 306.

In *Reves v. Ernst & Young*, the Supreme Court held that in order to allege that a defendant conducted or participated in the conduct of an enterprise, a plaintiff must allege that defendant "participate[d] in the operation or management of the enterprise itself."[126] While RICO liability is not limited to those with *primary* responsibility for the enterprise's affairs, nor to those with formal positions in the enterprise,[127] s*ome* part in directing the enterprise's affairs is required.[128]

Although many cases in this district have held that providing professional services by outsiders to a racketeering enterprise is insufficient to satisfy the participation requirement,[129] courts have also found the allegations of operation or management adequate where professionals were alleged to have exceeded the mere rendering of legitimate professional services.[130] The fundamental question is "whether the provision of these services allows the defendant to direct the affairs of the enterprise." [131]

The allegations of such direction here are insufficient. The Court finds *Sumitomo Corp. v. The Chase Manhattan Bank* instructive.[132] There, Sumitomo Corporation sued two major banks alleging their participation in a scheme to defraud Sumitomo by structuring certain transactions so that they appeared to be normal copper transactions without disclosing other related transactions that transformed these transactions into

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126 507 U.S. 170, 185 (1993).

127 *Id.* at 179 (emphasis added).

128 *Id.* (emphasis in the original).

129 *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 254 (S.D.N.Y. 1997) (citing cases).

130 *JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, 2007 WL 1159637, *8 (S.D.N.Y. Apr. 18, 2007) (citing cases).

131 *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) (internal quotations and citations omitted.)

132 2000 WL 1616960 (S.D.N.Y. Oct. 30, 2000).

loans of which the plaintiff was unaware.[133] The plaintiffs alleged an enterprise comprised of a Sumitomo employee, a rogue trader, and each bank engaged in the scheme.[134] Judge Martin held that where the fraudulent financing operation was itself the RICO enterprise, the complaint sufficiently alleged the defendants' participation in the affairs of the RICO enterprise.[135] However, the court also found the allegations with respect to Sumitomo as a RICO enterprise to be deficient, because the complaint did not adequately allege that the defendants participated in the operation or management of the enterprise's affairs, but merely put forth facts establishing that the defendant banks made loans to Sumitomo.[136]

While the Second Circuit has observed that the "operation or management" test typically has proven to be a relatively low hurdle for plaintiffs to clear…especially at the pleading stage,[137] the intervenor complaint fails to put forth facts to support the allegations that the banks—the outsiders to both of the alleged enterprises—exercised control over the Rigas or Adelphia enterprises. For example, the Equity Committee alleges that the Banks "knew" of the alleged fraudulent nature of the facilities, that Wachovia "established, and maintained the Cash Management System" and structured it to facilitate the fraud; that the Banks were "integrally involved" in the establishment and maintenance of the Co-Borrowing facilities; that the Banks "coordinated their activities"

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133 *Id.* at *1.

134 *Id.*

135 *Id.*

136 *Id.* fn. 2.

137 *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004) ("First Capital") (citations omitted); *but see Advance Relocation & Storage Co., Inc. v. Local 814, Intern. Broth. of Teamsters, AFL-CIO*, 2005 WL 665119, *9 (E.D.N.Y. Mar. 22, 2005) ("The operation-management test has been recognized as 'a very difficult test to satisfy.'") (citing *Amsterdam Tobacco Inc. v. Philip Morris Inc.*, 107 F. Supp. 2d 210, 216 (S.D.N.Y. 2000)); *see also Redtail Leasing, Inc. v. Bellezza*, 2001 WL 863556, *4 (S.D.N.Y. Jul. 31, 2001).

with the Rigas Management to loot the Debtors; and that the Banks "agreed to structure" the Co-Borrowing facilities to permit the looting of the Debtors, among others.[138] But at the same time, the Equity Committee alleges that "[i]n addition to working jointly with the Rigas Family to create the fraudulent structure of the Co-Borrowing Facilities, the Agent Banks acquiesced to lending terms… that were…dictated by the Rigas Family to the Agent Banks."[139] The complaint further alleges that the *Rigas family* controlled, directed, managed and operated the alleged RICO enterprises.[140] The complaint does not allege that the Defendants exerted influence over the Rigases or Adelphia. Thus, while the Equity Committee's allegations demonstrate that the RICO Defendants provided services assisting (and critical to) the Rigases' alleged scheme to loot Adelphia, they lack the necessary element of direction. Significantly, "it is not the importance of such services that determines § 1962(c) liability, but whether the provision of these services *allows the defendant to direct the affairs of the enterprise*."[141] None of the Equity Committee's allegations rise to the level of "control" or direction over the Rigas or Adelphia enterprises, as required by *Reves*.

