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

TODD HELLER, SUSAN HELLER, THI SMITH LANE INVESTMENTS, INC. THI PARTNERS, TODD HELLER, INC. ABRAHAM BERNSTEIN, DIANNE G. BERNSTEIN, AB RITTENHOUSE INVESTMENTS LLC, RITTENHOUSE SQUARE PARTNERS, ABD RITTENHOUSE INVESTMENTS, INC., JAMES F. NASUTI, CELESTE NASUTI, JFN WILLIAMSON INVESTMENTS LLC, WILLIAMSON PARTNERS, and JFN WILLIAMSON INVESTORS, INC.	: CIVIL ACTION : : : NO. 04-CV-3571 : : : : : : : :
vs.	:
DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC., D/B/A DEUTSCHE BANK ALEX BROWN, A DIVISION OF DEUTSCHE BANK SECURITIES, INC., DAVID PARSE, BDO SEIDMAN, L.L.P. ROBERT DUDZINSKY, ELLIOTT P. FOOTER, BEARD MILLER COMPANY, LLP STEVEN D. ORNDORF, WILKINSON AND TANDY LLC, RALPH E. LOVEJOY and KPMG, LLP	: : : : : : : : : : : :

MEMORANDUM AND ORDER

JOYNER, J. **March 3, 2005**

This civil action has been brought before the Court again on motion of Defendants, Beard Miller Company, LLP and Steven D. Orndorf to dismiss Plaintiffs' Complaint. For the reasons set forth below, the motion shall be granted in part and denied in part.

History of the Case

This case has its origins in an income tax avoidance strategy which the defendants, allegedly acting in concert, marketed and sold to the plaintiffs. Despite having knowledge of two IRS notices in 1999 and 2000 which informed tax attorneys and accountants across the country of the illegality of strategies such as the one at issue here involving the purchase of digital options on foreign currency, Defendants allegedly nevertheless continued to aggressively market and sell the strategy as a legitimate tax shelter, charging Plaintiffs fees of between 5 ½% and 9 ½% of the client's desired tax savings. Unbeknownst to Plaintiffs, Defendants also failed to register the strategy as a tax shelter with the IRS and failed to inform them that the legal opinion letters upon which Plaintiffs were relying were not independent opinions but were instead drafted by the same law firm that helped develop the strategy in the first place. Defendants also did not advise Plaintiffs of the IRS Tax Amnesty Program under which taxpayers who voluntarily disclosed their participation in such an illegal strategy could avoid any penalties for underpayment of taxes.

As a result of their participation in the defendants' illegal tax strategy, Plaintiffs incurred significant penalties and interest to the IRS along with having to pay back taxes, and

additional legal and accounting advisory fees. They commenced this suit on July 28, 2004 under the theories of Civil RICO, 18 U.S.C. §§1962(c) and (d), breach of contract, unjust enrichment, breach of the duty of good faith and fair dealing, breach of fiduciary duty, fraud, negligent misrepresentation, malpractice, civil conspiracy and for declaratory judgment. Defendants Beard Miller Company, LLP ("Beard Miller") and Steven Orndorf ("Orndorf"), now move to dismiss the complaint against them in its entirety pursuant to Fed.R.Civ.P. 12(b)(6).

Standards Governing Motions to Dismiss

In considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is

certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

A. Plaintiffs' RICO Claims

Defendants first move to dismiss the plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1962(c) and (d) on the grounds that the complaint fails to sufficiently allege such claims and that the claims are barred by Section 107 of the Private Securities Litigation Reform Act, ("PSLRA"), which amended 18 U.S.C. §1964(c).[1]

[1] Plaintiffs' have also endeavored to state a third RICO claim for "violations of 18 U.S.C. §2 by seeking to and aiding and abetting a scheme to violate 18 U.S.C. §1962(c)." (Complaint, p. 67) However, as we noted in our

Specifically, Section 1962(c) states:

> It shall be unlawful for any person[2] employed 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 or collection of unlawful debt.

Section 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

Finally, under Section 1964(c), (as amended by Section 107 of the Private Securities Litigation Reform Act, Pub.L. No. 104-67, 109 Stat. 737 (1995)) which provides for civil remedies for RICO violations,

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Memorandum and Order in this case issued on February 3, 2005, the U.S. Court of Appeals for the Third Circuit has held that a private cause of action for aiding and abetting a RICO violation does not lie under 18 U.S.C. §2 or §1964. See, Pennsylvania Association of Edwards Heirs v. Rightenour, 235 F.3d 839, 843-844 (3d Cir. 2000); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 657 (3d Cir. 1998). We therefore grant the moving defendants' motion to dismiss that claim at the outset.

