

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL McHALE,	:	CIVIL ACTION
MARCIA McHALE,	:	NO. 01- 4111
BMM, INC.,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
NuENERGY GROUP,	:	
PAUL HYDOK,	:	
LEONARD CHYLACK,	:	
JOHN TOBELMAN,	:	
Defendants	:	

MEMORANDUM

Giles, C.J.

February 27, 2002

Plaintiffs Michael McHale, Marcia McHale, and BMM, Inc., filed a complaint in the Court of Common Pleas of Chester County seeking damages for violation of the Racketeer Influenced & Corrupt Organizational Act (RICO) 18 U.S.C. § 1962(c) (Count I), and for state law fraud (Count II), negligent misrepresentation (Count III), breach of contract (Count IV), breach of the covenant of good faith and fair dealing (Count V), breach of fiduciary duty (Count VI), and unjust enrichment (Count VII). Defendants NuEnergy Group, Paul Hydok, Leonard Chylack, and John Tobelman filed a Notice of Removal, based upon federal question jurisdiction and diversity jurisdiction. They have moved to dismiss certain of plaintiffs' claims in their entirety and to dismiss other claims in regard to particular defendants based on Rules 12(b)(6) and 12(e) of the Federal Rules of Civil Procedure. For the reasons that follow, the motion is granted in part and denied in part.

I. Facts

The facts in the light most favorable to plaintiffs are as follows:

Defendant NuEnergy is in the business of marketing and selling natural gas and electric energy produced by energy suppliers to end users. (Compl. ¶ 7.) NuEnergy is owned and operated by three persons: (1) Paul Hydok, the President of NuEnergy; (2) Len Chylack, an investor in NuEnergy who participates in the management of the company; and (3) John Tobelman, a Commodities Manager responsible for maintaining the reconciliations for NuEnergy sales representatives. (Compl. ¶¶ 8-10.) In December 1998, NuEnergy entered into an Independent Sales Representative Agreement with Marcia McHale for plaintiffs to act as NuEnergy's "non-exclusive independent sales representative" for the sale and marketing of gas and electricity ("NuEnergy Agreement"). (Id. ¶ 4. Ex. A.) In January of 2001, plaintiffs established BMM, Inc., a New York Corporation that allegedly became the assignee of the NuEnergy Agreement. (Id. ¶ 4.) The NuEnergy Agreement sets forth the amount of commission to be paid by NuEnergy for the sale of natural gas and electricity. (Compl. ¶¶ 21-22.)

In practice, under the NuEnergy Agreement only plaintiff Michael McHale was responsible for executing hundreds of contracts with customers for electricity on behalf of NuEnergy and energy suppliers. (Id. ¶ 5.) It was NuEnergy's responsibility to bill and collect commissions paid by energy suppliers and to distribute the agent's portion of such commissions. (Id. ¶ 15.)

In March 2000, NuEnergy entered into an agreement to sell electricity for Keyspan and as an independent sales representative of NuEnergy, McHale sold electricity that was supplied by Keyspan to various customers in New York. (Id. ¶ 23.) NuEnergy provided Keyspan with reconciliations which detailed the accounts held by NuEnergy, including Mr. McHale's accounts, and the commissions owed by Keyspan to NuEnergy on these accounts. ("Keyspan

Reconciliations”). (Id. ¶ 30.) Plaintiffs have obtained both a computer disc copy and a hard copy of a Keyspan Reconciliation which reflects the actual commissions that Keyspan owed to NuEnergy in connection with Mr. McHale’s accounts as of December 2000. (Id. ¶ 31.)

Plaintiffs allege that defendants maintained two sets of reconciliation statements with respect to the calculations of NuEnergy commissions. (Compl. ¶ 17.) One set of reconciliations, which reflected the actual commissions owed by energy suppliers in connection with Mr. McHale’s accounts, was prepared by defendants and presented to energy suppliers. A second set of false reconciliations, showing lower rates of commissions than those charged to the energy suppliers, was prepared by defendants allegedly for the purpose of defrauding Mr. McHale of the actual commissions earned (“McHale Reconciliations”). (Id.) Mr. McHale received six separate statements that cover the period from May 2000 to April 2001 and he received commission payments from NuEnergy that were based upon these McHale Reconciliations. (Id. ¶26.)

