UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA – FORT MYERS DIVISION

Case No. 2:09-cv-445-FtM-29SPC
(Ancillary to Case No. 2:09-cv-229-FtM-29SPC)

DANIEL S. NEWMAN, as Receiver for Founding Partners Capital Management Company; Founding Partners Stable-Value Fund, L.P.; Founding Partners Stable-Value Fund II, L.P.; Founding Partners Global Fund, Ltd.; and Founding Partners Hybrid-Value Fund, L.P.,

Plaintiff,

vs.

SUN CAPITAL, INC., a Florida corporation, SUN CAPITAL HEALTHCARE, INC., a Florida corporation, and HLP PROPERTIES OF PORT ARTHUR, LLC, a Texas limited liability company,

Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

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Sun Capital Healthcare, Inc. ("SCHI"), Sun Capital, Inc. ("SCI") (together, "Sun Capital"), and HLP Properties of Port Arthur, LLC ("HLP Port Arthur") (collectively, "Defendants") submit this memorandum in opposition to the Receiver's motion for leave to file a proposed First Amended Complaint on behalf of Founding Partners Stable-Value Fund, L.P. ("Stable-Value" or "Lender").

PRELIMINARY STATEMENT

This motion to file an amended complaint is another in a series of submissions in which the Receiver, despite many months of investigation and discovery, chooses to ignore the factual reality of the lender-borrower relationship he has inherited and instead asserts claims based upon his own *post hoc* opinions of how the relationship should have been handled. At every turn, the Receiver has insisted upon recasting as improper "dissipation and diversion" numerous transfers of funds by Sun Capital during its 8½-year relationship with the Lender, although it is clear that the Lender approved and encouraged those activities to the extent they used loan proceeds, and that Sun Capital was free to do what it wished with the profits from its financing business.

The Receiver's proposed First Amended Complaint seeks to add six new causes of action and either 38 or 45 new defendants – the caption lists 38 but the pleading itself lists 45 – including the hospital entities that are subsidiaries of Sun Capital's affiliates, Promise Healthcare, Inc. ("Promise") and Success Healthcare, LLC ("Success"), as well as some other entities owned by the three principals of Sun Capital, the three principals themselves, and their wives. The basic theory is that all these new defendants, simply by virtue of having received funds from Sun Capital during the time that Sun Capital was receiving

loans from Stable-Value, for purposes the Receiver now deems "improper," have received fraudulent transfers, have been unjustly enriched at Stable-Value's expense, and have converted Stable-Value's funds. Indeed, the Receiver declares that all these proposed new defendants are liable for Sun Capital's alleged breaches of contract, even though they had no contractual relationship with Stable-Value. He posits an extreme "alter ego" theory in which the Sun Principals and all 42 entities they own are collapsed into a single liability unit, so that any transaction done by one affiliate was done by all, and any liability owed by one is owed by all. This of course stands basic corporate law tenets on their head, and the Receiver does not present any adequate basis to achieve such a coup (despite many months of investigation and discovery).

The motion for leave to file this proposed pleading should be denied, for several reasons. First, it appears to be lodged in bad faith, more as an abusive, bludgeoning tactic than as legitimate claims by Stable-Value. The claims are pleaded in an omnibus, generic fashion without any effort to distinguish appropriately among the 38 to 45 new defendants or to plead which ones engaged in which transactions, when, or even why they were wrongful. Aside from the lack of privity between the new defendants and Stable-Value, many of the Receiver's allegations are not supported in, and indeed directly contrary to, the evidentiary record. For similar reasons, the claims against the new defendants are futile, being both factually unsupported and legally insufficient.

Moreover, the sheer number of new defendants and claims would cause undue prejudice to the existing Defendants by making the case a great deal more complicated and protracted than it already is, without adding viable claims to the existing (defective) complaint. There would be great delay while the new defendants retained counsel and

made motions to dismiss. Notably, the Receiver has already balked at providing complete discovery related to his existing contract-based claims, deeming it a "waste" of his limited resources. It would be unfair to multiply exponentially the discovery burdens on the Defendants and their affiliates while the plaintiff rejects such burdens himself.

PROCEDURAL HISTORY

The current Receiver was appointed on May 20, 2009, after the Court had denied both the SEC's effort to impose a freeze on Sun Capital's assets and the initial Receiver's effort to expand her Founding Partners receivership to cover Sun Capital as well. (No. 2:09-cv-229 Doc. 70 at 3-5). The Court held that Sun Capital, far from being a mere repository of ill-gotten funds, has a "legitimate ownership interest" in the loaned funds received from Stable-Value, and therefore cannot be treated as a mere "relief defendant" subject to disgorgement or asset freeze remedies. (*Id.* at 5; No. 2:09-cv-229 Doc. 89 (order granting motion to dismiss) at 2, 5-7; Doc. 19 herein (order granting TRO) at 2-3).

The Receiver's original Complaint, filed on July 14, 2009, asserts nine claims against the three Defendants. The claims are primarily contract-based, seeking damages, replevin, and foreclosure remedies for alleged breaches of the loan agreements that each defendant had with Stable-Value (Counts I-VI). The same uses of funds by Sun Capital that assertedly constitute breaches of the credit agreements also assertedly constitute fraudulent transfers to unspecified affiliates of Sun Capital (Counts VII and VIII) and aiding and abetting of Mr. Gunlicks' breach of fiduciary duty to the Founding Partners entities (Count IX).

The Receiver simultaneously seized Sun Capital's bank accounts based on the

alleged defaults, and Sun Capital sought preliminary injunctive relief. The Receiver's July 24, 2009 opposition rested on the same theme of dissipation and diversion of Stable-Value funds as had the initial Receiver's unsuccessful expansion motion. After the temporary restraining order was issued on July 24, 2009, expedited discovery was conducted on the issues related to the injunction motion. During that three-month period, Sun Capital and its affiliates produced over 974,000 pages of documents and gave seven depositions (whereas the Receiver never completed his document production). (Doc. 157 at 6-7).

The Receiver submitted voluminous papers in opposition to the injunction motion on January 19, 2010, reiterating at length his claims of dissipation and diversion of funds and breaches of the original contract terms by Sun Capital. Sun Capital submitted its reply papers on March 3, 2010, demonstrating that the Receiver's positions were both factually and legally erroneous. Indeed, the key issues that will be dispositive of that motion will likely also be dispositive of the merits of the claims in both the Receiver's original complaint and his proposed First Amended Complaint.

ARGUMENT

The Receiver's proposed First Amended Complaint ("FAC") reiterates the theories in his injunction opposition papers. It seeks to expand greatly the scope of the case by adding six new claims and at least 38 new defendants who had no relationship with Stable-Value but received funds from Sun Capital over many years, premised on an attenuated alter ego conspiracy theory. In claiming that these "dissipated and diverted" funds should be "returned to" Stable-Value, the Receiver advances the already-rejected theory that Sun Capital has no legitimate right to retain the funds it received from Stable-Value, only now

he extends it even further to the downstream recipients of funds from Sun Capital. He does so despite the evidence that the expenditures about which he complains were authorized by the Lender, and the lack of evidence that any of the downstream recipients ever did anything wrong toward Stable-Value in accepting funds from their lender, Sun Capital.

The grant or denial of leave to file an amended pleading is "committed to the district court's discretion." *Nat'l Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.*, 747 F.2d 1396, 1404 (11th Cir. 1984); *see Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) (a district court has "extensive discretion" to decide whether or not to allow a party to amend a complaint). As the Receiver acknowledges, leave to amend is properly denied for several reasons including bad faith, undue prejudice, and futility. (Pl. Mem. at 2). *See Andrx Pharmaceuticals, Inc. v. Elan Corp.*, 421 F.3d 1227, 1236 (11th Cir. 2005). As those factors are all present here, the Court should exercise its discretion to deny leave outright, or, at a minimum, to permit the filing of only a greatly reduced form of the pleading that excludes the claims against all the proposed new defendants.

A. The Receiver Does Not Make Even the Minimal Required Showing

Apparently relying solely on a liberal standard for allowing amended pleadings, the Receiver fails to support his motion. He invokes the Rule 15(a)(2) standard that "[t]he court should freely give leave when justice so requires" (except that he erroneously quotes the pre-2007 version).[1] (Pl. Mem. at 2). However, he makes no showing of why "justice [ ] requires" leave to file this unusually broad and far-reaching pleading.

[1] Rule 15(a) previously stated "leave shall be freely given when justice so requires." The "shall be" terminology, which may have suggested an unduly mandatory application for what is actually a discretionary decision, was changed to the "court should" formulation in 2007.

In his minimalist motion papers, the Receiver summarizes the changes from the existing complaint so briefly as to suggest they are minor tweaks and updates. (Pl. Mem. at 2-3). He does not say just how many new parties he is seeking to add, leaving it to the Court to count the 38 new defendants listed in the caption of the proposed pleading and/or the 45 new defendants identified in the body of the pleading. He does not bother to describe the nature, factual basis, or legal theories of the six proposed new claims, nor to explain how the new defendants could be held liable on any of the existing or proposed claims. He does not remotely satisfy the "justice so requires" test for this hugely expanded pleading. *See Andrx Pharmaceuticals*, 421 F.3d at 1237 (affirming denial of motion, noting plaintiff's undue delay, its attempt to inject a new theory of recovery, and "its failure to show that justice required the grant of its motion"); *Nat'l Indep. Theatre*, 747 F.2d at 1404 (affirming denial of plaintiffs' motion for leave to amend complaint to add fourteen new defendants where "the plaintiffs, in moving for leave to amend, made no showing in their factual allegations as to how the additional parties could be held liable on any of the claims they were asserting against [the original defendants]"); *Cordova v. Lehman Bros. Inc.*, 237 F.R.D. 471, 477 (S.D. Fla. 2006) (denying motion to amend where "Plaintiffs have not offered sufficient reasons why allowing the amendment is in the interests of justice").

Nor does the Receiver acknowledge that, because he is seeking to join new defendants, his motion must meet the requirements of Rule 20(a) as well as Rule 15.[2] *See Exime v. E.W. Ventures, Inc.*, 250 F.R.D. 700, 700-01 (S.D. Fla. 2008) (while amending

[2] Rule 20(a)(2) states that persons "may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."

pleadings is freely permitted under Rule 15(a), a motion to file an amended complaint adding new defendants is "simultaneously governed" by Rule 20(a)); *see Lover v. District of Columbia*, 248 F.R.D. 319, 323 (D.D.C. 2008) (if a proposed amended complaint seeks to add additional parties, court must consider the Rule 20 requirements). Therefore, to join new defendants, the Receiver "must demonstrate: (1) a right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences, and (2) some question of law or fact common to all persons [sought] to be joined." *Exime*, 250 F.R.D. at 700-01.

Amendments are denied when the Rule 20(a) showing is not made. *See Exime*, 250 F.R.D. at 702 (denying complaint adding prior employer because plaintiff's employment with the new and prior employers constituted "separate series of transactions or occurrences" under Rule 20(a)); *Lover*, 248 F.R.D. at 324 (denying amendment adding 15 new parties as failing to meet the "same transaction or occurrence" requirement "because of the variances in the manner of the alleged searches, the officers allegedly involved, and the timing of each alleged search"); *Dorman v. Simpson*, 893 F. Supp. 1073, 1084 (N.D. Ga. 1995) (denying motion where plaintiff did not meet the "same transaction" test, saying only that he would later explain how the proposed defendants conspired against him).[3]

Even if the Rule 20(a) requirements are met, a joinder motion may be denied based on other discretionary factors as well. *See United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (affirming discretionary denial of joinder of several defendants as not serving the interests of judicial economy; counterclaims also futile); *Lover*, 248 F.R.D. at

[3] *See also DIRECTV v. Brown*, 2003 WL 25569731, *3 (M.D. Fla. May 22, 2003) (finding improper joinder of four defendants because the complaint was "bereft of any allegation that Defendants are jointly or severally liable to [plaintiff]" and the defendants' interactions with plaintiff, though similar to each other, did not arise out of the same transaction or occurrence).

323 (even if the prerequisites for joinder are satisfied, court should consider the risk of jury confusion; amendment denied due to prejudice); *McCoy v. City of Mobile*, 2005 WL 2453742, *1, 3 (S.D. Ala. Oct. 3, 2005) (denying addition of Magistrate as defendant, for even assuming Rule 20(a) was satisfied, the addition would be prejudicial, increasing costs and delay, and unreasonable because the Magistrate clearly had immunity).

Here, the Receiver does not make the required Rule 20(a) showing, as he only vaguely alludes to general categories of transactions that might or might not correspond to the unspecified transactions he contemplated in his original complaint, and fails to show what questions of law or fact are common to all the existing and proposed defendants. But in any event, a review of the FAC's allegations, together with the existing evidentiary record, reveals that the claims are futile and made in bad faith, lacking both evidentiary and legal support, and would serve only to delay and complicate the proceedings herein.