[2] Under the "Definitions" given in 18 U.S.C. §1961,

> As used in this chapter–
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> ...
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
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> (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;
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> (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 any period of imprisonment) after the commission of a prior act of racketeering activity;
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> ....

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.* (emphasis added).

Thus, §107 operated to eliminate, as a predicate act for a private cause of action under RICO any conduct actionable as fraud in the purchase or sale of securities. Mathews v. Kidder, Peabody & Co., Inc., 161 F.3d 156, 157 (3d Cir. 1998). In determining whether the alleged predicate acts are barred by this section of the PSLRA, Courts should properly focus their analysis on whether the conduct pled as the predicate offenses is "actionable" as securities fraud-- not on whether the conduct is "intrinsically connected to, and dependent upon" conduct actionable as securities fraud. Bald Eagle Area School District v. Keystone Financial, Inc., 189 F.3d 321, 330 (3d Cir. 1999). As noted by the Committee Conference Report accompanying §107, the amendment was not intended merely "to eliminate securities fraud as a predicate offense in a civil RICO action," but also to prevent a plaintiff from "pleading other specified offenses, such as mail or wire fraud, as predicate acts under Civil RICO if such offenses are based on conduct that would have been actionable as

securities fraud." Burton v. Ken-Crest Services, Inc., 127 F.Supp.2d 673, 676 (E.D.Pa. 2001), quoting H.R. Conf. Rep. No. 104-369, at 47.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) provides, in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–
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> ....
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange not so registered or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
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> ....

SEC Rule 10b-5, 17 C.F.R. §240.10b-5 similarly provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase

or sale of any security.

Thus, securities fraud is a scheme to defraud, a misleading statement, or an omission of a material fact in connection with the purchase or sale of securities. Flood v. Makowski, Civ. A. No. 3:CV:03-1803, 2004 U.S. Dist. LEXIS 16957 (M.D. Pa. Aug. 24, 2004), citing 15 U.S.C. §78j(b) and Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 173 (3d Cir. 2001). To state a valid claim for a violation of securities fraud under §10b and Rule 10b-5[3], a plaintiff must show that the defendant (1) made a misstatement or an omission of a material fact (2) with scienter (3) in connection with the purchase or the sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury. In re Ikon Office Solutions, Inc., 277 F.3d 658, 666 (3d Cir. 2002); Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp., 315 F.Supp.2d 666, 673-674 (E.D.Pa. 2004). It should be noted that the PSLRA's exclusion of securities fraud as a RICO predicate act applies regardless of whether a particular plaintiff has standing to bring a civil action under §10b and Rule 10b-5. Gatz v. Ponsoldt, 297 F.Supp.2d 719, 731 (D.Del. 2003); In re Ikon Office Solutions, Inc. Securities Litigation,

[3] The scope of Rule 10b is coextensive with the coverage of §10b. Securities and Exchange Commission v. Zandford, 535 U.S. 813, 816, 122 S.Ct. 1899, 1900, 153 L.Ed.2d 1 (2002), n.1, citing United States v. O'Hagan, 521 U.S. 642, 651, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) and Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

86 F.Supp.2d 481, 486 (E.D.Pa. 2000).

It is generally recognized that among Congress' objectives in passing the Securities and Exchange Act was "to insure honest securities markets and thereby promote investor confidence" after the stock market crash of 1929. Zandford, 535 U.S. at 819, 122 S.Ct. at 1903, quoting U.S. v. O'Hagan, 521 U.S. at 658. In so doing, Congress sought "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." Id., quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). To that end, Congress enacted a broad definition of "security," sufficient "to encompass virtually any instrument that might be sold as an investment." Securities and Exchange Commission v. Edwards, 540 U.S. 389, 393, 124 S.Ct. 892, 896, 157 L.Ed.2d 813, 819 (2004), quoting Reves v. Ernst & Young, 494 U.S. 56, 61, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990). Consequently, the statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes. Zandford, 535 U.S. at 819. It is enough that the scheme to defraud and the sale of securities[4] coincide. Zandford, 535 U.S. at 822, 122

[4] Under the Securities and Exchange Act of 1933, 15 U.S.C. §77b(a), the term "security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate,

S.Ct. 1904.