Numerous oral representations were made to Mr. McHale by Messrs. Hydok, Chylack, and Tobelman that the McHale Reconciliations were accurate accountings of the commissions owed under the NuEnergy Agreement in response to Mr. McHale’s inquiries. (Compl. ¶ 27.) In particular, Mr. Hydok told Mr. McHale, “We’re not screwing you; everything is correct.” (Id. ¶ 28.)

Plaintiffs allege that according to the Keyspan Reconciliation defendants were collecting significantly higher commissions from Keyspan on Mr. McHale’s accounts than the amounts defendants disclosed to plaintiffs. (Id. ¶ 32.) The Keyspan Reconciliation was created by Mr. Tobelman allegedly at the direction of Messrs. Hydok and Chylack on behalf of NuEnergy. (Id. ¶

33.)

In addition, plaintiff alleges that misrepresentations were made by the defendants with respect to commissions that defendants owed to Mr. McHale with regard to the following accounts: (a) PSE&G in New Jersey (Compl. ¶ 42); (b) Cushman & Wakefield in New York (Compl. ¶¶ 46-50); and (c) Columbia Presbyterian in New York (Compl. ¶¶ 53-56.).

Plaintiffs filed their complaint in the Court of Common Pleas of Chester County on July 23, 2001. Defendants filed their notice of removal on August 13, 2001, based upon federal question jurisdiction and diversity jurisdiction. Defendants filed their motion to dismiss on August 20, 2001.

II. Discussion

Legal Standard for 12(b)(6) Motion to Dismiss

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), this court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir.1990). The court will only dismiss the complaint if " 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, (1989).

Legal Standard for 9(b) of the Federal Rules of Civil Procedure

Rule 9(b) of the Federal Rules of Civil Procedure requires that an allegation of fraud be pled with specificity. "In all averments of fraud or mistake, the circumstances constituting the

fraud or mistake shall be stated with particularity.” FED. R. CIV. P. 9(b). The third circuit has explained that Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). Allegations of "date, place, or time" fulfill these functions, but nothing in the rule requires them. A plaintiff is free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud. Id. Further, courts should be "sensitive" to the fact that application of the Rule 9(b) prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud." They should also respect the "general simplicity and flexibility" of the Federal Rules of Civil Procedure. Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992).

Count I: The RICO Claim as to all Defendants

When bringing a civil RICO cause of action, 18 U.S.C. § 1961 et seq., a plaintiff must plead and prove the following elements: 1) the conducting of 2) an enterprise affecting interstate commerce 3) through a pattern of 4) racketeering activity. See Sedima v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). The definitions section of the RICO statute states in relevant part:

(1) "Racketeering activity" means...(B) any act which is indictable under any of the following provisions of title 18, United States Code:....Section 1341 (relating to mail fraud), ... Section 1343 (relating to wire fraud) ...; (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property; (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; (5) "pattern of racketeering activity"

requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding the period of imprisonment) after the commission of a prior act of racketeering.
18 U.S.C. § 1961

18 U.S.C. § 1962(c) states that it is unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" Not only does a plaintiff have to establish that a defendant meets all of the requirements of § 1962(c), but the plaintiff must properly allege that a defendant committed the elements of the predicate acts that form the basis for the "pattern of racketeering activity." See Spitzer v. Adelhak, No. CIV.A. 98-6476, 1999 WL 1204352, at *2 (E.D. Pa. 1999).

Defendants argue that plaintiffs' complaint fails to state a RICO claim in that (1) it fails to allege the required predicate acts with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure (Mem. in Supp. of Mot. to Dismiss at 4); (2) it fails to establish the required continuity of racketeering activity to sustain a claim for RICO (Id. at 9)¹; and (3) NuEnergy cannot be both an "enterprise" and liable "person" under RICO (Id. at 6.).