B. <u>The Proposed Pleading Is Greatly Expanded with Many New Issues</u>

Though understated in his motion, the Receiver's proposed FAC is greatly expanded, containing six new claims and either 38 or 45 new defendants. The 45 new defendants identified in the body of the FAC include the three owners of Sun Capital, their three spouses, Promise, each of its 12 subsidiaries, Success, each of its four subsidiaries, six other hospital entities and nine other real estate entities that are owned (in whole or in part) by the Sun Principals (in addition to HLP Port Arthur), and six other investment entities in which one or more of the Sun Principals allegedly have an interest. (FAC ¶¶ 13-20, 24-48, 51-66). All 39 entities (and the Sun Principals' wives) are defined as the "Sun Principal Owned Entities." (FAC at 20 n.5).

The FAC contains six wholly new claims, Counts III, V, XII, XIII, XIV, and XV. Three concern events in 2009-2010: Count V asserts a breach of contract claim against only SCHI, concerning a $5.8 million note that allegedly matured in January 2010. Count XII asserts fraudulent inducement and Count XIII breach of contract, both concerning a mortgage offered to the Receiver during his July 2009 bank account seizure, when he refused to release funds to Sun Capital from its own bank accounts without further security.

The other three new claims purport to extend liability to the Sun Principals and the 39 remote entities: In Count III, the Receiver seeks to hold the new defendants liable for the alleged contract breaches in the existing complaint, on the theory that they were all alter egos of SCHI and SCI. (FAC ¶ 170). Similarly, Counts XIV and XV assert that the new defendants were unjustly enriched and converted property of Stable-Value when Stable-Value allegedly "transferred vast sums for the benefit of Sun Capital and its alter egos ... without receiving any value in return." (¶¶ 266, 276). Each of these claims makes the incomprehensible allegation that the Sun Principal Owned Entities are alter egos of Sun Capital because they "share an identity of purpose; that is, the Sun Principal Owned Entities would have no reason to exist but for their position as fraudulent transferees of monies taken by Sun from Stable-Value." (¶¶ 267, 277). Apparently the entities' business purpose of operating hospitals with thousands of patients is worth no notice in the Receiver's mind.

The Receiver also expands his two existing fraudulent transfer claims. In the original complaint, he asserted these two claims against SCHI and SCI, complaining of unspecified transfers to unspecified recipients and seeking only a judgment for damages from SCHI and SCI. (Doc. 1 at pp. 31-32, 32-33). The amended versions of these claims bypass Sun Capital entirely and seek judgments only against the Sun Principals and the Sun

Principal Owned Entities, seeking avoidance of the transfers, attachment and provisional relief, appointment of a receiver, and other equitable relief. (FAC pp. 54-55, 55-56). Count IX generically alleges transfers made with actual intent to hinder, delay, or defraud Stable-Value under Fla. Stat. § 726.105, without any particulars. (FAC ¶ 218). Count X, resting upon Fla. Stat. § 726.106(2), alleges generally that all the transfers were made to "insiders." (FAC ¶ 224).

The FAC vaguely adumbrates a fraudulent course of conduct by all the new defendants, allegedly designed to enrich themselves at Stable-Value's expense (and Sun Capital's expense). (FAC ¶¶ 134-37, 142, 146-47, 149-55, 218-20, 267, 277). The theory is that "the Sun Principals caused SCHI and SCI to purposely engage in transactions designed to result in losses and to engage in fraudulent transfers solely for the benefit of the Sun Principals and the Sun Principal Owned Entities," injuring both Stable-Value and SCHI and SCI themselves. (FAC ¶¶ 149, 150). Without citing any particular transactions or participants, the Receiver complains generically about "working capital loans," "due from related party" transfers, elimination of the Reserve Account, purchases of DSH receivables, so-called "Additional Investments," and payments of salaries and other benefits (the same things he complained of in his injunction opposition papers), contending that all these unspecified transactions were transfers "made to insiders, when SCHI was not solvent, and were not for reasonably equivalent value." (FAC ¶¶ 138-41, 143-44). Stable-Value has supposedly been "severely injured by this misconduct" because its ability to recover on its loans "has been frustrated and compromised," and indeed, it was allegedly "for the purpose of frustrating Stable-Value's ability to collect on the loans" that the Sun Principals "diverted" funds to their businesses. (FAC ¶¶ 137, 147, 155).

At the core of the Receiver's new claims is his new alter ego theory: "the [three] Sun Principals and the [40] Sun Principal Owned Entities dominated and controlled SCHI and SCI to such an extent that SCHI's and SCI's independent corporate existence was in fact non-existent." (FAC ¶ 145). Allegedly "the corporate forms of SCHI and SCI were used fraudulently and/or for an improper purpose," and "SCHI and SCI became an instrumentality to fund the Sun Principal Owned Entities, and acted against their own independent corporate interests." (FAC ¶¶ 146, 152). The result of this extreme "alter ego" theory, the Receiver posits, is that every single corporate entity owned by the Sun Principals, regardless of differing function or geographic location, may be collapsed together and treated as a single unit owing money to Stable-Value – despite not having any contractual relationship with Stable-Value – and all of the new defendants immediately become liable for each other's and Sun Capital's actions.

C. The Amendment Is Sought in Bad Faith

The proposed FAC appears to be lodged in bad faith. Courts have rejected a proposed amendment for bad faith when it appears to be abusive, unfounded, or sought for improper purposes.[4] There are several indicators of bad faith here:

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[4] *See Rogers v. Nacchio*, 241 Fed. Appx. 602, 610 (11th Cir. 2007) (affirming denial of request to file a third amended complaint where plaintiffs had displayed bad faith and Rule 11 sanction was imposed for unfounded jurisdictional allegations), *aff'g Rogers v. Nacchio*, No. 0:05-cv-60667, Doc. 441 at 34-35, 37-38 (S.D. Fla. June 6, 2006) (attached) ("Plaintiffs' complaints appear to be 'shotgun pleadings,' where litigants include numerous vague, repetitive, and superfluous allegations against multiple parties in an apparent hope to coerce – or to extort – opposing parties into settlements," and it "would be the height of injustice to force Defendants through another round in a case where Plaintiffs' pleadings are abusive and improper"); *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139-40, 141 (5th Cir. 1993) (affirming denial of leave for bad faith because plaintiffs knew the facts purportedly supporting their new claim theories before initiating the action, but did not present the new claims until nine months later when summary judgment was imminent); *Ascon Prop. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160-61 (9th Cir. 1989) (affirming denial of amendment for bad faith

First, the Receiver seeks improperly to join multiple new defendants without proper basis, in undifferentiated, blunderbuss fashion. He complains in vague and generic terms about all the new defendants as a group having allegedly received funds from Sun Capital over the years, without specifying anything about which transactions they participated in, when (pertinent for statutes of limitations), in what amount, for what purpose, or with what intent or effect. He does not identify any wrongful conduct toward Stable-Value by any of these entities, which did not have any contract with or duties toward Stable-Value.[5]

The Receiver sets forth no basis to include the Sun Principals' wives as defendants. He states that each of them is included as a defendant "because she pledged her ownership interest in collateral that is the subject of foreclosure claims" (FAC ¶¶ 17-19), but he does not explain what collateral or what foreclosure, and does not include them in either of his two foreclosure claims (Counts VII and VIII). Nor does he anywhere else in the proposed pleading cite anything the three spouses ever did that would give rise to a claim against any of them. His mis-inclusion of these individuals in the Sun Principal Owned Entities

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where plaintiff had apparently not carefully read the statute, had been alerted to its error yet did not correct it, and then claimed, contrary to the record, that it always meant to proceed under a different subsection); *GSS Prop., Inc. v. Kendale Shopping Ctr.*, 119 F.R.D. 379, 380-81 (M.D.N.C. 1988) (noting that "[b]ad faith amendments are those which may be abusive or made in order to secure some ulterior tactical advantage," court found bad faith where plaintiff apparently withheld facts known to it and had an ulterior purpose of either forcing defendant to settle or punishing defendant for not settling); *Damiani v. Adams*, 657 F. Supp. 1409, 1416 (S.D. Cal. 1987) (denying leave to amend complaint to add 25 defendants to the "ever-expanding theory of a conspiracy dedicated to harming [plaintiffs'] interests," where plaintiffs' motives were "suspect," involving "incessant harassment," and "[t]o allow Plaintiffs to include more defendants in their unwarranted claims would serve only to compound the costs and inconvenience incurred by the present defendants").

[5] An egregious example is the inclusion of WorldFactor as a defendant on claims for which the applicable statutes of limitation are four years at most. WorldFactor was dissolved in 2003 and did not receive any transfers of funds from Sun Capital after that, as was apparent from the related parties schedule used by the Receiver as a deposition exhibit. (See Pl. 1/19/10 Ex. D at 133; Pl. 1/19/10 Ex. J at 370; 3/2/10 Leder Aff. at 53 n.43, Exs. 85, 93).

category (FAC at 20 n.5) does not support any proper claim against them.

The Receiver makes inappropriately generic jurisdictional assertions. He states that every one of the new entities has its "principal place of business in Palm Beach County, Florida" (FAC ¶¶ 25-36, 38-41, 43-48, 50-59, 61-66), even though many of the entities' businesses are located in the various states where they operate hospitals or hold real estate. He further asserts that each entity either operated a business venture in Florida "through its relationship with the Receivership entities" or committed a tortious act against the Receivership entities or breach of contract in Florida (¶ 9), even though the out-of-state entities do not operate business ventures in Florida, do not have a contractual relationship with a Receivership entity, and have not done anything to a Receivership entity in Florida.

The new claims lack factual support. The Receiver asserts that the proposed new claims and parties "are the result of the discovery obtained in this case during the expedited discovery period" for the injunction motion, as well as his "continuing investigation and analysis." (Pl. Mem. at 2). However, the actual discovery record shows that the Lender approved the uses of loan proceeds about which the Receiver complains; that both the Lender and Sun Capital received equivalent value for their loans and purchases in the form of ample security acceptable to the Lender, as well as huge interest payments to the Lender; and that the Lender was well aware that Sun Capital was providing funds to affiliated entities, but the Lender never complained of any dissipation, diversion, or breaches. (3/2/10 Def. Reply Mem. at 13-18, 20-21; Leder Aff. ¶¶ 17-46, 57, 67). Only by ignoring the actual evidentiary record and instead superimposing his own belated opinions can the Receiver allege that all Sun Capital's approved expenditures were fraudulent transfers without reasonably equivalent value, or improper conversions of Stable-Value funds, or

unjust enrichments of the recipients by Stable-Value.

Similarly, the Receiver's new alter ego theory derives solely from the Receiver's after-the-fact reworking of historical events to conform to his current opinions, contrary to what the parties believed and intended at the time. The evidentiary record does not show any abuse of corporate forms to conceal self-dealing or perpetrate a fraud against Stable-Value. Rather, it shows that, over the course of the parties' 8½-year relationship, various entities owned by the Sun principals were created to purchase hospitals or real estate in different states at different times, and did in fact make those purchases and operate *bona fide* hospital businesses, which had separate administrative and record-keeping functions. (3/2/10 Leder Aff. ¶¶ 30, 32, 34, 38-44; Pl. 1/19/10 Ex. G at 83-84, Ex. I at 127). The discovery has shown that many affiliated (and non-affiliated) entities periodically received funds from Sun Capital as loans or receivables purchases, as approved by the Lender when making loans, but that does not transform them into alter egos of Sun Capital or demonstrate that they dominated and controlled Sun Capital (FAC ¶ 145). There is no evidence that SCHI and SCI, which existed first and held the purse strings, were dominated and controlled by the later-arising affiliates.

Nor is there any evidence that Sun Capital either subjectively intended to or objectively was acting against its own interests when it took loans from Stable-Value to make receivables purchases, loans, or other investments that it expected to be profitable over time. Sun Capital's financing business was profitable and successful for 8½ years, and both the Sun Principals and the Lender expected to share the upside from the hospital investments in a few years. (3/2/10 Leder Aff. ¶¶ 48, 90, 96). And notwithstanding the Receiver's oft-repeated assertion that Sun Capital was insolvent at all times, that faulty

contention has already been debunked in Sun Capital's injunction reply papers, as it rests solely on a willful distortion of the record and financial information. (3/2/10 Hopwood Decl. ¶¶ 16-17, 30; 3/2/10 Leder Aff. ¶¶ 57, 90, 96, 113).

There is also no evidence of an intent by any of the defendants to defraud or frustrate the Lender's ability to obtain repayment of the loan. On the contrary, the evidence shows that in 2002 Sun Capital wanted to begin repaying the loan but the Lender instead pushed Sun Capital to find new investments to utilize Stable-Value funds and provide ever-increasing interest. The Lender wanted to avoid loan repayment, not Sun Capital or its affiliates. (3/2/10 Leder Aff. ¶¶ 12-15). Later, the Lender repeatedly agreed to undertake a restructuring in which a substantial portion of the loan would be repaid by converting debt to equity for the Lender, but that was never finalized – again, due to the Lender's own inaction, not any fault of Sun Capital. (*Id.* ¶¶ 47-54, 125; 3/2/10 Frew Decl. ¶ 3). The Receiver has no basis in the discovery record to claim any intent to harm or defraud the Lender, let alone that the corporate forms of SCHI and SCI were misused to do so.