As this Court stated, in a different context, in its *Creditor's Committee Decision*:

> The allegations of the complaint do not assert control by the Agent Banks, or any of the Debtors' lenders…Rather, they allege a material assistance by the Bank Agents (and their Investment Bank affiliates) to the Rigases in connection with the *Rigases'* control over Adelphia, as motivated by the alleged substantial rewards to the Agent Banks (and, in particular, their Investment Bank affiliates) that would be the consequence of giving the

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138 *See* Intervenor Cmplt. ¶¶ 998-1059.

139 Intervenor Cmplt. at ¶509. Furthermore, Agent Banks "knew that the fees to [their] affiliated Investment Bank[s] depended upon participation in the Co-Borrowing Facilities: members of the Rigas Family expressly conditioned the granting of investment banking business on participation in the Co-Borrowing Facilities." *Id.* at ¶ 511.

140 *See, e.g., Id.* at ¶¶ 413-415, 461-68.

141 *Schmidt*, 16 F. Supp. 2d at 346 (citations omitted) (emphasis added).

> Rigases what they wanted….It is the distinction between helping the Rigases in their exercise of their control, by means of wrongful conduct, and actually exercising the control to direct Debtor affairs.[142]

With that said, the Court is aware that the Second Circuit, in *First Capital Asset Management, Inc. v. Satinwood,* held that "one who assists in the fraud also conducts or participates in the conduct of the affairs of the enterprise."[143] Thus, the Second Circuit held that where a bankruptcy estate was a RICO enterprise, a debtor engaging in bankruptcy fraud conducted or participates in the conduct of the affairs of the enterprise.[144] After citing allegations of specific fraudulent statements made by the debtor's mother to the bankruptcy court and the trustee, the Second Circuit further held that a plaintiff has alleged, "albeit barely," that a mother assisting her son in defrauding the bankruptcy court and trustee also participated in the conduct of the enterprise.[145]

But in the present case, even if the Equity Committee could argue under *First Capital* that one who merely assists RICO fraud also conducts and participates in the

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142 365 B.R. at 63. The Equity Committee, citing *Sumitomo*, 2000 WL 1616960, and presumably realizing the shortcoming of its allegations of the RICO Defendants' control or management of the alleged enterprises, requests leave to amend its intervenor complaint to separately plead an alternative RICO enterprise, presumably to include the Defendants or the co-borrowing facilities. *See* Equity Committee's Opposition to Agent Banks' Motion to Dismiss at 80. This request is denied, as the Court believes that if the Equity Committee had enough facts to allege this alternative enterprise, it would have done so in its original intervenor complaint.

143 385 F.3d at 178. *But see Redtail Leasing*, 1997 WL 603496 at *5.

144 *Id.*

145 *Id.* The Circuit noted that because the mother's liability was also premised on a RICO conspiracy theory, the standard applied to her was more relaxed. *Id.* Other courts in this district that similarly upheld as adequate allegations that outsiders to the enterprise were liable for participation in the operation or management of the enterprise cited specific elements of fraud by the outsiders as part of their "control" of the enterprise. *See, e.g.*, *OSRecovery, Inc. v. One Groupe Intern., Inc.*, 354 F. Supp. 2d 357, 376 (S.D.N.Y. 2005) (the complaint alleged defendant bank Lateko's knowledge of Card Accounts' involvement in prior frauds when that company first approached the bank and Lateko's false denial of any relationship with Card Accounts); *In re Sumitomo Copper Litig.*, 104 F. Supp. 2d 314, 325 (parent company of a subsidiary alleged to be part of an enterprise found to have directly participated in the enterprise's affairs, where the allegations of a parent's fraud were evidenced by an internal memo). Here, the Court has held that the elements of fraud have not been adequately pleaded.

affairs of the enterprise, the Court has held that the Equity Committee has not pleaded fraud and (and the Creditors' Committee has not pleaded aiding and abetting fraud) with sufficient particularity. The Court therefore holds that the intervenor complaint fails to plead the requisite element of control, and must dismiss the Equity Committee's RICO claim based on section 1961(c).