The federal mail and wire fraud statutes prohibit the use of mails or interstate wire for the purpose of carrying out any scheme or artifice to defraud. 18 U.S.C. §§ 1341 & 1343. Here, it is alleged that defendants used interstate mail and wires in furtherance of their scheme to defraud. Plaintiffs allege that false reconciliations and checks were sent from NuEnergy in Pennsylvania

¹ Defendants do not dispute that the relatedness prong has been met in the present case.

to plaintiffs' business in New York through the mail. (Compl. ¶¶ 62-65.) Similarly, plaintiffs allege that defendants misrepresented the commissions that were due to plaintiffs through multiple interstate faxes and e-mails. (Compl. ¶¶ 68-71.)

The court finds that the mail fraud paragraphs (Compl. ¶¶ 61-66) and wire fraud paragraphs (Compl. ¶¶ 67-75) state with sufficient detail the date, place, and conduct in which mail and wire communications were made by defendants in furtherance of an alleged scheme to defraud plaintiffs to satisfy the pleading requirement of Rule 9(b). Plaintiffs make numerous specific allegations concerning defendants' fraudulent conduct, and then describe specific examples of how defendants committed such conduct using the mails and wires. See Perlberger v. Caplan & Luber, LPP, 152 F. Supp.2d 650, 654-55 (E.D. Pa. 2001).

The fact that plaintiffs have not pled which individual defendants mailed, faxed, or e-mailed particular checks, reconciliations, faxes, and e-mails at issue in this case is not fatal to the mail fraud, wire fraud, and subsequent RICO claim. In order to plead mail or wire fraud as a predicate act, as to which each defendant must have participated two or more times, plaintiffs must allege facts giving rise to a strong inference of scienter on the part of each defendant. Spitzer, 1999 WL 1204352, at *6. Plaintiffs can establish scienter by pleading facts showing conscious or reckless behavior to defraud. Knowledge concerning a company's key businesses or transactions may be attributable to the company, its officers and directors. Id. (citing In re Aetna Inc. Sec. Litigation, 34 F. Supp.2d 935, 953 (E.D. Pa. 1999)). As discussed above, each of the defendants was instrumental in the everyday running of the company and made assurances that the commissions paid to Mr. McHale were accurate. Therefore, at this point in the proceedings, each defendant can have attributed to him knowledge of the fraud alleged by plaintiff for

purposes of the predicate acts of mail and wire fraud.

In H.J., Inc. v. Northwestern Bell Tel. Co., the Supreme Court analyzed the meaning of the term "pattern of racketeering activity," and found that "to prove a pattern of racketeering activity a plaintiff ... must show that the racketeering predicates ... are related, and that they amount to or pose a threat of continued criminal activity." H.J., 492 U.S. 229, 239 (1989). In H.J., the Supreme Court stated that Congress had a commonsense approach to RICO's pattern element in mind, "intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity." Id. at 237. "What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*." Id. at 241.

In explaining how a plaintiff can make this continuity showing, the Supreme Court described continuity as "both a closed and open-ended concept" referring either to a "closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995) (quoting H.J., 492 U.S. at 241). A party may establish "closed end continuity" by proving a series of related predicate acts extending over a substantial period of time. Id. at 1293. "Open ended continuity" may be demonstrated where it is shown that the predicate acts are a regular way of conducting defendant's ongoing legitimate business, or of conducting or participating in an ongoing and legitimate RICO "enterprise." Id. The ambit of RICO may encompass a "legitimate" businessman who regularly conducts his business through illegitimate means, that is, who repeatedly defrauds those with whom he deals and in the process commits predicate acts, which

may include using the postal service as a means of accomplishing his scheme. Tabas, 147 F.3d at 1292. The court does not reach the issue of “open-ended continuity” since it finds that plaintiffs have sufficiently pled “closed-ended continuity.”