In this case, Moving Defendants do not assert that the Plaintiffs' foreign currency option trades constitute the purchase or sale of securities or that the COBRA transaction[5]

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certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Similarly, under the Securities and Exchange Act of 1934, 15 U.S.C. §78c(a)(10),

The term "security" means any note, stock, treasury stock, security future, bond debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof) or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument, commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

[5] Here, the steps of the COBRA strategy were as follows:

First, the Individual Plaintiffs would sell a short option and purchase a long option in almost identical amounts on a foreign currency with different (but narrow) strike prices, each to expire in thirty (30) days. The cost of the long option, though large, would be largely (although not entirely) offset by the premium earned on the sale of the short option. The Individual Plaintiffs would form a single-member limited liability company ("LLC") for the purpose of purchasing the options; Second, the Individual Plaintiffs (through the LLCs) would contribute their options to a general partnership formed for the purpose of conducting the COBRA transactions. After 30 days, the long and short options would expire either "in or out of the money," resulting in a gain or loss, depending upon the exchange rate between the U.S. dollar and the relevant foreign currency at the time; Third, the Individual Plaintiffs would make a capital contribution consisting of cash or other capital assets to the partnership; if cash was contributed it was sometimes

constituted a securities transaction in and of itself.[6] Rather, they contend that it was the fact that plaintiffs were required to form and purchase shares in S Corporations in order to participate in the COBRA strategy which gives rise to the PSLRA bar. In making this argument, Movants rely upon the Supreme Court's holding in Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985) that the sale of stock in a privately-held corporation was sufficient to garner the protection of the securities laws given that the definition of "security" under the Securities and Exchange Acts is "quite broad."

While it is true that the Court held in Landreth that a single individual who purchased 100% of the stock in a privately-

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used to purchase capital or ordinary assets (depending on whether a capital or ordinary loss was being "created"); Fourth, the Individual Plaintiffs would contribute their interests in the partnership to an S Corporation, causing the termination of the partnership as a matter of law; and Fifth, the S Corporation would sell the capital or ordinary assets contributed by the Individual Plaintiffs. These assets would have an artificially inflated basis and their sale would lead to a substantial unrealized short-term capital loss and/or ordinary loss. (Complaint, ¶82).

[6] We note that the allegations in the complaint in this case with respect to the foreign currency transactions are very similar to those in Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Company, 179 F.Supp.2d 118 (S.D.N.Y. 2000) and 179 F.Supp.2d 159 (2001) in that it appears that "no physical exchange of the underlying foreign currencies took place in connection with the trading activity. The foreign currency trades were placed and, at expiration–when the currency would otherwise change hands–new positions were entered into that either rolled the trades further into the future or offset them with trades taking the opposite position." See, Lehman, 170 F.Supp.2d at 163. As observed by Judge Keenan in that case, "[a]s such, these transactions resemble a contractual wager based on movements in specified foreign currency prices, without the real possibility of foreign-currency positions changing hands. Unlike with an option, neither party here, for all intents and purposes had a right to take possession of foreign currency." Id. Thus, the Lehman court found that the foreign exchange or FX transactions at issue did not fall within the meaning of securities set forth in the 1933 and 1934 Securities and Exchange Acts.

held corporation could state a claim under the securities laws for fraud in the sale of the business, its holding was premised upon the finding that the stock in question possessed all of the characteristics traditionally associated with common stock. Those characteristics are: (1) the right to receive dividends contingent upon an apportionment to profit; (2) negotiability; (3) the ability to be pledged or hypothecated; (4) conferring of voting rights in proportion to the number of shares owned; and (5) the capacity to appreciate in value. Landreth, 471 U.S. at 686, 105 S.Ct. 2302, citing United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975). Given that all we know at this juncture in this case is that the plaintiffs are alleged to have been the 100% shareholders of certain S Corporations which were capitalized by Plaintiffs' contributions of their interests in general partnerships, we cannot find that the S Corporation "stocks" at issue here constitute "securities" within the meaning of the 1933 and 1934 Acts. Accordingly, we deny the defendants' motion to dismiss on the basis of this argument at this time. Upon further development of the record, of course, Moving Defendants are free to re-argue this point via motion for summary judgment.