D. Section 1962(d) (Claim 56)

Finally, the Equity Committee alleges that each RICO Defendant *conspired* to violate RICO sections 1962 (a), (b) or (c), in violation of RICO section 1962(d).[146] The Equity Committee alleges that the Rigas management "by its actions or words, manifested an agreement" with each of the RICO Defendants "to work together to establish the Co-Borrowing Facilities and the Cash Management System and structure them to further the goal of permitting the Rigas Management to siphon more than $3.4 billion from the Debtors, while generating extraordinary fees for each of the RICO Defendants."[147] The Intervenor Complaint further alleges that an agreement between each RICO Defendant and the Rigas management may be inferred from the positions each RICO Defendant held in the co-borrowing facilities and from each Defendant's assent to commit predicate acts.[148]

The Defendants argue that the RICO conspiracy claim should be dismissed because the Equity Committee failed to adequately allege any violation of the RICO's substantive provisions in sections 1962(b) and (c). Further, the Defendants argue that the

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146 Intervenor Cmplt. ¶ 1104. Even though the Equity Committee refers to the Defendants' conspiracy to violate three substantive provisions of section 1962, the intervenor complaint does not actually allege a cause of action under section 1962(a) against any of the RICO Defendants.

147 Intervenor Cmplt. ¶¶ 1105-6.

148 Intervenor Cmplt. ¶¶ 1107-8.

Intervenor Complaint does not set forth any facts supporting the existence of an agreement to violate RICO sections 1962 (b) and (c), and that the RICO conspiracy claim therefore must be dismissed. The Court agrees.

RICO's conspiracy provision, § 1962(d), provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The Second Circuit has held that "[a]ny claim under § 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient."[149]

This Court has held that the Equity Committee has failed to adequately allege a violation of either section 1962(b) or (c), and thus the Equity Committee's claim of violation of 1962(d) must also fail. And if the Equity Committee had adequately alleged a violation of a substantive provision of section 1962, the intervenor complaint would still fail to allege a RICO conspiracy because the Equity Committee did not allege facts supporting any agreement involving each of the RICO Defendants to commit at least two predicate acts.

To state a claim under § 1962(d), plaintiffs must allege facts that support a conclusion that defendants consciously agreed to commit predicate acts.[150] The Second Circuit has held that "[b]ecause the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement."[151] Conclusory allegations of a conspiracy are

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149 *Discon,* 93 F.3d at 1064 (citing *Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d, 1153, 1191 (3d Cir. 1993)).

150 *Black Radio Network,* 44 F. Supp. 2d at 581.

151 *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990).

insufficient.[152] Even though measured under the more liberal pleading requirements of Rule 8(a), "the complaint must allege some factual basis for a finding of a conscious agreement among the defendants."[153] As the Supreme Court recently stated in *Bell Atlantic*, "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint."[154]

The Equity Committee alleges that the Rigas management and the RICO Defendants "by their actions, or words, manifested an agreement"[155] and that the agreement "may be inferred"[156] from the actions of each of the RICO Defendants. However, such references to an "agreement" in the intervenor complaint are merely legal conclusions. The Equity Committee references no actual agreements, and alleges no facts to support the presence of any agreements between any of the RICO Defendants. It thus falls short of the specificity required to allege that the Defendants consciously

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152 *Black Radio Network*, 44 F. Supp. 2d at 581.

153 *Hecht*, 897 F.2d at 26 n. 4. *See also Bell Atlantic*, 127 S.Ct. at 1974 ("we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed").

154 *Bell Atlantic*, 127 S.Ct. at 1966 (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

155 Intervenor Cmplt. ¶ 1105-6.

156 Intervenor Cmplt. ¶ 1107-8.

agreed to commit predicate acts.[157] Therefore, the RICO conspiracy claim must be dismissed.[158]

Conclusion

For the foregoing reasons, the motions to dismiss are determined in accordance with the attached table.

SO ORDERED.

Dated: New York, New York
August 17, 2007

s/Robert E. Gerber
United States Bankruptcy Judge

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157 In *Schmidt*, 16 F. Supp. 2d at 354, the court similarly found the plaintiff's allegations of conspiracy insufficient, where the plaintiff alleged that the defendants "by their words and/or actions, manifested their agreement that each would commit…or conspire to commit, two or more of the racketeering acts."

158 In addition to their other arguments for dismissal of the intervenor complaint, Defendants BAS and SSB move to dismiss the Equity Committee's RICO claims with respect to the Investment Banks because, they argue, the RICO claims are barred by the PSLRA as based on conduct actionable as securities fraud. Because the Court has held that the Equity Committee failed to allege any RICO violations, the Court need not, and does not, address whether PSLRA would bar the Equity Committee's RICO claims.