Plaintiffs have alleged that defendants have participated in a scheme to defraud plaintiffs since 1998 and have continued until the filing of this complaint. (Compl. ¶ 60.) The first predicate act stated in the complaint occurred in November 1999 (Compl. ¶ 62) and the last predicate act detailed in the complaint occurred on June 8, 2001, a period of one year and eight months. (Compl. ¶ 65.) While the third circuit has found that “closed end continuity” cannot be satisfied by pleading predicate acts that occur over a period of less than twelve months, Tabas, 47 F.3d at 1293, third circuit case law supports the proposition that predicate acts over a nineteen month period of time may establish “closed ended continuity.” See Tabas, 47 F.3d at 1294 (quoting United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1993) (a nineteen month period of racketeering activity is sufficient to satisfy the continuity requirement); Swistock v. Jones, 884 F.2d 755, 759 (3d Cir. 1989 (a fourteen month period of conduct may be sufficient to establish a closed period of repeated conduct)). The court finds that plaintiffs have pled predicate acts that occurred over a substantial period of time and, in doing so, have sufficiently pled a pattern of racketeering activity.

NuEnergy is alleged to be the RICO “enterprise” through which the defendant “persons,” Messrs. Hydock, Chylack, and Tobelman, acted. (Compl. ¶¶ 59-60.) Because § 1962(c) requires a “person” acting through an “enterprise,” the third circuit has held that the person subject to liability cannot be the same entity as the enterprise. See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 262 (3d Cir.1995). “[W]hile corporate officers may be held liable

for conducting a pattern of racketeering activity through a corporate enterprise, the corporation itself cannot be held liable under § 1962(c) unless it engages in racketeering activity as a ‘person’ in another distinct enterprise.” Oglesby v. Saint Gobain Corp., 1997 WL 570925, at *4 (E.D. Pa. 1997). Plaintiffs have not pled another distinct enterprise. Therefore, the RICO claim is dismissed with prejudice as to NuEnergy. Plaintiffs’ RICO claim as to defendants Messrs. Hydok, Chylack, and Tobelman survives.

Count II: Fraud as to all Defendants

Defendants argue that the claims of fraud (and negligent misrepresentation) against Mr. Chylack and Mr. Tobelman should be dismissed for failure to provide any particularity regarding their individual involvement in the alleged fraudulent or negligent conduct; specifically, defendants argue that plaintiffs do not allege any specific statements by Mr. Chylack and Mr. Tobelman in furtherance of this alleged fraud. (Mem. in Supp. of Mot. to Dismiss at 11.) The complaint alleges that NuEnergy is owned and operated by three persons: (1) Paul Hydok, the President of NuEnergy; (2) Len Chylack, an investor in NuEnergy who participates in the management of the company; and (3) John Tobelman, a Commodities Manager responsible for maintaining the reconciliations for NuEnergy sales representatives. (Compl. ¶¶ 8-10.) **Therefore, it can be inferred that Mr. Chylack and Mr. Tobelman were in a small closely-held corporation where each defendant participated in the management of the daily operations of the corporation and that all of the defendants created, maintained, or directed the maintenance of NuEnergy records, including the direction and preparation of the Keyspan and McHale Reconciliations. (Pls.’ Resp. at 16.)** Plaintiffs argue that, “[g]iven the size and hierarchy at NuEnergy, the inference that Messrs. Hydok and Chylack were aware of and directed the creation

of separate fraudulent reconciliations is more than reasonable.” (Pls.’ Resp. at 8.)

As discussed supra, the third Circuit has explained that Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. Seville, 742 F.2d at 791.

Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud. Id. With these standards in mind, the court finds that plaintiffs have stated a common law fraud claim against all of the defendants with sufficient particularity to comply with Rule 9(b) of the Federal Rules of Civil Procedure.