Moving Defendants alternatively assert that Plaintiffs' RICO claims against them should be dismissed because they do not sufficiently allege that they participated in the operation and

management of the purported enterprise, they do not plead the alleged predicate acts with the required degree of specificity, and because they have not alleged the existence of a RICO conspiracy under §1962(d).

To state a cause of action under Section 1962(c), a plaintiff must at a minimum allege (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity or the collection of an unlawful debt. Salinas v. U.S., 522 U.S. 52, 62, 118 S.Ct. 469, 476, 139 L.Ed.2d 352 (1997); H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232, 109 S.Ct. 2893, 2897, 106 L.Ed.2d 195 (1989); Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). To plead a claim under §1962(d), the complaint must contain allegations that (1) there was an agreement to commit the predicate acts of fraud and, (2) that defendants had knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate §1962(a), (b) or (c). Stewart v. Associates Consumer Discount Co., 1 F.Supp.2d 469, 475 (E.D.Pa. 1998); Martin v. Brown, 758 F.Supp. 313, 319 (W.D.Pa. 1990).

In order to allege a RICO enterprise, the Third Circuit has identified three elements: (1) that there be an ongoing organization; (2) that the associates function as a continuing unit; and (3) that the enterprise is separate and apart from the

pattern of activity in which it engages. Bonavitacola Electric Contractor, Inc. v. Boro Developers, Inc., Civ. A. No. 01-5508, 2003 U.S. Dist. LEXIS 2190, at *10-11 (E.D.Pa. Feb. 12, 2003). See Also, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S.Ct. 2087, 2090, 150 L.Ed.2d 198 (2001) and Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258, 269 (3d Cir. 1995).

Racketeering activity means "any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 (relating to mail fraud), section 1344 (relating to wire fraud)..." 18 U.S.C. §1961(1)(b). To plead a pattern of racketeering activity, a plaintiff must allege that a defendant committed at least two acts of racketeering activity, as part of a related and continuous pattern. Teti v. Towamencin Township, Civ. A. No. 96-CV-5602, 2001 U.S. Dist. LEXIS 15600, at *18 (E.D.Pa. Aug. 17, 2001), citing H.J., Inc., 492 U.S. at 237, 109 S.Ct. at 2899. A pattern is not formed by sporadic activity and a person cannot be subjected to the sanctions of RICO simply for committing two widely separated and isolated criminal offenses. Teti, 2001 U.S. Dist. LEXIS at *25, citing H.J, Inc., 492 U.S. at 239, 109 S.Ct. At 2900. Stated otherwise, a "pattern" of racketeering activity exists when predicate criminal acts are related and amount to or otherwise constitute a threat of continued criminal activity. Werther v. Rosen, Civ. A. No.

02-CV-3589, 2002 U.S. Dist. LEXIS 22262, at *5 (E.D.Pa. Oct. 30, 2002).

Racketeering acts are said to be related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. H.J., Inc., 492 U.S. at 240, 109 S.Ct. At 2901; Schroeder v. Acceleration Life Insurance Co., 972 F.2d 41, 46 (3d Cir. 1992). Continuity has been said to be both a closed and open-ended concept referring either to a closed period of repeated conduct or to past conduct which by its nature projects into the future with a threat of repetition. H.J., Inc., 492 U.S. at 241-242, 109 S.Ct. at 2902. Thus, a party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time or by demonstrating that a threat of continuing criminal activity exists. Id.; Hindes v. Castle, 937 F.2d 868, 872 (3d Cir. 1991).

Whether the predicate acts constitute a threat of continued racketeering activity depends on the specific facts of each case. Tabas v. Tabas, 47 F.3d 1280, 1295 (3rd Cir. 1995). Indeed, with respect to a "closed-ended scheme," the Third Circuit has developed a durational requirement of at least twelve months, which time period is measured between the first and last predicate acts alleged. Bonavitacola, 2003 U.S. Dist. LEXIS at

*27, citing Tabas, 47 F.3d at 1293 and Plater-Zyberk v. Abraham, Civ. A. No. 97-3322, 1998 U.S. Dist. LEXIS 1736, at *23-24 (E.D.Pa. Feb. 18, 1998). While predicate acts extending over a few weeks or months and threatening no future criminal conduct thus do not satisfy the continuity requirement, open-ended continuity may be satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business or of conducting or participating in an ongoing and legitimate RICO enterprise. H.J., Inc., 492 U.S. at 243, 109 S.Ct. at 2902; Tabas, at 1295. Finally, in determining whether a pattern of racketeering activity has been established in a given case, it is appropriate to consider: (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. Tabas, at 1292; Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (3rd Cir. 1987). See Also: Bonavitacola, 2003 U.S. Dist. LEXIS at *22.