D. The Proposed New Claims Are Futile

A proposed amended claim is properly denied as futile when it would be subject to dismissal or summary judgment because it is legally or factually insufficient to establish a valid claim.[6] Here, it is apparent from the existing record that the three new claims seeking

[6] *See Cockrell v. Sparks*, 510 F.3d 1307, 1310-11 (11th Cir. 2007) (affirming denial of plaintiff's motion to amend seeking to change the named defendant, because the proposed defendant would have been entitled to summary judgment on the claim given the evidence); *Spanish Broadcasting Sys. v. Clear Channel Commcns., Inc.*, 376 F.3d 1065, 1079 (11th Cir. 2004) (affirming denial of plaintiff's motion to amend where claims rested upon hypothetical and conclusory allegations of antitrust injury that were unsupported by specific factual allegations); *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262-63 (11th Cir. 2004) (affirming denial of leave where two of the new claims depended on the existence of a valid contract, which the court had already rejected in

to extend liability to the many new defendants are futile because the Receiver has no basis to establish either the alter ego theory upon which his claims depend or valid fraudulent transfer, unjust enrichment, or conversion claims.

To pierce a corporate veil based upon an alter ego theory, plaintiff must show that (1) the entity is an alter ego or "mere instrumentality" of another, and (2) was organized or used for an improper purpose that caused injury to the plaintiff. *See Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1320 (11th Cir. 1998); *N. Am. Clearing, Inc. v. Brokerage Computer Sys., Inc.*, 666 F. Supp. 2d 1299, 1306 (M.D. Fla. 2009). The improper conduct needed is "proof of *deliberate* misuse of the corporate form – tantamount to fraud." *John Daly Enters., LLC v. Hippo Golf Co.*, 646 F. Supp. 2d 1347, 1353 (S.D. Fla. 2009) (quoting *In re Hillsborough Holdings Corp.*, 166 B.R. 461, 469 (M.D. Fla. 1994)). Improper conduct is present only "where the corporation was a mere device or sham to accomplish some ulterior purpose ... or to accomplish some fraud or illegal purpose." *Johnson Enters.*, 162 F.3d at 1320 (quoting *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1117 (Fla. 1984)).

The Receiver cannot meet this standard because, as he acknowledges in substantial part, and as the SEC stated from the outset of its litigation and Gunlicks has admitted, the Lender was well aware of how the loan proceeds were being used and approved those

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summary judgment, and the third did not state a valid claim under Alabama law); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999) (affirming denial of two motions to amend complaint where each of the proposed contract breach claims was insufficient as a matter of law); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520-21 (11th Cir. 1996) (affirming denial of amendment where proposed contribution claim was not viable because defendants would not be subject to CERCLA liability as claimed); *Lord v. Fairway Elec. Corp.*, 223 F. Supp. 2d 1270, 1276-77 (M.D. Fla. 2002) (denying motion where plaintiff's causation theory rested upon an expert opinion that was excluded from evidence, leaving plaintiff unable to show a factual basis for the amendment).

expenditures, including when made to affiliates. (FAC ¶ 236; 1/19/10 Pl. Mem. Opp. at 38 n.40; No. 2:09-cv-229 Doc. 1 ¶¶ 3, 30, Doc. 197-1 ¶¶ 11, 12; 3/2/10 Def. Mem. at 12-18). Given this ongoing knowledge, consent, and encouragement by Stable-Value, there was obviously no fraud or deception of Stable-Value through these entities. Nor does the Receiver offer a sufficient "mere instrumentality" pleading. His only non-conclusory factual assertions involve common ownership, which by itself is insufficient to pierce the corporate veil. *See Molenda v. Hoechst Celanese Corp.*, 60 F. Supp. 2d 1294, 1300 (S.D. Fla. 1999), *aff'd*, 212 F.3d 600 (11th Cir. 2000). It is not enough simply to plead the legal elements without supporting facts, as the Receiver does. *See N. Am. Clearing, Inc. v. Brokerage Computer Sys., Inc.*, 2009 WL 1513389, *9 (M.D. Fla. May 27, 2009) (dismissing alter ego claim where plaintiff recited case law language listing elements of alter ego status, but not any specific facts).

For a § 726.105(1)(a) actual fraudulent transfer claim, a creditor must establish that "there is [1] a creditor to be defrauded, [2] a debtor intending fraud, and [3] a conveyance of property which is applicable by law to the payment of the debt due." *Johnson v. Dowell*, 592 So. 2d 1194, 1196 (Fla. 2d DCA 1992); *In re Young*, 235 B.R. 666, 669 (M.D. Fla. 1999). Showing actual intent generally requires establishing several of the "badges of fraud" listed in § 726.105(2)(a)-(k). *Id.* The Receiver does not cite any facts showing actual intent to defraud Stable-Value by either Sun Capital or the transferees, and the only two badges he alleges, insolvency and lack of reasonably equivalent value (FAC ¶ 219), are belied by the record.

To set aside a transfer as constructively fraudulent under § 726.106(2), a creditor must show that "the transfer was made to an insider [as defined in § 726.102(7)] for an

antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." Fla. Stat. § 726.106(2); *see Mied, Inc. v. Summit Healthcare, Inc.*, 849 So. 2d 397, 398 (Fla. 4th DCA 2003); *Balsamo v. Gruppo Ceramiche Ricchetti, S.P.A.*, 862 So. 2d 812, 813 (Fla. 4th DCA 2003). Again, however, the Receiver's conclusory assertions that Sun Capital was insolvent and the transferees had reasonable cause to believe so are belied by the evidence.

For an unjust enrichment claim, the plaintiff must show "(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006). This claim is futile because Stable-Value did not directly confer any benefit on the proposed new defendants. *See Extraordinary Title Serv., LLC v. Fla. Power & Light Co.*, 1 So. 3d 400, 404 (Fla. 3d DCA 2009); *Peoples Nat'l Bank of Commerce v. First Union Bank of Fla.*, 667 So. 2d 876, 879 (Fla. 3d DCA 1996).

Conversion is an "act of dominion wrongfully asserted over another's property." *In re Aqua Clear Tech., Inc.*, 361 B.R. 567, 574 (S.D. Fla. 2007) (quoting *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993)). A plaintiff must demonstrate "a right to property, a demand for the return of that property, and the defendants' refusal to return the property." *In re PSI Indus., Inc.*, 306 B.R. 377, 387 (S.D. Fla. 2003); *see United States v. Bailey*, 419 F.3d 1208, 1214 (11th Cir. 2005). Here, however, the funds transferred by Sun Capital to the proposed new defendants were not Stable-Value's "property," the new defendants never exercised any wrongful dominion over any Stable-Value property, and

Stable-Value never demanded the return of any such property. *See id.* at 1215-16, 1217.

E. The Pleading Would Cause Undue Prejudice

To permit the FAC would also cause undue prejudice both to the existing Defendants and the numerous proposed new defendants. An amended pleading is deemed prejudicial "if the defendant would be put to added expense and the burden of a more complicated and lengthy trial, or if the issues raised by the amendment are remote from the other issues in the case and might confuse or mislead the jury." *Dannebrog Rederi AS v. M/Y True Dream*, 146 F. Supp. 2d 1307, 1315 (S.D. Fla. 2001). Prejudice has been found where, as here, "the amendment brings entirely new and separate claims" and "would require expensive and time-consuming new discovery." *Van Harlingen v. City of Dunedin*, 1992 WL 80954, *1 (M.D. Fla. Apr. 8, 1992) (denying amendment as unfairly prejudicial).[7]

Here, the proposed FAC would add enormous complexity, and a great deal more discovery and pretrial proceedings addressing many new issues and parties. This would greatly delay the proceedings, defeat the present schedule, and vastly increase the cost of the proceedings to the existing and new defendants. Many of the new defendants would make early motions to dismiss for lack of personal jurisdiction, improper joinder, and/or failure to state a claim, which would need to be resolved before the case could proceed.

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[7] *See also Technical Res. Serv., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1463-64 (11th Cir. 1998) (affirming denial of leave to assert antitrust tying claim where amended complaint would have increased the complexity of an already complex case and required discovery to be reopened); *GRV Aviation, Inc. v. Hale Aircraft, Inc.*, 2003 U.S. Dist. LEXIS 27573, *4 (N.D. Ga. Jan. 31, 2003) (denying motion to add a claim for attorney's fees as unduly prejudicial because it would require new discovery and make the suit more complex by injecting issues not previously covered); *Lord v. Fairway Elec. Corp.*, 223 F. Supp. 2d 1270, 1276 (M.D. Fla. 2002) (denying amendment changing causation theory, as defendant had expended time and resources researching, mediating, and doing discovery on the prior erroneous theory).

The injection of the extreme alter ego theory would create whole new areas of discovery and motion practice for all defendants, as would the new issues concerning unjust enrichment and conversion claims against parties not in privity with Stable-Value. Moreover, greatly expanded discovery would be needed concerning the details of every single transfer of funds to any of the new defendants within the applicable limitations periods. Such excessive litigation burdens to litigate futile claims are not what "justice [ ] requires," Fed. R. Civ. P. 15(a) – all the more so in this case because to add all the hospital corporations as defendants would harm both their ongoing businesses and any efforts to obtain a beneficial recapitalization or refinancing transaction (which might otherwise operate to the benefit of Stable-Value and its investors).

The Receiver himself has already balked at completing his discovery on the existing contract issues, deeming it too burdensome and a "waste" of his resources. (Doc. 153 at 17, n.10; Doc. 81 at 20). It is surely prejudicial and in bad faith for the plaintiff to seek to impose on numerous defendants – including strapped hospital corporations – huge costs and discovery burdens that he himself is unwilling to bear. *See In re Acceptance Ins. Cos. Sec. Litig.*, 352 F. Supp. 2d 928, 935 (D. Neb. 2003) ("Plaintiffs have engaged in dilatory conduct and bad faith during the discovery process thus far, and this conduct weighs heavily against granting leave to allow the amendment"), *aff'd*, 423 F.3d 899, 904 (8th Cir. 2005).

CONCLUSION

The motion for leave to file the First Amended Complaint should be denied.

Dated: March 24, 2010 Respectfully submitted,

By: /s/ Jonathan Galler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 2010, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jonathan Galler
Jonathan Galler

SERVICE LIST

Daniel S. Newman, as Receiver v. Sun Capital, Inc., et al.,
Case No. 2:09-cv-445-FtM-29-SPC
(Ancillary to Case No. 2:09-cv-229-FtM-29 SPC)

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA – FORT MYERS DIVISION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-60667-CIV-COHN/SNOW

WILLIAM M. ROGERS and C. MYLETT,

Plaintiffs,

vs.

JOSEPH P. NACCHIO, ET AL.,

Defendants.
_____/

ORDER GRANTING VARIOUS MOTIONS TO DISMISS; ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS; AND ORDER OF DISMISSAL

THIS CAUSE came before the Court on the following motions: (1) Defendant Arthur Andersen LLP's Motion to Dismiss Plaintiffs' Second Amended Civil RICO Complaint [DE 335]; (2) Defendant Mark Iwan's Motion to Dismiss Plaintiffs' Second Amended Civil RICO Complaint [DE 336]; (3) Defendant James Kozlowski's Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction [DE 340]; (4) Defendant James Smith's Supplemental Memorandum Regarding Insufficient Service in Support of Defendants' Consolidated Motion to Dismiss [DE 342]; (5) a Supplemental Motion to Dismiss Regarding Counts Five and Six of the Second Amended Complaint [DE 343] by Defendants Grant Graham, Thomas Hall, and Robin Szeliga; (6) the Citigroup Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [DE 347];[1] (7) a Consolidated Motion to Dismiss by various Defendants [DE 348];[2] (8)

[1] The Citigroup Defendants are Citigroup Inc., Citigroup Global Markets Holdings Inc. f/k/a Salomon Smith Barney Holdings Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., Sandy Weill, and Jack Grubman.

[2] The following Defendants joined in this motion: Linda Alvarado, Phillip Anschutz, the Anschutz Company, Joel Arnold, Craig Barrett, Hank Brown, Gregory

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Defendant Credit Suisse Securities (USA) LLC's Supplemental Motion to Dismiss [DE 354]; (9) Defendant Jennifer Tanner's Motion to Dismiss [DE 363]; (10) Defendant Qwest Communications International Inc.'s Motion to Strike Portions of the Second Amended Complaint [DE 369-1] and to Dismiss the Second Amended Complaint [DE 369-2]; (11) Defendant Bank of America, N.A.'s Motion to Dismiss the Second Amended Complaint [DE 373]; (12) Defendant James Kozlowski's Rule 11 Motion for Sanctions Dismissing Plaintiffs' Second Amended Complaint Against Mr. Kozlowski and Ordering Plaintiffs to Pay Monetary Penalty into Court [DE 388]; (13) Defendant Mark Schumacher's Motion to Dismiss [DE 427], and (14) Plaintiffs' Responses to the Court's May 10, 2006 Order to Show Cause [DE 438, 439]. The Court has considered each of the above motions, the respective Responses [DE 386, 379, 424, 380, 389, 376, 391, 385, 394, 400, 405, 438] by Plaintiffs William Rogers and C. Mylett, as well as Plaintiffs' Notices of Errata in their Response [DE 377, 415], and the respective Replies [DE 409, 411, 410, 419, 434, 418, 429, 430, 414, 413, 435, 412, 428] and is otherwise fully advised in the premises.[3]

Casey, Augustine Cruciotti, Thomas Donohue, Michael Felicissimo, Grant Graham, Thomas Hall, Cannon Harvey, Peter Hellman, Roger Hoaglund, Douglas Hutchins, Mark Iwan, Steven Jacobsen, Vinod Khosla, Afshin Mohebbi, Frank Noyes, Loren Pfau, Frank Popoff, Craig Slater, James Smith, W. Thomas Stephens, Kimberly Stout Smiley, Robin Szeliga, Drake Tempest, Bryan Treadway, John Walker, Marc Weisberg, Richard Weston, Louis Wilks, and Robert Woodruff. The following Defendants joined the motion in part: Arthur Andersen LLP, Credit Suisse Securities (USA) LLC, William Eveleth, James Kozlowski, and Joseph Nacchio. Additionally, Sonus Networks, Inc. joined the motion in part, but they have since settled and have been dismissed from this action. (See Order of Dismissal With Prejudice of Def. Sonus Networks, Inc. (May 5, 2006) [DE 432].)