The complaint also alleges that Mr. McHale repeatedly demanded from Messrs. Hydok, Chylack, and Tobelman, proper reconciliations of his commissions and in response to his inquiries, NuEnergy provided Mr. McHale with the McHale Reconciliations. (Compl. ¶ 25.) The complaint further alleges that Messrs. Hydok, Chylack, and Tobelman made numerous oral representations to Mr. McHale that the McHale Reconciliations were accurate accountings of the commissions owed to him. (Id. ¶ 27.) However, plaintiffs allege that according to the Keyspan Reconciliations, defendants were collecting significantly higher commissions from Keyspan on Mr. McHale’s accounts than the amounts defendants disclosed to plaintiffs. (Id. ¶ 32.)

Plaintiffs allege that the Keyspan Reconciliations were created by Mr. Tobelman at the direction of Messrs. Hydok and Chylack on behalf of NuEnergy. (Compl. at 33.) Plaintiffs base this assertion on the fact that the document profile information contained within the computer disc copy of a Keyspan Reconciliation, states that John Tobelman was the author of it. (Id.) As discussed supra, given the size and hierarchy of NuEnergy, it is reasonable to infer that

defendants Messrs. Chylack and Tobelman knew that the McHale Reconciliations were false because of their knowledge of the correct Keyspan Reconciliations. Plaintiffs have stated a claim for fraud as to all defendants.

Count III: Negligent Misrepresentation as to all Defendants

Plaintiffs correctly note that the pleading requirements of Rule 9(b) do not apply to claims of negligent misrepresentation. See Small v. Provident, No. CIV.A.98-2034, 1998 WL 848112, at *3 (E.D. Pa. Dec. 4, 1998) ("Because a claim of negligent misrepresentation is distinct from a claim of fraud under Pennsylvania law, Rule 9(b) does not apply to the former according to its terms."). Plaintiffs have complied with the liberal pleading requirement under Federal Rule of Civil Procedure 8(a) that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

The complaint alleges that throughout the course of plaintiffs' business relationship with defendants, Mr. McHale made good faith inquiries as to the true and accurate commissions due. (Compl. ¶ 85.) Defendants negligently, carelessly, or recklessly represented to Mr. McHale, through various means of communications including the McHale Reconciliations, that plaintiffs were entitled to commissions or margins that were significantly lower than those reflected in the Keyspan Reconciliation. (Id. ¶ 86.) Further, since December 1998, plaintiffs justifiably have relied on the representations and omissions by defendants. (Id. ¶ 87.) Plaintiffs have stated a claim for negligent misrepresentation as to all defendants.

Count IV: Breach of Contract as to Defendant NuEnergy

Plaintiffs allege NuEnergy has materially and substantially breached the express terms of the NuEnergy Agreement by failing to provide the plaintiffs with commission payments as set

forth in Section 6.1, Section 6.5, and in Exhibit C of the NuEnergy Agreement and by not paying commissions for the Cushman & Wakefield and Columbia Presbyterian accounts. (Compl. ¶¶ 91-93.) Defendants argue that there is no valid agreement between plaintiffs Michael McHale and BMM, Inc., and defendants since the Independent Sales Representative Agreement is not signed and the Agreement was not properly assigned to BMM, Inc., plaintiffs' company. (Mem. in Supp. of Mot. to Dismiss at 13-14.) Paragraph 13.2 of the Agreement states that "[t]his entire Agreement will inure to and bind the permitted successors and assigns of the Parties; provided (a) Agent may not assign this Agreement without the prior written consent of the Company..."

Defendants concede that for purposes of a 12(b)(6) motion the court must assume that the NuEnergy Agreement existed between Marcia McHale and NuEnergy, even though the copy attached to the complaint is not signed. Plaintiffs allege a fully executed copy exists in the defendants' files. Defendants dispute that the Agreement was properly assigned to BMM, Inc., and allege, therefore, that the only party who may claim under the written contract is Marcia McHale. (Mem. in Supp. of Mot. to Dismiss at 13-14.)