Finally, "to conduct or participate directly or indirectly in the conduct of an enterprise's affairs," a defendant must have had some part in directing those affairs and "one is not liable unless one has participated in the operation or management of the enterprise itself." Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 1170, 1172, 122 L.Ed.2d 525 (1993).

In reviewing the complaint in this case in light of the preceding standards, we find that it is adequate to state claims under Sections 1962(c) and (d) against the Beard Miller defendants. Indeed, according to the complaint, there were in essence two "enterprises" at work: (1) the "solicitation" enterprise, which consisted of the Deutsche defendants, Jenkens & Gilchrist, the BDO Seidman defendants, the KPMG defendants and "all other marketing participants (including without limitation, the Beard Miller defendants, Wilkinson defendants and Wachovia defendants) and other persons and entities which solicited persons to participate in the FX contracts offered by the Deutsche Defendants for the alleged purpose of tax liability reduction as set forth in the opinion letters offered by Jenkens;" and (2) the "FX" enterprise, which consisted of "all defendants and all other persons or entities that participated in any way in the implementation, sale and or development of FX contracts sold for the alleged purpose of decreasing the tax liability of any individual." (Complaint, ¶153). Beard Miller and Steven Orndorf are alleged to have participated in the solicitation and FX enterprises specifically by using their knowledge of the Heller plaintiffs' finances and their positions as the Heller plaintiffs' longtime accountants to introduce them to the COBRA strategy, by setting up meetings and telephone conference calls with Attorneys Daugerdas and Guerin of Jenkens &

Gilchrist and David Parse of Deutsche Bank and by helping to sell the Hellers on the legality of the strategy. (Complaint, ¶s 63, 69, 70). In addition to their purported roles in marketing COBRA to the plaintiffs, the Beard Miller defendants are also alleged to have further participated in the FX enterprise by preparing the 1999 and 2000 corporate and personal tax returns for the Heller plaintiffs. We find these averments clearly suffice to allege direct participation in the RICO enterprises in this case.

As to the predicate acts, the complaint avers that "[f]or the purpose of executing and/or attempting to execute their transaction to defraud and to obtain money by means of false pretenses, representations or promises the Defendants, in violation of 18 U.S.C. §1341 [and] 18 U.S.C. §1343...placed in post offices and/or in authorized repositories for mail matter and things to be sent or delivered by the Postal Service and received matter and things therefrom..." [and] "transmitted and received by wire matter and things therefrom including but not limited to contracts, instructions, correspondence, opinion letters, funds...tax returns, wire transfer and other instructions... and others." (Complaint, ¶s 166-167, 170-171). Plaintiffs allege that these mail and wire transmitted documents were false and/or fraudulent in that, *inter alia*, they misrepresented and suppressed material facts which would have

alerted Plaintiffs to the true likelihood (1) that the IRS would not accept the tax treatment of the COBRA transactions as indicated in the opinion letters, (2) that the FX contracts would not pay out, (3) that the Defendants retained virtually unlimited discretion to determine whether the FX contracts would pay out, and (4) that the Jenkens' opinion letters were truly not independent. (Complaint, ¶172).

Finally, in paragraph 174, the plaintiffs specify various letters, agreements, invoices and e-mails which Defendants transmitted via the mail and wire, including the persons to whom they were directed and the dates on which they were sent and/or transmitted. Thus, as these excerpts make clear, the plaintiffs have alleged RICO predicate acts with sufficient particularity to survive a Rule 12(b)(6) motion. We therefore deny Moving Defendants' motions to dismiss Plaintiffs' claim under Section 1962(c).