[3] Additionally, the Court has considered the Citigroup Defendants' Request for Oral Argument [DE 346], the Consolidated Request for Oral Argument by various

This action alleges securities fraud. Plaintiffs are pro se. Their Second Amended Complaint contains 344 pages and includes 25 counts. The counts include Colorado, Florida, and federal civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims; Colorado, Florida, and federal securities claims, a common law fraud claim, a fraud in the inducement claim, a fraudulent concealment claim, a civil theft claim, a civil conspiracy claim, and a claim for a violations of the Florida Deceptive and Unfair Trade Practices Act, as well as various other aiding and abetting claims. The 61 Defendants named in the Second Amended Complaint include Qwest Communications International Inc. and various individuals and entities involved with Qwest, a telecommunications company. In addition to the Second Amended Complaint, Plaintiffs have filed a 732-page Civil RICO Case Statement pursuant to Rule 12.1 of the Local Rules of the U.S. District Court for the Southern District of Florida.

Plaintiffs allege that Qwest and the various other individuals and entities formed a massive conspiracy to affect the value of Qwest's securities. All claims sound in fraud. For the most part, the alleged fraud concerned financial reports between 1999 and 2002. Defendants allegedly overstated revenue growth in Qwest through the reports when most of the revenue over the reporting period was non-recurring. Non-recurring revenue, such as one-time capacity swaps for long-term capacity in a telecommunication network, should have been recognized throughout the life of the capacity swap, rather than up-front, Plaintiffs allege. These alleged discrepancies

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Defendants [DE 417], and Defendant Bank of America N.A.'s Request for Oral Argument [DE 420], the Responses to these Requests [DE 407, 425, 426], and the Citigroup Defendants' Reply [DE 422]. The Court does not believe a hearing would be helpful with respect to the above motions and shall respectfully deny these requests.

ultimately resulted in restatements of Qwest's revenue. Defendants include various Qwest executives, accountants, accounting entities, investment banks, and investment advisors who allegedly partook in these accounting irregularities.

Defendants offer several reasons to dismiss, including statutes of limitations, lack of personal jurisdiction, and failure to state a claim. This Order shall proceed by first addressing those federal claims where there exists nationwide service of process. Second, the Court shall address personal jurisdiction with respect to the remaining claims. See Posner v. Essex Ins. Co., 178 F.3d 1209, 1214 n.6 (11th Cir. 1999) ("A court without personal jurisdiction is powerless to take further action."). Finally, for the remaining claims and Defendants, the Court shall address whether Plaintiffs have stated claims for which relief may be granted.

With respect to Defendants' motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court notes that it must accept all allegations in Plaintiffs' Second Amended Complaint as true and construe those allegations in the light most favorable to Plaintiffs. Lopez v. First Union Nat. Bank of Fla., 129 F.3d 1186, 1189 (11th Cir. 1997). The Court cannot dismiss Plaintiffs' Second Amended Complaint for failure to state a claim unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Id.

I. FEDERAL SECURITIES CLAIM (COUNT 23)

Plaintiffs allege that they relied on Defendants' false or misleading statements in purchasing shares of Qwest. They allege that these false or misleading statements led to an inflated value of the shares and that Plaintiffs subsequently suffered damage

when the value of the shares declined. Plaintiffs have therefore filed a claim pursuant to Section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), and 17 C.F.R. § 240.10b–5. Defendants contend, among other arguments, that this claim is time-barred.

Pursuant to 28 U.S.C. § 1658(b), a plaintiff must bring an action involving a claim of fraud in contravention of a regulatory requirement concerning federal securities laws no later than the earlier of two years after the discovery of the facts constituting the violation or five years after such violation. The five-year limitation is a statute of repose to which no equitable tolling principles apply. See Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1279 n.5 (11th Cir. 2005). According to Plaintiffs' Second Amended Complaint, Plaintiff Rogers purchased the shares in question on June 20, 1999. (Second Amended Compl. at 227, ¶ 574 (Dec. 28, 2005) [DE 278].) Accordingly, the five-year statute of repose ran as of June 20, 2004. Moreover, Defendants contend that publicly available information concerning the alleged fraudulent activity would have placed Plaintiffs on inquiry notice as of March 2002 at the latest, meaning that the two-year statute of limitations would have required the filing of their claims by March 2004. In either event, because Plaintiffs did not file their Complaint until April 21, 2005, Plaintiffs' securities claim is time-barred. (See Compl. (Apr. 21, 2005) [DE 1].)

Plaintiffs argue that the tolling doctrine of American Pipe & Construction Company v. Utah, 414 U.S. 538, 554 (1974), and Crown, Cork & Seal Company v. Parker, 462 U.S. 345, 349 (1983), applies to their securities claim. Generally speaking, the doctrine that the Supreme Court established in these cases is that the time limit for filing suit for putative class members is tolled until the trial court denies certification of

the class or until the class action is decertified. Plaintiffs argue that a class action filed in the U.S. District Court for the District of Colorado tolled the limitations period for their action.

The Colorado action, however, cannot operate to toll the limitations period here. First, American Pipe tolling only applies to defendants who were sued in the class action. See Arneil v. Ramsey, 550 F.2d 774, 782 n.10 (2d Cir. 1977) (declining to extend American Pipe tolling to defendants who were not defendants in class action). Plaintiffs name numerous Defendants in this action who were not Defendants in the Colorado class action. (See Consolidated Reply Mem. in Support of Certain Defs.' Consolidated Mot. to Dismiss at 4 (Apr. 24, 2006) [DE 414].) The pending class action would not toll the limitation period with respect to these Defendants. Second, a plaintiff cannot rely on American Pipe tolling where the plaintiff files an individual action before the class action court makes a decision affecting class certification. "The purposes of American Pipe tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification . . . ." Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 659 (6th Cir. 2005). These purposes include the avoidance of a rash of individual suits by litigants seeking relief that duplicates the relief that a pending class seeks. See Am. Pipe, 414 U.S. at 551. Accordingly, American Pipe tolling is inapplicable here.[4]

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[4] Plaintiffs also argue that the Court should excuse their premature reliance on American Pipe tolling as excusable neglect pursuant to Rule 6(b) of the Federal Rules of Civil Procedure. Rule 6(b) is a rule of procedure; it does not apply to time periods set out by statutes. 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1164, at 519 (3d ed. 2002). And in any event, Plaintiffs offer no justifiable excuse for their year-long delay in bringing this action other than the fact that they were

Finally, Plaintiffs argue that the date from which any statute of limitations should run should be the date they sold the Qwest shares. They claim that they sold their shares in March 2002, though they neglected to include this date in their pleadings. Their Second Amended Complaint, however, alleges nothing about Defendants' fraudulent activity inducing them to sell their shares. The pleadings all appear to relate to Plaintiff Rogers' purchase of shares in 1999 and to Plaintiffs' holding the shares through 2002. (See, e.g., Second Amended Compl. at 338–39, ¶¶ 834–842.) The Court fails to see how the sale date relates to a violation of the securities laws in this action.

In any event, even if the Court were to accept that the statute of limitations began running in March 2002, Plaintiffs would still be required to pursue this action within two years of the discovery of the fraudulent activity. The U.S. District Court for the District of Colorado, where much of the litigation surrounding Qwest's alleged fraudulent activity has occurred, has held that shareholders were on inquiry notice of fraudulent activity with respect to Qwest as of February 9, 2002. See In re Qwest Communications Int'l, Inc. Sec. Litig., 387 F. Supp. 2d 1130, 1141–42 (D. Colo. 2005). Plaintiffs admit that they were reasonably on inquiry notice as of March 2002. Therefore, even if the Court were to accept Plaintiffs' date rather than the court's date, Plaintiffs would be required to file their action by March 2004. They did not. The

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simply ignorant of their rights as putative class members in the Colorado class action. "[I]nadvertence, ignorance of the rules, or mistakes in construing the rules do not usually constitute 'excusable' neglect . . . ." Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 392 (1993). The Court finds that Plaintiffs' neglect here was not excusable under Rule 6(b).

federal securities claim is therefore time-barred even if the statute of limitations ran from the date Plaintiffs sold their shares.

For the foregoing reasons, Plaintiffs' federal securities claim is time-barred. The Court shall dismiss Count 23 of the Second Amended Complaint.

II. FEDERAL CIVIL RICO CLAIMS (COUNTS 5 AND 6)

Plaintiffs allege that Defendants Graham, Hall, and Szeliga conducted and conspired to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO Act, 18 U.S.C. § 1962(c), (d). (Second Amended Compl. at 317–19, ¶¶ 702–715.) Thus, Plaintiffs allege that they suffered damages and file claims pursuant to 18 U.S.C. § 1964(c). Defendants Graham, Hall, and Szeliga ("Federal RICO Defendants") argue that Plaintiffs' RICO claims are not actionable because they are based on allegations of securities fraud.

As revised by Section 107 of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the RICO statute provides an exception to the civil RICO cause of action for "any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). The statutory exception for securities fraud, however, "does not apply to an action against any person that is criminally convicted in connection with the fraud."

Plaintiffs do not contest the fact that all of their pleadings relate to securities fraud. Thus, they argue that the criminal conviction exception permits a RICO cause of action against the Federal RICO Defendants because all three have been convicted of violations in connection with the fraud. In Krear v. Malek, 961 F. Supp. 1065 (E.D. Mich. 1997), the court provided a thorough review of the legislative history behind

Section 107 of the PSLRA and concluded that "Congress, by enacting this amendment, was intending to correct the misapplication of RICO in the securities fraud context. Moreover, the record reveals that Congress was weary of the susceptibility of civil RICO to litigation abuses in the securities fraud area." Krear, 961 F. Supp. at 1076. Accordingly, the court concluded that the criminal conviction exception must be construed "as narrowly as possible so that the exception is only available to those plaintiffs against whom a defendant has specifically been convicted of criminal fraud." Id. Otherwise,

> plaintiffs who were not found to have been criminally defrauded would be allowed to 'bootstrap' their RICO claims to the claims of those plaintiffs who were found to have been criminally defrauded. This would necessarily cause the 'conviction exception' to swallow the rule which prohibits civil RICO claims for securities fraud.

Id.

The Court agrees with this analysis. The Federal RICO Defendants here are each charged with crimes having nothing to do with defrauding Plaintiffs specifically. Defendant Graham pled guilty to a one-count information charging him with being an accessory after the fact in violation of 18 U.S.C. § 3. The information contains no allegations of defrauding Plaintiffs. Defendant Hall pled guilty to one count of false writing in violation of 18 U.S.C. § 1018. This misdemeanor involves no element of fraud against other individuals. And Defendant Szeliga pled guilty to a one-count information for insider trading in violation of 15 U.S.C. § 78j(b) and 78ff(a), 17 C.F.R. § 240.10b–5-1. The information contains no allegations that Defendant Szeliga defrauded Plaintiffs. Accordingly, none of these Defendants falls within the criminal conviction exception

under 18 U.S.C. § 1964(c). The Court shall therefore dismiss Count 5 and Count 6 from Plaintiffs' Second Amended Complaint.

III. PERSONAL JURISDICTION

Most of Plaintiffs' remaining claims concern state law.[5] For such claims, there is no provision for nationwide service of process as with the federal securities claim or the federal civil RICO claims. Accordingly, to maintain these claims against Defendants, Plaintiffs must demonstrate that each Defendant is subject to personal jurisdiction in Florida. A majority of Defendants submit that they have no sufficient minimum contacts with Florida and therefore argue that the Court lacks personal jurisdiction.[6]

The determination of personal jurisdiction over a nonresident defendant requires a two-part analysis. Where jurisdiction is based on diversity, Rule 4(e) of the Federal Rules of Civil Procedure requires that both assertion of jurisdiction and service of process be determined by the state long-arm statute. Cable/Home Communication Corporation v. Network Productions, Inc., 902 F.2d 829, 855 (11th Cir. 1990); Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1358 (Fed. Cir. 1998). If there is a basis for the assertion of personal jurisdiction under the state

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[5] The one exception concerns Plaintiffs' claim for aiding and abetting a federal RICO violation under Count 11. The Court addresses this claim in Section IV.b, infra.