Plaintiffs respond that under Pennsylvania law, even when an assignment requires consent, "a party can waive its rights or otherwise ratify the assignment by words or conduct." Wyatt v. Mount Airy Cemetery, 224 A.2d 787, 791 (Pa. Super. Ct. 1966); National Data Payment Systems Inc v. Meridian Bank, No. Civ. A. 97-6724, 1998 WL 655544, at *4 (E.D.Pa. Sept. 22, 1998). Since January 2001, NuEnergy has made payments under the NuEnergy Agreement to BMM, Inc. for the work performed by Michael McHale. (Compl. ¶ 20.) Whether defendants have either waived the assignment-by-consent provisions in the NuEnergy Agreement or implied ratification of an assignment of the NuEnergy Agreement to BMM, Inc. is an issue of fact for the

jury. At this stage of the proceedings the court must assume, as pled, that there was a binding contract between BMM, Inc. and defendant NuEnergy. Accordingly, plaintiffs have stated a claim for breach of contract as to defendant NuEnergy.

Count V: Breach of the Covenant of Good Faith and Fair Dealing as to Defendant NuEnergy

Defendants argue that plaintiffs' claims for (1) breach of the covenant of good faith and fair dealing and (2) breach of fiduciary duties are precluded under the contractual language of the NuEnergy Agreement. (Mem. in Supp. of Mot. to Dismiss at 14.) Article 9.2 of the Agreement states as follows:

...nothing in this Agreement is intended or will be construed to constitute or imply a joint venture, partnership, association, or fiduciary duty, obligation or liability between the Company and the Agent. The Company is interested only in the results obtained under this Agreement. The manner and means of performing the work are subject to Agent's sole control. Agent cannot obligate the Company or commodity, energy products, or service supplier to any contract or service to any third party...

Plaintiffs' claim for breach of the covenant of good faith and fair dealing must be dismissed. This court finds that Pennsylvania law would not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim since the actions forming the basis of the breach of contract claim are essentially the same as the actions forming the basis of the bad faith claim. See King of Prussia Equipment Corp., v. Power Curbers, Inc., 158 F. Supp.2d 463, 466-67 (E.D. Pa. 2001) (citing Northview, Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78 (3rd Cir.2000)). Plaintiffs cite Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992) in support of the claim for breach of implied covenant of

good faith and fair dealing. However, the majority in Somers only stated that the general duty of good faith and fair dealing in the performance of a contract has been adopted in this Commonwealth, and that a party may bring a claim for breach of contract. A breach of such covenant is a breach of contract action, not an independent action for breach of a duty of good faith and fair dealing. Drysdale v. Woerth, No. CIV.A. 98-3090, 1998 WL 966020, at *3 (E.D. Pa. Nov. 18, 1998) (quoting Equal Employment Opportunity Commission v. Pathmark Inc., No. Civ.A.97-3994, 1998 WL 57520, at *6 (E.D.Pa. Feb. 12, 1998)). Therefore, the claim for breach of covenant of good faith and fair dealing is dismissed.

Count VI: Breach of Fiduciary Duties as to all Defendants

Plaintiffs argue that by virtue of the fact that defendants received commissions from energy suppliers for the benefit of plaintiffs and that such funds were to be distributed to plaintiffs, defendants held a specific and particular relationship of trust and confidence with plaintiffs. As a result of the relationship between defendants and plaintiffs, defendants owed plaintiffs certain fiduciary duties which included the duty to monitor and remit the proper distribution of commissions received by energy suppliers for the benefit of plaintiffs. (Compl. ¶¶ 99-100.) Defendants argue that the contractual language discussed above, "...nothing in this Agreement is intended or will be construed to constitute or imply a joint venture, partnership, association, or fiduciary duty, obligation or liability between the Company and the Agent," precludes a breach of fiduciary duty claim. (Mem. in Supp. of Mot. to Dismiss at 14-15.)