We reach the same conclusion as to the §1962(d) claim. Indeed, reading the complaint as a whole and looking at paragraphs 131-139 and 199-200 in particular, we find that the plaintiffs have alleged an outline of the defendants' agreement to commit the predicate acts of fraud and their awareness that those acts were part of an overall pattern of racketeering activity. As paragraph 131 for example avers: "[o]n information and belief, the Defendants (along with Jenkens) conspired to

devise and promote the COBRA strategy for the purpose of receiving and splitting millions of dollars in fees...The receipt of those fees was the primary, if not sole, motive in the development and execution of the transaction...Indeed, Defendants devised the transaction and agreed to provide a veneer of legitimacy to each other's opinion as to the lawfulness and tax consequences of the COBRA strategy by agreeing to the representations that would be made and to issue the allegedly "independent" opinions before potential clients were solicited..." We therefore deny the moving defendants' motion to dismiss Plaintiffs' claim under Section 1962(d).

B. Plaintiffs' Fraud and Negligent Misrepresentation Claims

Movants also seek the dismissal of the plaintiffs' claims under state law for, *inter alia*, fraud and negligent misrepresentation.

To state a claim for fraud which satisfies the exacting standard of Fed.R.Civ.P. 9(b), the plaintiff must "plead (1) a specific false representation of material fact, (2) knowledge by the person who made it of its falsity, (3) ignorance of its falsity by the person to whom it was made, (4) the intention that it should be acted upon, and (5) that the plaintiff acted upon it to his damage." U.S. ex. Rel. Atkinson v. Pennsylvania Shipbuilding Co., 255 F.Supp.2d 351, 407 (E.D.Pa. 2002), quoting Shapiro v. UJB Financial Corp., 964 F.2d 272, 284 (3d Cir. 1992).

See Also, Brickman Group Ltd. v. CGU Insurance Co., No. 754 EDA 2004, 2004 Pa. Super. LEXIS 4936, *28 (Dec. 29, 2004)("The essential elements of a cause of action for fraud or deceit are a misrepresentation, a fraudulent utterance thereof, an intention to induce action thereby, justifiable reliance thereon and damage as a proximal result.")

A cause of action for fraudulent misrepresentation is similarly comprised of the following elements: "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result." Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992), quoting Scaife Co. V. Rockwell-Standard Corp., 446 Pa. 280, 285, 285 A.2d 451, 454 (1971), *cert. denied*, 407 U.S. 920, 92 S.Ct. 2459, 32 L.Ed.2d 806 (1972).

By way of their motions, Moving Defendants argue that Plaintiffs have also failed to allege sufficiently specific facts to plead fraud or negligent misrepresentation. Reading the complaint as a whole and paragraphs 231-248 in particular, we find that the gravamen of plaintiffs' averments is (1) that the defendants, including the movants here, acting in concert, knowingly and specifically misrepresented to the plaintiffs that, *inter alia*, the COBRA tax strategy was a legal tax shelter and/or

use of a tax code "loophole" which had been independently reviewed by the Jenkens law firm and by the various accountant defendants and found to be legal; (2) that Defendants made these misrepresentations with the purpose of inducing the plaintiffs to engage in the strategy and thereby generate fees of between 5 ½% and 9 ½% of the tax savings being sought, (3) that the plaintiffs justifiably relied upon these misrepresentations (given the defendants' reputations and the relationships which plaintiffs had shared with them) and engaged in the tax strategy (4) with the result that they suffered extreme financial damages by having to pay back taxes, penalties and interest when the IRS disallowed the losses which the plaintiffs had taken on their returns. These averments are, we find, more than sufficient to put the defendants on notice of what conduct they are charged with having committed and to satisfy the particularity requirements of both Federal and Pennsylvania law. Accordingly, Plaintiffs' seventh and eighth causes of action shall be allowed to stand.

C. Plaintiffs' Breach of Contract and Professional Negligence Claims

Movants here also seek the dismissal of the plaintiffs' claims for breach of contract and professional negligence for failure to plead any facts which could support a finding that they negligently performed the services for which they were hired and because the complaint fails to indicate whether the alleged contract between them and the Heller plaintiffs is oral or

written. Defendants also assert that the breach of contract claim should be dismissed as a "mislabeled negligence claim" because it is not based on a breach by movant of any specific provision of the contract between them.