[6] These Defendants include Linda Alvarado, Phillip Anschutz, the Anschutz Company, Joel Arnold, Craig Barrett, Hank Brown, Gregory Casey, Augustine Cruciotti, Thomas Donohue, Michael Felicissimo, Grant Graham, Thomas Hall, Cannon Harvey, Peter Hellman, Roger Hoaglund, Douglas Hutchins, Mark Iwan, Steven Jacobsen, Vinod Khosla, James Kozlowski, Afshin Mohebbi, Frank Noyes, Loren Pfau, Frank Popoff, Mark Schumacher, Craig Slater, James Smith, W. Thomas Stephens, Kimberly Stout Smiley, Robin Szeliga, Jennifer Tanner, Drake Tempest, Bryan Treadway, John Walker, Marc Weisberg, Richard Weston, Louis Wilks, and Robert Woodruff.

statute, the court must next determine whether sufficient minimum contacts exist to satisfy the Due Process Clause of the Fourteenth Amendment so that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945); Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla. 1989).

When a district court does not conduct a discretionary evidentiary hearing on a motion to dismiss for lack of personal jurisdiction, the plaintiff must establish a prima facie case of personal jurisdiction over a nonresident defendant. See Cable/Home Communication, 902 F.2d at 855. A prima facie case is established if a plaintiff presents enough evidence to withstand a motion for directed verdict. E.g. Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988) (citations omitted). A district court must accept the facts alleged in a complaint as true, to the extent that they are uncontroverted by a defendant's affidavits. However, where a plaintiff's complaint and a defendant's affidavits conflict, the district court must construe all reasonable inferences in favor of the plaintiff. Robinson, 74 F.3d at 255 (11th Cir. 1996) (citing Madara, 916 F.2d at 1514).

Here, each Defendant listed in note 6 above has provided a declaration demonstrating a lack of any sufficient contacts with the state of Florida to satisfy either the state's long-arm statute or Due Process. In response, Plaintiffs argue that Defendants have all made sufficient contacts with the state through the activities of Qwest and that these activities satisfy various provisions of the Florida long-arm statute. In particular, Plaintiffs argue that (1) each Defendant operated a business or business venture in Florida through Qwest, satisfying § 48.193(1)(a) of the statute; (2) each

Defendant caused injuries to persons within Florida through activities outside of the state, satisfying § 48.193(1)(f); (3) each Defendant engaged in substantial and not isolated activity within Florida through Qwest, satisfying § 48.193(2); and (4) each Defendant committed tortious acts in Florida, satisfying § 48.193(1)(b).

The Court construes and applies the Florida long-arm statute as would the Florida Supreme Court. Horizon Aggressive Growth, L.P. v. Rothstein Kass, P.A., 421 F.3d 1162, 1166–67 (11th Cir. 2005). "The Florida long-arm statute is strictly construed, and the person invoking jurisdiction under it has the burden of proving facts which clearly justify the use of this method of service of process." Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 891 (11th Cir. 1983).

With respect to activities that Defendants allegedly performed through Qwest, these cannot subject Defendants to personal jurisdiction in Florida.

> While a corporation itself may be subject to jurisdiction when it transacts business through its agents operating in the forum state, unless those agents transact business on their own account in the state, as opposed to engaging in business as representatives of the corporation, they are not engaged in business so as to be individually subject to the state's long-arm statute.

Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 628 (11th Cir. 1996) (citing Excel Handbag Co. v. Edison Bros. Stores, 428 So. 2d 348, 350 (Fla. Dist. Ct. App. 1983)). Thus, Qwest's activities in Florida have no bearing on the court's personal jurisdiction over the individual Defendants unless they transacted business on their own account. As Plaintiffs have provided no evidence of such activity by each individual Defendant, the Court has no grounds for personal jurisdiction pursuant to § 48.193(1)(a) and § 48.193(2).

With respect to Plaintiffs' allegations that the individual Defendants caused injuries to individuals within Florida from activities outside the state, such activity satisfies § 48.193(1)(f) of the long-arm statute only if Defendants were "engaged in solicitation or service activities within" Florida, § 48.193(1)(f)(1), or "[p]roducts, materials, or things processed, serviced, or manufactured by [Defendants] anywhere were used or consumed within [Florida] in the ordinary course of commerce, trade, or use." Plaintiffs provide no evidence that any of the individual Defendants were engaged in solicitation or service activities within Florida. Moreover, Plaintiffs provide no evidence that the individual Defendants processed, serviced, or manufacturered anything that was used or consumed within Florida. Finally, to the extent that Plaintiffs are alleging that Defendants caused financial or economic harm to individuals in Florida through unspecified service activities, the "Florida Supreme Court has decided that a purely economic injury . . . is insufficient to confer jurisdiction over a defendant under § 48.193(1)(f)." Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1033 (11th Cir. 1991) (citing Aetna Life & Cas. Co. v. Therm-O-Disc, Inc., 511 So. 2d 992 (Fla. 1987)). Accordingly, Plaintiffs have not demonstrated personal jurisdiction pursuant to § 48.193(f)(1).

Finally, Plaintiffs allege that each individual Defendant committed tortious acts in Florida through the alleged activities constituting RICO violations, violations of state securities laws, and fraud. Therefore, Plaintiffs argue that Defendants are subject to personal jurisdiction under § 48.193(1)(b). "For personal jurisdiction to attach under the 'tortious activity' provision of the Florida long-arm statute, the plaintiff must demonstrate that the non-resident defendant 'committed a substantial aspect of the alleged tort in

Florida.'" Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389, 394 (11th Cir. 1988) (quoting Watts v. Haun, 393 So. 2d 54, 56 (Fla. Dist. Ct. App. 1981)). "[T]he alleged tortfeasor's 'physical presence [in Florida] is not required.'" Horizon Aggressive Growth, L.P. v. Rothstein Kass, P.A., 421 F.3d 1162, 1168 (11th Cir. 2005) (quoting Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002)) (alteration in original). For instance, a tortfeasor can commit a tortious act in Florida through telephonic, electronic, or written communications. See, e.g., Wendt, 822 So. 2d at 1260. There must, however, be some 'connexity' between the out-of-state communications and the cause of action such that the cause of action arises from the communications. Id. In other words, the communications into Florida must be tortious in and of themselves. Carlyle v. Palm Beach Polo Holdings, Inc., 842 So. 2d 1013, 1017 (Fla. Dist. Ct. App. 2003). A plaintiff does not need to demonstrate that a defendant made communications directly to the plaintiff, though. See, e.g., Deloitte & Touche v. Gencor Indus., Inc., No. D05-1734, 2006 WL 1359330, *5 (Fla. Dist. Ct. App. May 19, 2006) (holding foreign auditor subject to personal jurisdiction for allegedly sending false reports to codefendant in Florida and because foreign auditor was aware that plaintiff would rely on reports in Florida).

Here, Plaintiffs' claims revolve around general allegations that Defendants fraudulently induced them to buy and hold shares in Qwest. Plaintiffs may be able to establish that the Court has personal jurisdiction over the individual Defendants listed in note 6 above if Plaintiffs demonstrate that each Defendant made fraudulent communications to the general public, that each Defendant was aware that the communications would reach Florida, and that each Defendant was aware that individual investors in Florida would rely on the communications to their detriment.

Plaintiffs fail to do so, however. Rather, they allege in the Second Amended Complaint that each individual Defendant conducted business in Florida and was part of the RICO enterprise. (See Second Amended Compl., ¶¶ 11–15, 17, 18, 20–31, 33–42, 46–49, 51–54, 69.) In their memoranda in opposition to the motions to dismiss, Plaintiffs identify various activities of Qwest in Florida but do not identify any activities of the individual Defendants. Such general allegations provide no grounds for personal jurisdiction under § 48.193(1)(b), as the Court cannot determine that each Defendant committed a tortious activity causing injury in Florida.[7]

Even if the Court were to accept that Plaintiffs have met their burden to demonstrate personal jurisdiction based on these general allegations, though, Plaintiffs have failed to carry their burden to demonstrate sufficient contacts to satisfy the Due Process clause. Again, Plaintiffs provide numerous details concerning Qwest's contacts with Florida, but they provide no evidence that any of the individual Defendants had sufficient contacts with Florida. Therefore, Plaintiffs fail to refute each Defendant's affidavit evidence demonstrating a lack of contact with Florida. Accordingly, Plaintiffs fail to demonstrate personal jurisdiction over the individual Defendants pursuant to the Due Process Clause.

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[7] To the extent that Plaintiffs attempt to establish personal jurisdiction through each Defendant's participation in a conspiracy to commit a tortious act in Florida, Plaintiffs have failed to demonstrate each Defendant's role in the conspiracy. Rather, Plaintiffs simply allege that each Defendant was a member of the RICO enterprise. This provides no basis by which the Court can ascertain whether each Defendant had an actual role in bringing about tortious conduct in Florida.

For the foregoing reasons, Plaintiffs have demonstrated no basis for personal jurisdiction under the Florida long-arm statute or the Due Process Clause. The Defendants listed in note 6 above shall be dismissed.

IV. REMAINING CLAIMS AS TO REMAINING DEFENDANTS

Given the above rulings, the remaining Defendants in this action are Arthur Andersen LLP, Bank of America, Citigroup Global Market Holdings Inc. f/k/a Salomon Smith Barney Holdings, Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney, Inc., Citigroup Inc., Credit Suisse First Boston Corp., William Eveleth, Jack Grubman, Steven Haggerty, Jordan Haines, John Hoffman, Joseph Nacchio, Qwest Communications International, Inc., Sandy Weill, and Robin Wright. Most of these Defendants argue in various motions that the remaining state law claims are either barred by statutes of limitations, facially invalid, or insufficiently pled. Therefore, Defendants argue, these claims must be dismissed for failure to state claims upon which relief can be granted. The Court shall address each remaining count in turn.

a. State RICO Claims (Counts 1–4, 7–11)

1. Colorado RICO Claims (Counts 7–11)

Plaintiffs file claims under the Colorado Organized Crime Control Act (the "COCCA"), Colo. Rev. Stat. §§ 18-17-101 to 18-17-109. Plaintiffs allege that Defendants: (1) used or invested proceeds from a pattern of racketeering activity in violation of § 18-17-104(1), (Second Amended Compl., ¶¶ 716–726 (Count 7)); (2) acquired or maintained an interest in or control of an enterprise through racketeering activity in violation of § 18-17-104(2), (id. ¶¶ 727–735 (Count 8)); (3) conducted the affairs of an enterprise through a pattern of racketeering activity in violation of § 18-17-

104(3), (id. ¶¶ 736–746 (Count 9)); and (4) conspired to violate the provisions of the COCCA in violation of § 18-17-104(4), (id. ¶¶ 747–756 (Count 10)). Additionally, Plaintiffs allege that Defendants aided and abetted other Defendants in violating the COCCA. (Id. ¶¶ 757–764 (Count 11).)

A number of Defendants argue that Plaintiffs' COCCA claims are barred by Colorado's two-year statute of limitations. At least three courts have held that Colorado's residuary two-year statute of limitations, Colo. Rev. Stat. § 13-80-102(1)(i), applies to state Civil RICO claims. See Sender v. Mann, No. CIVA01CV02315, 2006 WL 753209, *8 (D. Colo. Mar. 20, 2006); Fed. Deposit Ins. Corp. v. Refco Group, Ltd., 989 F. Supp. 1052, 1078 (D. Colo. 1997); see also Victoria Oil Co. v. Lancaster Corp., 587 F. Supp. 429, 432 (D. Colo. 1984) (applying three-year residuary statute previously codified at Colorado Revised Statutes § 13-80-108(1)(b)).

Defendants cite Brooks v. Bank of Boulder, 891 F. Supp. 1469, 1481 (D. Colo. 1995), for the proposition that the statute of limitations for COCCA claims is four years. In Brooks, however, the Court addressed the statute of limitations for a federal civil RICO claim and merely applied the federal four-year statute of limitations to the COCCA claim without discussion. The Court believes that this holding was erroneous given the lack of any specific statute of limitations regarding COCCA claims and the broad language of Colorado's residuary clause. See 13-80-102(1)(i) (providing two-year statute of limitations for "[a]ll other actions of every kind for which no other period of limitation is provided").

A COCCA claim "accrues for limitations purposes when a plaintiff knows or should have known of the existence of all elements of the claim, including the existence

of a pattern." Refco Group, 989 F. Supp. at 1078 (citing Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc., 733 F. Supp. 1406, 1409 (D. Colo. 1990)). Here, Plaintiffs have stated that they were on inquiry notice of the alleged fraudulent activity concerning Qwest as of March 2002. All of Plaintiffs' COCCA claims concern fraud. Accordingly, Plaintiffs' COCCA claims accrued for the purposes of the two-year statute of limitations in March 2002. As Plaintiffs filed their initial Complaint after March 2004, their COCCA claims are untimely. The Court shall dismiss Counts 7–10 of the Second Amended Complaint. The Court shall also dismiss Count 11's aiding and abetting claim insofar as it pertains to the alleged COCCA claims.