Under Pennsylvania law, "[t]o demonstrate the existence of a fiduciary duty, plaintiff must show a relationship in which trust and confidence were reposed by one side, and

domination and influence exercised by the other." Lazin v. Pavilion Partners, No. C.I.V.A.95-601, 1995 WL 614018, at *5 (E.D. Pa. Oct. 11, 1995); see also Com., Dep't of Transp. v. E-Z Parks, 620 A.2d 712, 717 (Pa. Commw. Ct. 1993) ("A confidential relationship exists when 'one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.'") However, placing confidence in another party in and of itself is not sufficient to create a fiduciary relationship. "A business association may be the basis of a confidential relationship 'only if one party surrenders substantial control over some portion of his affairs to the other.'" Lazin, 1995 WL 614018, at *5 (citing E-Z Parks, 620 A.2d at 717). The court finds that for purposes of the 12(b)(6) motion, the court assumes that Mr. McHale was in a fiduciary relationship with NuEnergy and the contractual language does not negate that relationship. Plaintiffs have stated a claim for breach of fiduciary duty as to all defendants.

Count VII: Unjust Enrichment as to all Defendants.

Plaintiffs allege that a portion of the commissions received by NuEnergy from Keyspan and other energy suppliers was received as a direct result of the services rendered by plaintiffs for NuEnergy. They argue that because NuEnergy benefitted by receiving commissions issued from Keyspan and other energy suppliers at the expense of plaintiffs, defendants have become unjustly enriched. (Compl. ¶¶ 106-107.) Defendants argue that plaintiffs' unjust enrichment complaint does not pertain to Messrs. Chylack and John Tobelman. The court finds, given that only three people own and operate the company, that it is reasonable to infer that all three would benefit from diverting plaintiffs' commissions to NuEnergy. Thus, plaintiffs have stated a claim for

unjust enrichment against all defendants.

IV. Conclusion

For the above reasons, defendants' motion to dismiss is granted in part and denied in part. The court also denies defendants' request, pursuant to Rules 9(b) and 12(e) of the Federal Rules of Civil Procedure, for a RICO case statement.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL McHALE,	:	CIVIL ACTION
MARCIA McHALE,	:	NO. 01-4111
BMM, INC.,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
NuENERGY GROUP,	:	
PAUL HYDOK,	:	
LEONARD CHYLACK,	:	
JOHN TOBELMAN,	:	
Defendants	:	

ORDER

AND NOW, this ___ day of February 2002, upon consideration of defendants' motion to dismiss, Docket #2, and the responses thereto, it hereby is ORDERED as follows:

- (1) The motion to dismiss the RICO claim (Count I) of plaintiffs' complaint is GRANTED as to defendant NuEnergy and DENIED as to defendants Paul Hydok, Len Chylack, and John Tobelman;
- (2) The motion of defendants Leonard Chylack and John Tobelman, to dismiss the Fraud claim (Count II) and Negligent Misrepresentation claim (Count III) is DENIED;
- (3) The motion of defendant NuEnergy to dismiss the Breach of Contract claim (Count IV) as to plaintiffs Michael McHale and BMM, Inc., is

DENIED;

- (4) The motion of defendants to dismiss the Breach of Covenant of Good Faith claim as to defendant NuEnergy is GRANTED;
- (5) The motion of defendants to dismiss the Breach of Fiduciary Duty claim (Count VI) is DENIED;
- (6) The motion of defendants Leonard A. Chylack and John Tobelman to dismiss the Unjust Enrichment claim (Count VII) is DENIED.

It is further ORDERED that the claims remaining before this court are as follows:

- (1) The RICO claim (Count I) as to defendants Paul Hydok, Len Chylack, and John Tobelman;
- (2) The Fraud claim (Count II) as to all defendants;
- (3) The Negligent Misrepresentation claim (Count III) as to all defendants;
- (4) The Breach of Contract claim (Count IV) as to defendant NuEnergy;
- (5) The Breach of Fiduciary Duty claim (Count VI) as to all defendants; and
- (6) The Unjust Enrichment claim (Count VII) as to all defendants.

BY THE COURT:

JAMES T. GILES C.J.

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