Generally speaking, to sustain a claim for breach of contract, a plaintiff must allege: (1) the existence of a contract, (2) including its essential terms, (3) a breach of a duty imposed by the contract and (4) resultant damage. Pittsburgh Construction Co. v. Griffith, 834 A.2d 572, 580 (Pa.Super. 2003); Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999). Contracts for professional, legal and accounting services contain, as an implied term of the contract, a promise by the attorney or accountant to render legal services in accordance with the profession at large. See, Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108, 115 (1993); Gorski v. Smith, 2002 Pa. Super. 334, 812 A.2d 683, 694 (2002); Koken v. Steinberg, 825 A.2d 723, 730 (Pa. Cmwlth. 2003). Thus, a breach of contract claim may properly be premised on a professional's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large. Gorski, 812 A.2d at 694.

Furthermore, under Pennsylvania law, professional negligence actions can be maintained only against defendants who are licensed professionals such as (1) health care providers as

defined by Section 503 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.503; (2) accountants; (3) architects; (4) chiropractors; (5) dentists; (6) engineers or land surveyors; (7) nurses; (8) optometrists; (9) pharmacists; (10) physical therapists; (11) psychologists; (12) veterinarians; or (13) attorneys. Gilmour v. Bohmueller, Civ. A. No. 04-2535, 2005 U.S. Dist. LEXIS 1611 (E.D.Pa. Jan. 27, 2005); Pa.R.C.P. 1042.1. In order to establish a claim for malpractice, a plaintiff/aggrieved client must demonstrate three basic elements: (1) employment of the professional or other basis for a duty; (2) the failure of the professional to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of damage to the plaintiff. Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1029 (1998); Rizzo v. Haines, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989).

In this case, the plaintiffs allege that defendants Orndorf and Beard Miller were the longtime accountants for the Heller plaintiffs and that in response to the Heller plaintiffs' request for tax planning advice, the Heller plaintiffs and the Beard Miller defendants effectively entered into a contract for professionally competent accounting advice. Thereafter, these defendants introduced plaintiffs to the COBRA strategy by referring them to Defendants Dudzinsky, BDO Seidman and representatives of Jenkens & Gilchrist and the Deutsche Bank

defendants and that Orndorf participated in several teleconference calls between the Hellers and these other parties. In so doing, the complaint alleges that Orndorf and Beard Miller disregarded their obligations to meet all applicable standards of care and to comply with all applicable rules of professional conduct and instead provided plaintiffs with advice, opinions, recommendations, representations and instructions that they either knew or reasonably should have known to be wrong thereby breaching their contract with plaintiffs and committing malpractice. These averments are, we find, more than adequate to plead claims for contractual breach and professional malpractice and we therefore deny the motion to dismiss these claims against Moving Defendants.

D. Plaintiffs' Claim for Breach of Fiduciary Duty

The Beard Miller defendants also seek dismissal of plaintiffs' sixth claim for breach of fiduciary duty.

Generally speaking, a fiduciary relationship arises under Pennsylvania law where "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. Becker v. Chicago Title Insurance Co., Civ. A. No. 02-2292, 2004 U.S. Dist. LEXIS 1988 at *22 (E.D.Pa. Feb. 4, 2002), quoting L & M Beverage Co. v. Guiness

Import Co., 1995 U.S. Dist. LEXIS 19443 at *13-14 (E.D.Pa. Dec. 29, 1995). See Also, Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, 811 A.2d 10, 22 (Pa. Super. 2002). Thus, those who give advice in business may engender confidential relations if others, by virtue of their own weakness or inability, the advisor's pretense or expertise, or a combination of both, invest such a level of trust that they seek no other counsel. Basile v. H & R Block, 2001 Pa. Super. 136, 777 A.2d 95, 102 (Pa. Super. 2001). In Pennsylvania, a claim for breach of fiduciary duty must allege that: (1) the defendant acted negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) the plaintiff suffered injury; and (3) the defendant's failure to act solely for the plaintiff's benefit was a real factor in bringing about plaintiff's injuries. Gilmour, 2005 U.S. Dist. LEXIS at *30.

In reviewing the plaintiffs' complaint, we note that it alleges that Mr. Orndorf and Beard Miller occupied a position of trust in relation to the Heller plaintiffs by virtue of their having long been the Hellers' accountants and that the Heller plaintiffs had placed their confidence in these defendants to advise them appropriately and to act in their best interests. The complaint further avers that the moving defendants either intentionally or negligently disregarded this relationship when

they failed to act in good faith and advised Plaintiffs to enter into the COBRA transactions, that as a result of the defendants' counsel and advice the plaintiffs did engage in the COBRA transactions with the result that they suffered serious financial harm by having to pay, *inter alia*, back taxes and significant penalties and interest to the IRS. As we find these allegations are sufficient to state a cause of action against the movants here for breach of fiduciary duty, the motion to dismiss this claim is denied.