2. Florida Civil RICO Claims (Counts 1–4, 11)

Plaintiffs file claims under Florida's Civil Remedies for Criminal Practices Act, (the "CRCPA"), Fla. Stat. §§ 772.101–772.19. Plaintiffs allege that Defendants: (1) used or invested proceeds from a pattern of several racketeering activities in violation of § 772.103(1), (Second Amended Compl., ¶¶ 590–636 (Count 1)); (2) acquired or maintained an interest in or control of an enterprise through racketeering activity in violation of § 772.103(2), (id., ¶¶ 637–648 (Count 2)); (3) conducted the affairs of an enterprise through a pattern of racketeering activity in violation of § 772.103(3), (id., ¶¶ 649–694 (Count 3)); and (4) conspired to violate the provisions of the CRCPA in violation of § 772.103(4), (id., ¶¶ 695–701 (Count 4)). Additionally, Plaintiffs allege that Defendants aided and abetted other Defendants in violating the CRCPA. (Id., ¶¶ 757–764 (Count 11).)

In order to demonstrate violations of § 772.103(1)–(3), "the Complaint must allege 'two acts of racketeering with enough specificity to show that there is probable

cause the crimes were committed. That determination is possible only if the factual basis of the predicate acts is set out with specificity.'" In re Cascade Int'l Sec. Litig., 840 F. Supp. 1558, 1566 (S.D. Fla. 1993) (quoting Banco de Desarrollo Agropecurario, S.A. v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986)).[8] Moreover, where the predicate acts of racketeering involve allegations of fraud, a plaintiff must plead in particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. See Brooks v. Blue Cross & Blue Shield, 116 F.3d 1364, App. A at 1380–81 (11th Cir. 1997) (per curiam) (reprinting U.S. District Court decision). In addition, a plaintiff must demonstrate direct injury from the underlying violations of § 772.103(1)–(3). "'[I]ndirect injuries, that is injuries sustained not as a direct result of predicate acts . . . will not allow recovery under Florida RICO.'" Palmas Y Bambu, S.A. v. E.I. Dupont de Nemours & Co., 881 So. 2d 565, 570 (Fla. Dist. Ct. App. 2004) (quoting O'Malley v. St. Thomas Univ., Inc., 599 So. 2d 999, 1000 (Fla. Dist. Ct. App. 1992)) (second alteration in original).

Plaintiffs allege five separate racketeering acts in support of their CRCPA claims: (1) mail/wire fraud in violation of state and federal laws, (Second Amended Compl., ¶¶ 595, 654); (2) extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and the Travel Act, 18 U.S.C. § 1952, as well as Florida Statutes § 836.05, (id., ¶¶ 609, 667); (3) use of mails, wires, and other facilities of interstate commerce to distribute proceeds of unlawful activity and/or to promote, manage, establish, carry on, or facilitate unlawful

[8] "Because of the similarities between Florida and federal RICO acts, Florida looks to federal authority regarding the interpretation and application of its act." Palmas Y Bambu, S.A. v. E.I. Dupont de Nemours & Co., 881 So. 2d 565, 570 n.1 (Fla. Dist. Ct. App. 2004).

activity in violation of the Travel Act, 18 U.S.C. § 1952, (id., ¶¶ 616, 674); (4) money laundering of proceeds derived from various fraud and theft activities in violation of the Travel Act, 18 U.S.C. § 1952, and the Money Laundering Control Act of 1986, 18 U.S.C. § 1957, as well as Florida Statutes § 896.101, (id., ¶¶ 623, 681); and (5) conspiracy to commit money laundering of proceeds derived from various fraud and theft activities in violation of the Travel Act, 18 U.S.C. § 1952, and the Money Laundering Control Act of 1986, 18 U.S.C. § 1956, (id., ¶¶ 630, 688).

Generally speaking, all of the underlying predicate acts involve either fraud, extortion, or theft. In no respect have Plaintiffs alleged details concerning the predicate acts with required specificity. With regard to fraudulent acts, the Court more fully addresses the lack of particularity in section IV.d below. Briefly summarized, Plaintiffs' pleadings either fail to demonstrate who specifically made the alleged misstatement or omission, why alleged misstatements or omissions were misleading, or how alleged misstatements or omissions induced reasonable reliance to Plaintiffs' detriment. Accordingly, none of the CRCPA predicate acts sounding in fraud gives rise to CRCPA liability on the part of Defendants.

With regard to extortion claims, the Hobbs Act proscribes obstructing, delaying, or affecting "commerce or the movement of any article or commodity in commerce by robbery or extortion." 18 U.S.C. § 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." "Fear of economic loss is a type of fear within the purview of § 1951." United States v. Haimowitz, 725

F.2d 1561, 1572 (11th Cir. 1984). The victim's fear, however, must be reasonable under the circumstances. Id.

Under Florida law, the elements of extortion are essentially the same. The Florida statute proscribes malicious threats of "injury to the person, property or reputation of another . . . with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will." Fla. Stat. § 836.05. "Malice is an essential element of the crime. A threat is malicious if it is made intentionally and without any lawful justification." Dudley v. State, 634 So. 2d 1093, 1094 (Fla. Dist. Ct. App. 1994) (citations omitted).

Plaintiffs provide insufficient allegations concerning the alleged extortion. Plaintiffs allege little more than the fact that some 15 of the remaining Defendants committed extortion against Novo Networks, Cisco Systems, and other unnamed entities by threatening economic harm. (See, e.g., id., ¶¶ 610.m, 668.m.) Plaintiffs' Civil RICO Case Statement provides scant additional details. (See, e.g., First Amended Civil RICO Case Statement at 26, 33, 323, 424, 662, 715, 722.)

With respect to Novo Networks, Plaintiffs do not state what "harm" Defendants threatened, other than the vague assertion that Defendants threatened to put Novo Networks out of business. (Id. at 26.) This allegation does not demonstrate adequately how Defendants used fear of economic injury and whether the fear was reasonable. Nor does this allegation provide any indication that the threat was malicious.

Moreover, Plaintiffs fail to specify how this alleged extortion caused Plaintiffs any direct injury. Plaintiffs allege that this extortion was part of a scheme to defraud

Plaintiffs, but as explained below, they do not provide the requisite particulars concerning how this fraud induced their reasonable reliance.

With regard to Cisco, Plaintiffs allege that Defendants threatened to cancel a contract if Cisco did not assist in a fraudulent scheme. (Id.) Plaintiffs further allege that this fraudulent scheme involved the artificial inflation of Qwest's revenue and securities. (Id. at 121.) Though these allegations may provide adequate detail concerning the exploitation of Cisco's fear of economic injury to force Cisco into a contract, Plaintiffs again fail to specify how the alleged fraudulent scheme caused them direct injury.

Finally, with regard to allegations of theft, Plaintiffs' allegations are even more sparse in detail. As explained by the Court below with regard to Plaintiffs' Civil Theft claim, see section IV.c, infra, theft involves obtaining or using:

> the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property. (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014(1). To the extent Plaintiffs are claiming that Defendants obtained property by fraud, trick, device, or false pretenses, Plaintiffs provide inadequate particulars as to Defendants' activities. Moreover, Plaintiffs do not specify how such alleged theft resulted in their direct injury.

Having failed to plead adequately the acts giving rise to CRCPA liability, Plaintiffs' conspiracy and aiding and abetting claims similarly fail.

For the foregoing reasons, the Court shall dismiss Counts 1, 2, 3, and 4 of the Second Amended Complaint. The Court shall also dismiss Count 11 insofar as it relates to aiding and abetting CRCPA violations.

b. Aiding and Abetting RICO Violation Claims (Count 11)

With the above rulings in section IV.a, all that remains of Count 11 is Plaintiffs' allegation that Defendants aided and abetted other Defendants in violating federal civil RICO law. It is unclear whether a cause of action for aiding and abetting federal civil RICO violations still exists after the Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). See Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656–57 (3d Cir. 1998), abrogated on other grounds by Rotella v. Wood, 528 U.S. 549, 555–59 (2000). But see In re Managed Care Litig., 135 F. Supp. 2d 1253, 1266–67 (S.D. Fla. 2001) (holding that aider and abetter liability claim still exists under Eleventh Circuit law, despite Central Bank decision). The Court shall leave this debate for another day, though. Even if a cause of action for aiding and abetting federal civil RICO violations still exists, Plaintiffs only have a claim for aiding and abetting if other Defendants are primarily liable under federal RICO laws. See Petro-Tech, Inc. v. W. Co. of N. Am., 824 F.2d 1349, 1356 (3d Cir. 1987) (holding that aider and abettor liability exists "if all of RICO's other requirements are met"). As explained above, Plaintiffs have failed to state a federal Civil RICO claim upon which relief can be granted. See section II, supra. Accordingly, the Court shall dismiss the remaining claims under Count 11 of the Second Amended Complaint.

c. Florida Civil Theft Claim (Count 12)

Various Defendants argue that Plaintiffs' Civil Theft claim must be dismissed because Plaintiffs do not allege that Defendants knowingly obtained or used any of Plaintiffs' property. Florida law provides a civil remedy for victims of theft or

exploitation. See Fla. Stat. § 772.11. In order to recover, however, a plaintiff must demonstrate:

> that the defendant knowingly obtained or used the plaintiff's property with the intent to, either temporarily or permanently deprive the plaintiff of a right to the property or a benefit therefrom, or alternatively, with the intent to appropriate the property to his own use or to the use of any person not entitled thereto.

United States v. Bailey, 288 F. Supp. 2d 1261, 1265 (M.D. Fla. 2003).

Plaintiffs make no allegation that the remaining Defendants obtained or used their property. Plaintiffs aver that they "purchased, via their E-TRADE discount brokerage account," shares in Qwest. (Second Amended Compl. ¶ 574.) This is the only allegation regarding a transfer of Plaintiffs' property. Accordingly, Plaintiffs have failed to state a claim under § 772.11 and the Court shall dismiss Count 12 of the Second Amended Complaint.

d. Fraud Claims (Counts 13, 19, and 24)

Plaintiffs allege that Defendants defrauded Plaintiffs through numerous misstatements and omissions in financial disclosures, analyst reports, and other public statements. Plaintiffs have filed claims for fraud in the inducement (Count 13), common law fraud (Count 19), and fraudulent concealment (Count 24). Defendants argue that Plaintiffs have failed to plead their claims of fraud with the requisite particularity under Rule 9(b) of the Federal Rules of Civil Procedure.

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise

misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) (internal quotes omitted). A plaintiff satisfies Rule 9(b) where:

> the complaint sets forth "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud."

Id. (quoting Brooks v. Blue Cross & Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997)). A plaintiff cannot simply "lump[] together all of the Defendants in their allegations of fraud." Brooks, 116 F.3d at 1381 (internal quotes omitted). "In a case involving multiple defendants the complaint should inform each defendant of the nature of his alleged participation in the fraud." Id. (alteration and internal quotes omitted).

Rule 9(b) is particularly significant where a plaintiff claims that a defendant's fraudulent misrepresentation or omission induced the plaintiff not to act. Florida law is unclear as to whether a plaintiff can sustain such a claim. See Rogers v. Cisco Sys., Inc., 268 F. Supp. 2d 1305, 1312–13 (N.D. Fla. 2003).[9] To the extent such a claim exists, however, the plaintiff must specifically identify what she would have done had the misrepresentation or omission not occurred. Where a plaintiff claims she was

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[9] As the court noted in Rogers, securities holding claims are not permitted in actions pursuant to Florida and federal securities laws. See 268 F. Supp. 2d at 1311 n.13 (citing Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1343 (11th Cir. 2002); Ward v. Atl. Sec. Bank, 777 So. 2d 1144, 1147 (Fla. Dist. Ct. App. 2001)).

fraudulently induced to hold shares of stock, the "'plaintiff must allege specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status, the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place.'" Id. (quoting Small v. Fritz Cos., 65 P.3d 1255, 1265 (Cal. 2003)).

Here, Plaintiffs identify dozens of statements that allegedly contained false or misleading information concerning Qwest's financial status. In many instances, Plaintiffs aver that "Defendants" made certain statements. (See, e.g., Second Amended Complaint ¶¶ 89, 91, 93, 95, 97, 99, 218, 228, 238, 242, 246, 251, 256, 260, 262, 269, 275, 283, 287, 316, 321, 328, 334, 345, 352, 354.) Such pleading does not meet the particularly requirements of Rule 9(b). With other statements, however, Plaintiffs identify the Defendant or Defendants responsible. (See, e.g., id. ¶¶ 83, 85, 87, 377–379, 428, 450, 458–460, 462–464, 466–469, 472–475, 478–480, 491–492, 494–497.)

Nevertheless, Plaintiffs have in all respects failed to plead adequately the manner in which the fraudulent misrepresentations or omissions misled them. Most of the statements or omissions noted above occurred after Plaintiffs purchased shares in Qwest on July 20, 1999. To the extent that these statements or omissions may have induced Plaintiffs to hold their shares, Plaintiffs merely state that having reasonably relied on the statements or omissions, they "held and were otherwise induced into holding and not selling the Qwest securities." (Id. ¶ 575.) They do not identify whether they would have sold their stock had Defendants not exposed them to certain statements or omissions. They do not identify how many shares they would have sold

or when Plaintiffs would have sold such shares. With such pleadings, Plaintiffs' holding claim is unsustainable.

With respect to the few statements that occurred prior to Plaintiffs' July 20, 1999 purchase of shares and may have induced Plaintiffs to execute this purchase, Plaintiffs are similarly vague in identifying which statements induced them to purchase the shares. Plaintiffs state:

> On or about July 20, 1999, Plaintiffs, reasonably relying on the false information, statements, representations, misrepresentations, misleading statements and information, and omissions created and disseminated by the Defendants in the manner and method described in this complaint, purchased, via their E-TRADE discount brokerage account, 100,000 shares at a total cost of $3,310,387.00, to their detriment.

(Id., ¶ 574.) Other allegations concerning Plaintiffs' reliance are similarly vague. (See, e.g., id. ¶ 773.) These general statements of reliance are contained within 344 pages identifying various statements by various Defendants, only a handful of which have anything to do with Qwest's financial state prior to July 20, 1999. (See, e.g., id. ¶¶ 83, 573.a, 580, 597.b–597.e, 598.a–598.b, 598.e–598.f, 598.h.) For all of the pre-July 20, 1999 alleged statements or omissions, Plaintiffs offer inadequate details concerning what Defendants said or omitted, which Defendants were responsible for the alleged statements or omissions, and/or how the statements or omissions influenced Plaintiffs' decision to purchase stock.

For the foregoing reasons, Plaintiffs' fraud claims are inadequately pled. The Court shall dismiss Counts 13, 19, and 24 of the Second Amended Complaint.

e. Aiding and Abetting Fraud Claims (Counts 21 and 22)

In addition to claiming fraud, Plaintiffs claim that all Defendants are liable for a separate tort of aiding and abetting fraud. It is questionable whether such a claim is valid under Florida law. Florida has adopted, with some statutory modification, principles of joint and several liability. See Acadia Partners, L.P. v. Tompkins, 759 So. 2d 732, 736–37 (Fla. Dist. Ct. App. 2000); see also Fla. Stat. § 768.81 (eliminating joint and several liability for negligence actions). Accordingly, an individual is jointly liable with another if the individual "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." Acadia Partners, 759 So. 2d at 736 (quoting Restatement (Second) of Torts § 876(b) (1979)). Hence, if Plaintiffs are claiming that certain Defendants assisted other Defendants in committing fraud, then the assisting Defendants would be jointly liable. Plaintiffs provide no authority under Florida law that the assisting Defendants would be liable under a separate theory of aiding and abetting.

In any case, even if such a separate tort exists, it would undoubtedly require liability on the part of the primary tortfeasor. See, e.g., In re Munford, Inc., 98 F.3d 604, 612–13 (11th Cir. 1996) (discussing proposed aiding and abetting breach of fiduciary duty claim). As Plaintiffs have failed to plead fraud properly, Plaintiffs' claims of aiding and abetting fraud must be dismissed. Accordingly, the Court shall dismiss Counts 21 and 22 of the Second Amended Complaint.

f. Florida Deceptive and Unfair Trade Practices Act (Count 14)

Several Defendants have argued that Plaintiffs' claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201–501.213,

is invalid as the Act does not apply to securities fraud claims. Although there are no state court decisions on point, two federal courts have predicted that the Florida Supreme Court would hold that FDUTPA does not apply to securities laws. See Rogers v. Cisco Sys., Inc., 268 F. Supp. 2d 1305, 1315 (N.D. Fla. 2003); Crowell v. Morgan, Stanley, Dean Witter Servs. Co., 87 F. Supp. 2d 1287, 1294–95 (S.D. Fla. 2000). These courts noted that FDUTPA instructs courts to confer "due consideration and great weight . . . to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1)" in construing whether certain practices constitute unfair methods of competition, unconscionable acts or practices, or unfair or deceptive acts or practices. Fla. Stat. § 501.204(2). The Federal Trade Commission Act "has been consistently 'interpreted to preclude coverage of securities claims' in the overwhelming majority of state and federal courts addressing this issue." Crowell, 87 F. Supp. 2d at 1294 (quoting Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1101 (5th Cir. 1988)). Therefore, both courts concluded that the Florida Supreme Court would not apply FDUTPA to securities claims. Indeed, courts have reached the same conclusion with respect to similar state statutes. See Rogers, 268 F. Supp. 2d at 1315 n.20 (collecting cases).

The Court agrees with the above reasoning and concludes that FDUTPA does not apply to securities claims. As Plaintiffs' FDUTPA claim relates solely to their purchasing and holding securities, (see Second Amended Compl., ¶ 777), they have failed to state a claim upon which relief can be granted. The Court shall dismiss Count 14 of Plaintiffs' Second Amended Complaint.

g. State Securities Claims (Counts 15 and 17)

Several Defendants have argued that Plaintiffs' state securities claims are time-barred. With respect to the Florida Securities and Investor Protection Act, Fla. Stat. §§ 517.011–517.32, the statute of limitations is two years, "with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence." Fla. Stat. § 95.11(4)(e). With respect to the Colorado Securities Act, Colo. Rev. Stat. § 11-51-501, the statute of limitations is three years. Colo. Rev. Stat. § 13-80-101(1)(c); In re Qwest Communications Int'l, Inc. Sec. Litig., 387 F. Supp. 2d 1130, 1150–51 (D. Colo. 2005). As with Florida law, the statute of limitations for fraud in Colorado is "tolled until the aggrieved party learns of the fraud or should have discovered it by the exercise of reasonable diligence." Hackbart v. Holmes, 675 F.2d 1114, 1120 (10th Cir. 1982), abrogated on other grounds by Anixter v. Home-Stake Prod. Co., 939 F.2d 1420, 1441 (10th Cir. 1991).

As noted above, Plaintiffs concede that they were on inquiry notice of Qwest's alleged fraudulent activity as of March 2002, though the Court believes that February 9, 2002, may be a more reasonable date given the court's thorough analysis in In re Qwest Communications International, 387 F. Supp. 2d at 1141–42. But even if the Court accepts Plaintiffs' date of March 2002, Plaintiffs would have been required to file suit on or before March 2004 for their Florida securities claims and March 2005 for their Colorado securities claims. They filed the instant action in April 2005. Accordingly, all state securities law claims are time-barred. The Court shall dismiss Count 15 and Count 17.

h. Aiding and Abetting Violations of State Securities Laws (Counts 16 and 18)

Under the Florida Securities and Investor Protection Act, buyer/seller privity is required in order to maintain an action for fraud in the purchase or sale of securities. Fla. Stat. § 517.211(2); Rousseff v. E.F. Hutton Co., 867 F.2d 1281, 1285 (11th Cir. 1989). The Act recognizes liability for those who aid in a violation only for directors, officers, partners, or agents of the buyer or seller. Fla. Stat. § 517.211(2). Accordingly, Plaintiffs' claims for aiding and abetting violations of Florida securities law fail with respect to Arthur Andersen LLP, Bank of America, Citigroup Global Market Holdings Inc. f/k/a Salomon Smith Barney Holdings, Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney, Inc., Citigroup Inc., Credit Suisse First Boston Corp., Jack Grubman, John Hoffman, Sandy Weill, U.S. Bancorp Piper Jaffray, and Robin Wright. With respect to the remaining Defendants, it is not clear whether Defendants would be subject to joint and several liability with the primary tortfeasor or would be subject to liability pursuant to a separate tort for aiding and abetting the primary tortfeasor. In either event, Plaintiffs' claims are subject to the same two-year statute of limitations noted above. See Fla. Stat. § 95.11(e). Accordingly, Plaintiffs' claims are time-barred. The Court shall dismiss Count 28 of Plaintiffs' Second Amended Complaint.

The Colorado Securities Act provides for liability for "[a]ny person who knows that another person liable [for fraud in relation to the sale of securities] is engaged in conduct which constitutes a violation of section 11-51-501 and who gives substantial assistance to such conduct is jointly and severally liable to the same extent as such other person." Colo. Rev. Stat. § 11-51-604(5)(c). Again, it is not clear whether a defendant who allegedly offered substantial assistance in a fraudulent securities

transaction is subject to liability for a separate tort of aiding and abetting or is simply subject to joint and several liability with the primary tortfeasor. In either case, an alleged aider and abettor would still benefit from the three-year statute of limitations. As Plaintiffs' Colorado Securities Act claims are time-barred, their aiding and abetting claims are time-barred, as well. Accordingly, the Court shall dismiss Count 26 of the Second Amended Complaint.

i. Civil Conspiracy Claim (Count 20)

Plaintiffs allege that Defendants are liable for civil conspiracy. "Civil conspiracy under Florida law requires a showing that two or more persons have taken concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means." Kee v. Nat'l Reserve Life Ins. Co., 918 F.2d 1538, 1541 (11th Cir. 1990). "The basis for the conspiracy must be 'an independent wrong or tort which would constitute a cause of action if the wrong were done by one person.'" Id. (quoting Am. Diversified Ins. Servs. v. Union Fid. Life Ins. Co., 439 So. 2d 904, 906 (Fla. Dist. Ct. App. 1983)).

Here, because the Court has ruled that all of Plaintiffs' claims must be dismissed, Plaintiffs' have failed to allege an independent wrong or tort. Accordingly, Plaintiffs' claim for civil conspiracy fails. The Court shall dismiss Count 20 of the Second Amended Complaint.

j. Respondeat Superior Claim (Count 25)

Finally, Plaintiffs' allege that Defendants Arthur Andersen and Citigroup Global Markets Inc. are liable under the theory of respondeat superior. As the Court has dismissed all underlying claims of liability, Plaintiffs cannot assert a theory of joint

liability under respondeat superior. Accordingly, the Court shall dismiss Count 25 of the Second Amended Complaint.

V. TO BE OR NOT TO BE WITH PREJUDICE

In responding to several motions to dismiss, Plaintiffs request that the Court grant them leave to amend their pleadings should the Court find that the pleadings fail to state a claim upon which relief may be granted. Defendants reply that the Court should dismiss this action with prejudice.

The Court's ruling above rests on three grounds—statute of limitations, personal jurisdiction, and failure to state a claim upon which relief can be granted. For obvious reasons, dismissals based on statutes of limitations are with prejudice. See Williams v. Coughlan, 244 F.2d 6, 8 (9th Cir. 1957). Once a statute of limitations has run, a plaintiff typically cannot correct defects in the pleadings to bring an action. Accordingly, Counts 7–10, 11 (as it relates to Plaintiffs' COCCA claims), 15, 17, 23, 26, and 28 shall be dismissed with prejudice.

With respect to dismissal based on personal jurisdiction, such dismissal "acts as res judicata for the jurisdictional issue." Posner v. Essex Ins. Co., 178 F.3d 1209, 1221 (11th Cir. 1999). Such dismissal must be without prejudice, however, as the plaintiff may pursue further litigation of the claims on the merits in the appropriate jurisdiction. Id.

Turning to dismissal based on a failure to state a claim for which relief can be granted, such dismissal may be with prejudice, depending on the circumstances. Normally, given the liberal pleading standards of the Federal Rules of Civil Procedure, courts must give litigants "'every opportunity . . . to state a claim upon which relief [can]

be granted.'" Hitt v. City of Pasedena, 561 F.2d 606, 608 (5th Cir. 1977) (quoting Byrd v. Bates, 220 F.2d 480, 482 (5th Cir. 1955)) (second alteration in original).[10] Accordingly, if there is any hope that a plaintiff could state a claim with amended pleadings, a court should grant the plaintiff a right to so amend the complaint. Ultimately, however, whether such dismissal is with or without prejudice depends on a "balance of hardships." Indeed, courts have been reluctant to extend an opportunity to amend pleadings to plaintiffs who have had a fair opportunity to present proper pleadings. See, e.g., Ageloff v. Kiley, 318 F. Supp. 2d 1157, 1160 (S.D. Fla. 2004) (dismissing with prejudice where plaintiff had had opportunity to file two complaints and to appear before court and had still failed to plead proper civil RICO claim).

Here, the Court finds that dismissal for failure to state claims upon which relief can be granted must be with prejudice. The Court notes that Plaintiffs have amended their Complaint twice and have had ample opportunity to provide appropriate allegations. Instead, they appear to have merely copied pleadings from other litigation with little thought as to how the pleadings would apply to their purchase of Qwest securities. (See Citigroup Defs.' Mot. to Dismiss Pls.' Second Amended Compl. at 1–3 (Feb. 13, 2006) [DE 347] (explaining that Plaintiffs obtained some 500 paragraphs of the Second Amended Complaint verbatim from action in federal court in Colorado)). Nevertheless, their Second Amended Complaint falls woefully short of pleading fraud

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[10] The decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

and other predicate RICO acts with requisite particularity or specificity with respect to each Defendant, despite its length.

Moreover, Plaintiffs' complaints appear to be "shotgun" pleadings, where litigants include numerous vague, repetitive, and superfluous allegations against multiple parties in an apparent hope to coerce—or to extort—opposing parties into settlements. See, e.g., Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001). The Eleventh Circuit has condemned such practice on numerous occasions. See Byrne v. Nezhat, 261 F.3d 1075, 1129 (11th Cir. 2001) (collecting cases).

> Cases framed by shotgun pleadings consume an inordinate amount of a court's time. As a result, justice is delayed, if not denied, for litigants who are standing in the queue waiting to be heard. Their impression of the court's ability to take care of its business can hardly be favorable. As the public becomes aware of the harm suffered by the victims of shotgun pleading, it, too, cannot help but lose respect for the system. Moreover, the consequence of a trial court's inability, or apparent unwillingness, to halt the use of shotgun pleadings may prompt parties to turn to non-judicial forums to resolve their disputes.