E. Plaintiffs' Civil Conspiracy Claim

Movants also ask that the plaintiffs' claim for civil conspiracy be dismissed. For the following reasons, this request too, shall be denied.

Civil conspiracy is the agreement of two or more entities or individuals to engage in an unlawful act, or an otherwise lawful act by unlawful means when some overt act is taken in furtherance of the conspiracy and some actual legal harm accrues to the plaintiff. Doltz v. Harris & Associates, 280 F.Supp.2d 377, 389 (E.D.Pa. 2003). To prove a civil conspiracy under Pennsylvania law, a plaintiff must show (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose, (2) an overt act done in pursuit of the common purpose and (3) actual legal damage. Id. See Also, Flynn v. Health Advocate, Inc.,

Civ. A. No. 03-3764, 2004 U.S. Dist. LEXIS 293 at *17 (E.D.Pa. Jan. 13, 2004).

In reading the complaint in this matter as a whole, we find that it more than amply states a cause of action for civil conspiracy against the moving defendants here in that movants are alleged to have acted in concert with all of the other defendants and attorneys and representatives from Jenkens & Gilchrist to persuade their clients (the Heller plaintiffs) to engage in an illegal tax strategy. The complaint further alleges that in pursuit of this goal, Defendants Orndorf and Beard Miller, *inter alia*, participated in phone conferences with plaintiffs and the other defendants and advised the plaintiffs that the strategy was lawful with the result that the plaintiffs were damaged by having to pay back taxes, interest and penalties to the IRS. Thus, the motion to dismiss the civil conspiracy claim is also denied.

F. Plaintiffs' Declaratory Judgment Claim

Finally, Movants assert that the plaintiffs' claim for declaratory judgment should be dismissed on the grounds that the relief which it seeks is merely duplicative of the relief sought under the other counts of the complaint. However, the only caselaw which defendants cite in support of this argument is from the seventh circuit and provides that dismissal on this basis is discretionary with the court. See, Yellow Cab Co. V. City of Chicago, 186 F.2d 946, 950-951 (7th Cir. 1951); Rayman v. Peoples

Savings Corp., 735 F.Supp. 842, 851-853 (N.D.Ill. 1993). Given that our independent research reveals no such authority from the Third Circuit and even accepting this Seventh Circuit authority, we decline to exercise our discretion in favor of dismissal on these grounds in light of the undeveloped state of the record in this case. Accordingly, the declaratory judgment claim shall likewise be permitted to stand.

An order follows.

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

TODD HELLER, SUSAN HELLER, THI SMITH LANE INVESTMENTS, INC. THI PARTNERS, TODD HELLER, INC. ABRAHAM BERNSTEIN, DIANNE G. BERNSTEIN, AB RITTENHOUSE INVESTMENTS LLC, RITTENHOUSE SQUARE PARTNERS, ABD RITTENHOUSE INVESTMENTS, INC., JAMES F. NASUTI, CELESTE NASUTI, JFN WILLIAMSON INVESTMENTS LLC, WILLIAMSON PARTNERS, and JFN WILLIAMSON INVESTORS, INC.	:	CIVIL ACTION
vs.	:	
DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC., D/B/A DEUTSCHE BANK ALEX BROWN, A DIVISION OF DEUTSCHE BANK SECURITIES, INC., DAVID PARSE, BDO SEIDMAN, L.L.P. ROBERT DUDZINSKY, ELLIOTT P. FOOTER, BEARD MILLER COMPANY, LLP STEVEN D. ORNDORF, WILKINSON AND TANDY LLC, RALPH E. LOVEJOY and KPMG, LLP	:	NO. 04-CV-3571

ORDER

AND NOW, this 3rd day of March, 2005, upon consideration of the Motion of Defendants Steven D. Orndorf and Beard Miller Company, LLP to Dismiss Plaintiffs' Complaint and Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART and Plaintiffs' Third Claim for Violating and Seeking to and Aiding and Abetting a Scheme to Violate 18 U.S.C. §1962(c) is DISMISSED with prejudice.

In all other respects the Motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.