Id. at 1130–31. It would be the height of injustice to force Defendants through another round in a case where Plaintiffs' pleadings are abusive and improper, especially after Plaintiffs had ample opportunity to state their claims properly. Dismissal with prejudice is therefore warranted in this case as to all remaining claims.

Finally, a rote application of Eleventh Circuit law may require that those Defendants dismissed in Section III, supra, would be dismissed without prejudice. The Court believes that such dismissal would be erroneous, though. Plaintiffs have already forced these Defendants into a cause occurring far away from their abode, requiring them to litigate personal jurisdiction where Plaintiffs were unable to demonstrate any

connection between individual Defendants and Florida. In balancing hardships, it would be unjust to allow Plaintiffs to continue to pursue these Defendants again in other jurisdictions. But more importantly, the Court dismissed Plaintiffs for personal jurisdiction as jurisdictional issues must precede issues on the merits. See Posner v. Essex Ins. Co., 178 F.3d 1209, 1214 n.6 (11th Cir. 1999). But even if the Court had personal jurisdiction over Defendants dismissed in Section III, supra, Plaintiffs' claims are fatally deficient as to all of them for the reasons highlighted in Section IV. Accordingly, the Court's dismissal as to those Defendants in Section III shall be with prejudice, as well.

VI. SANCTIONS

Several Defendants have requested attorneys' fees pursuant to Florida Statutes § 772.11. Moreover, Defendant Kozlowski has filed a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Turning first to Kozlowski's Motion, Kozlowski argues that Plaintiffs' claim that the Court has personal jurisdiction over Kozlowski was objectively frivolous and Plaintiffs were aware that the claim was objectively frivolous. Accordingly, Kozlowski argues that the Court should impose Rule 11 sanctions because Plaintiffs failed to reasonably inquire into the claim. Specifically, Kozlowski requests that the Court order Plaintiffs to pay a monetary penalty to the Court.

Rule 11 imposes upon litigants—both attorneys and unrepresented parties—the obligation to make certain certifications with respect to every filing in an action. Litigants must certify, inter alia, that to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the filing contains

claims, defenses, or other legal contentions that "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b).

Courts must conduct a two-step inquiry in determining whether Rule 11 sanctions are appropriate. First, courts must determine "'whether the party's claims are objectively frivolous.'" Byrne v. Nezhat, 261 F.3d 1075, 1105 (11th Cir. 2001) (quoting Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998)). Second, courts must determine "'whether the person who signed the pleadings should have been aware that they were frivolous.'" Id. (quoting Baker, 158 F.3d at 524).

In support of their claim that Kozlowski was subject to personal jurisdiction in Florida, Plaintiffs averred that Kozlowski "conduction [sic] or caused to be conducted business in the Southern District of Florida and elsewhere." (Second Amended Compl. at 17, ¶ 46 (Dec. 28, 2005) [DE 278].) Plaintiffs made the same allegation in their initial complaint. (See Compl. at 16, ¶ 46 (Apr. 21, 2005) [DE 1].) Kozlowski argues that because of the lack of legal or factual support, Plaintiffs' claim that Kozlowski was subject to personal jurisdiction in Florida because of business conduct was frivolous. Additionally, Kozlowski argues that Plaintiffs had no reason to believe that he had sufficient contacts with the state of Florida through conducting unspecified business when Plaintiffs filed their Second Amended Complaint. Plaintiffs were on notice that Kozlowski had insufficient contacts with Florida because of Kozlowski's motion to

dismiss Plaintiffs' initial complaint. (See Def. James J. Kozlowski's Mot. to Dismiss (Aug. 1, 2005) [DE 131].) Therefore, Kozlowski argues, Plaintiffs should have been aware that their personal jurisdiction claim was objectively frivolous.

In response, Plaintiffs argue that they had reason to believe that Kozlowski was subject to personal jurisdiction in Florida because of § 48.193(1)(b) of the Florida long-arm statute. As explained above in Section III, § 48.193(1)(b) provides for personal jurisdiction under the long-arm statute for non-residents who commit a substantial aspect of a tort in Florida. Plaintiffs failed to specify what tortious activities Kozlowski undertook in Florida other than his alleged involvement in the overall RICO enterprise. Accordingly, the Court found that Plaintiffs failed to demonstrate personal jurisdiction under § 48.193(1)(b). See Section III, supra. Nevertheless, Plaintiffs may have been reasonable in believing that Kozlowski was involved with the alleged RICO enterprise given Kozlowski's position as director and senior director of Qwest. But Plaintiffs provide no basis for their belief that Kozlowski had sufficient contacts with Florida such that he could be subject to the Court's personal jurisdiction under the Due Process Clause. Plaintiffs' only arguments concerning contacts with Florida relate to Qwest's activities in Florida. Such activities are patently insufficient to demonstrate contacts by Kozlowski individually.

Accordingly, Plaintiffs' claim that Kozlowski was subject to personal jurisdiction in Florida was frivolous. Moreover, Plaintiffs' were or reasonably should have been aware that their claim was frivolous given Kozlowski's earlier motion to dismiss. The Court shall grant Kozlowski's Motion for Sanctions and impose a fine upon Plaintiffs to be paid into the Court.

Turning to several Defendants' request for attorneys' fees pursuant to § 772.11, this provision of the civil theft statute states that the "defendant is entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support." Florida courts have held that the no "substantial fact or legal support" standard is lighter than the standard under Florida Statutes § 57.105, which provides a standard similar to that in Rule 11 of the Federal Rules of Civil Procedures. See, e.g., Marcus v. Miller, 663 So. 2d 1340, 1343 (Fla. Dist. Ct. App. 1995); Ciaramello v. D'Ambra, 613 So. 2d 1324, 1325 (Fla. Dist. Ct. App. 1991). Accordingly, the Court need not find a complete absence of legal and factual support for a party's civil theft claim. Ciaramello, 613 So. 2d at 1325. Rather, if a plaintiff brings a civil theft claim based on tenuous suppositions without any supportive evidence, an attorneys' fees award may be warranted. See, e.g., Marcus, 663 So. 2d at 1343.

As explained above, a successful civil theft claim requires that a defendant obtain or use the plaintiff's property. See Section IV.c, supra. Here, Plaintiffs provide no evidence that any Defendant obtained or used their property. Accordingly, Plaintiffs' civil theft claim is wholly lacking in factual support with respect to at least one element. Attorneys' fees are therefore warranted under § 772.11.

VII. RESPONSE TO COURT'S ORDER TO SHOW CAUSE

On May 10, 2006, the Court issued an Order to Show Cause why certain Defendants should not be dismissed for either lack of service or for their lack of inclusion as named Defendants in Plaintiffs' amended complaints. These Defendants include Jackie Armstrong, Michael Carpenter, Andrew Hammerling, Sherlyn McMahon,

Susan Chase, Cais Internet, unknown officers and directors of Cais Internet, Calpoint LLC, and unknown officers and directors of Calpoint LLC. Plaintiffs responded by agreeing that these Defendants should be dismissed. Accordingly, it shall be so ordered.

VIII. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Arthur Andersen LLP's Motion to Dismiss Plaintiffs' Second Amended Civil RICO Complaint [DE 335] is **GRANTED**.
2. Defendant Mark Iwan's Motion to Dismiss Plaintiffs' Second Amended Civil RICO Complaint [DE 336] is **GRANTED**.
3. Defendant James Kozlowski's Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction [DE 340] is **GRANTED**.
4. The Supplemental Motion to Dismiss Regarding Counts Five and Six of the Second Amended Complaint [DE 343] by Defendants Grant Graham, Thomas Hall, and Robin Szeliga is **GRANTED**.
5. The Motion to Dismiss Plaintiffs' Second Amended Complaint [DE 347] by Citigroup Inc., Citigroup Global Markets Holdings Inc. f/k/a Salomon Smith Barney Holdings Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., Sandy Weill, and Jack Grubman is **GRANTED**.
6. The Request for Oral Argument or Hearing by Citigroup Inc., Citigroup Global Markets Holdings Inc. f/k/a Salomon Smith Barney Holdings Inc.,

Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., Sandy Weill, and Jack Grubman is **DENIED**.

7. The Consolidated Motion to Dismiss [DE 348] by Defendants Linda Alvarado, Phillip Anschutz, the Anschutz Company, Arthur Andersen LLP, Joel Arnold, Craig Barrett, Hank Brown, Gregory Casey, Credit Suisse Securities (USA) LLC, Augustine Cruciotti, Thomas Donohue, William Eveleth, Michael Felicissimo, Grant Graham, Thomas Hall, Cannon Harvey, Peter Hellman, Roger Hoaglund, Douglas Hutchins, Mark Iwan, Steven Jacobsen, Vinod Khosla, James Kozlowski, Afshin Mohebbi, Joseph Nacchio, Frank Noyes, Loren Pfau, Frank Popoff, Craig Slater, James Smith, W. Thomas Stephens, Kimberly Stout Smiley, Robin Szeliga, Drake Tempest, Bryan Treadway, John Walker, Marc Weisberg, Richard Weston, Louis Wilks, and Robert Woodruff is **GRANTED**. Defendants shall file and serve a motion for attorneys' fees on or before July 5, 2006.

8. Defendant Credit Suisse Securities (USA) LLC's Supplemental Motion to Dismiss [DE 354] is **GRANTED**.

9. Defendant Jennifer Tanner's Motion to Dismiss [DE 363] is **GRANTED**.

10. Defendant Qwest Communications International Inc.'s Motion to Dismiss the Second Amended Complaint [DE 369-2] is **GRANTED**. Defendant Qwest Communication International Inc.'s Motion to Strike Portions of the Second Amended Complaint [DE 369-1] is **DENIED as moot**.

11. Defendant Bank of America, N.A.'s Motion to Dismiss the Second Amended Complaint [DE 373] is **GRANTED**.

12. Defendant James Kozlowski's Rule 11 Motion for Sanctions Dismissing Plaintiffs' Second Amended Complaint Against Mr. Kozlowski and Ordering Plaintiffs to Pay Monetary Penalty into Court [DE 388] is **GRANTED**. Plaintiffs are hereby ordered to remit a $500 monetary penalty to the Court. Plaintiffs shall file and serve notice of their payment of this penalty on or before July 5, 2006.

13. The Consolidated Request for Oral Argument by Defendants Linda Alvarado, Phillip Anschutz, the Anschutz Company, Arthur Andersen LLP, Joel Arnold, Craig Barrett, Hank Brown, Gregory Casey, Credit Suisse Securities (USA) LLC, Augustine Cruciotti, Thomas Donohue, William Eveleth, Michael Felicissimo, Grant Graham, Thomas Hall, Cannon Harvey, Peter Hellman, Roger Hoaglund, Douglas Hutchins, Mark Iwan, Steven Jacobsen, Vinod Khosla, James Kozlowski, Afshin Mohebbi, Joseph Nacchio, Frank Noyes, Loren Pfau, Frank Popoff, Craig Slater, James Smith, W. Thomas Stephens, Kimberly Stout Smiley, Robin Szeliga, Drake Tempest, Bryan Treadway, John Walker, Marc Weisberg, Richard Weston, Louis Wilks, and Robert Woodruff is **DENIED**.

14. Defendant Bank of America N.A.'s Request for Oral Argument is **DENIED**.

15. Defendant Mark Schumacher's Motion to Dismiss [DE 427] is **GRANTED**.

16. Defendants Jackie Armstrong, Michael Carpenter, Andrew Hammerling, Sherlyn McMahon, Susan Chase, Cais Internet, unknown officers and directors of Cais Internet, Calpoint LLC, and unknown officers and directors of Calpoint LLC are hereby **DISMISSED without prejudice**.

17. Defendants Linda Alvarado, Phillip Anschutz, the Anschutz Company, Arthur Andersen LLP, Joel Arnold, Bank of America, Craig Barrett, Hank Brown, Gregory Casey, Citigroup, Inc., Citigroup Global Markets Holdings Inc. f/k/a Salomon Smith Barney Holdings Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., Credit Suisse Securities (USA) LLC, Augustine Cruciotti, Thomas Donohue, William Eveleth, Michael Felicissimo, Grant Graham, Jack Grubman, Steven L. Haggerty, Jordan L. Haines, Thomas Hall, Cannon Harvey, Peter Hellman, Roger Hoaglund, John Hoffman, Douglas Hutchins, Mark Iwan, Steven Jacobsen, Vinod Khosla, James Kozlowski, Afshin Mohebbi, Joseph Nacchio, Loren Pfau, Frank Popoff, Qwest Communications International, Inc., Mark Schumacher, Craig Slater, Kimberly Stout Smiley, James Smith, W. Thomas Stephens, Robin Szeliga, Jennifer Tanner, Drake Tempest, Bryan Treadway, John Walker, Sandy Weill, Marc Weisberg, Richard Weston, Louis Wilks, Robert Woodruff, and Robin Wright are hereby **DISMISSED with prejudice**.

18. All pending motions are **DENIED as moot**. The Clerk of Court is hereby instructed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of June 2006.

JAMES I. COHN
UNITED STATES DISTRICT JUDGE

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