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

AMIHAI MIRON, AYALA MIRON, AM PARTNERS, AM TUCKERSTOWN INVESTORS, INC., and AM TUCKERSTOWN INVESTORS, LLC	:	CIVIL ACTION 04-968
v.	:	
BDO SEIDMAN, L.L.P., ROBERT J. DUDZINSKY, DEUTSCHE BANK AG, DAVID PARSE, DEUTSCHE BANK SECURITIES, INC. d/b/a DEUTSCHE BANK ALEX BROWN, A DIVISION OF DEUTSCHE BANK SECURITIES, INC., RAGGI & WEINSTEIN, LLP & CPA'S & CONSULTANTS, and BOB RAGGI	:	

MEMORANDUM AND ORDER

Joyner, J. **December 13, 2006**

Presently before the Court is Defendants Deutsche Bank AG's, Deutsche Bank Securities, Inc.'s, and David Parse's (collectively "DB Defendants") Motion for Certification for Interlocutory Appeal (Doc. No. 100), Plaintiffs' opposition (Doc. No. 107) and DB Defendants' reply thereto (Doc. No. 108). For the reasons below, the Court GRANTS in PART DB Defendants' motion.

Background[1]

In an effort to reduce their federal tax liabilities, Plaintiffs purchased a Currency Options Bring Reward Alternative ("COBRA") tax shelter in 2000. They allege that they bought the

[1] The Court forewarns the reader that this is not an exhaustive or detailed recitation of the facts or allegations made by Plaintiffs. To cite one example, the Court does not detail how the tax shelter at issue functioned.

COBRA shelter by relying upon certain representations as to its propriety made by Defendants BDO Seidman, L.L.P. and Bob Raggi. E.g., Complaint ("Compl.") ¶¶ 54-59, 90-92. But as it turns out, the Internal Revenue Service ("IRS") had issued a series of notices both before and after Plaintiffs purchased the COBRA tax shelter that called into question its legality. See id. ¶¶ 82-86. Plaintiffs, however, claim that they first learned of these notices (or more specifically their significance) only after retaining new tax and legal advisors in response to the IRS' January 2004 decision to audit their 2000 federal tax return. See id. ¶¶ 99, 100. Indeed, Plaintiffs aver that with the aid of their new advisors they were able to determine that all of the named Defendants conspired to mislead and defraud Plaintiffs into purchasing the COBRA tax shelter. See id. ¶ 100. Armed with this information, Plaintiffs filed suit on March 4, 2004 claiming violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961, et. seq., and various state laws.

On August 14, 2006, this Court denied in part DB Defendants' motion to dismiss. See Aug. 14, 2006 Order ("Order") (Doc. No. 99).[2] Most germane to the present motion is DB Defendants'

[2] The Court had previously denied DB Defendants' motion to compel arbitration and stayed this action pending resolution of arbitration proceedings between Plaintiffs and Defendants BDO Seidman, L.L.P. and Robert Dudzinsky (collectively "BDO Defendants"). See Miron v. BDO Seidman, LLP, 342 F. Supp. 2d 324 (E.D. Pa. 2004). On February 6, 2006, Plaintiffs and BDO Defendants dismissed all claims and counterclaims asserted in the arbitration proceedings. See Doc. No. 83. The Court subsequently lifted its stay on February 28, 2006. See Doc. No. 85.

argument that the Private Securities Litigation Reform Act of 1995 ("PSLRA") bars Plaintiffs' RICO claims.[3] The PSLRA amended RICO to provide that "no person may rely upon conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964; see also Pub. L. No. 104-67, § 107. In rejecting DB Defendants' argument, the Court reasoned that "merely by inserting a purchase and sale of stock at the end of a larger tax strategy" DB defendants can not escape RICO liability. Order at 2 n.2. The Court did note, however, that other district courts considering similar sets of facts had reached the opposite conclusion. See, e.g., Seippel v. Jenkens & Gilchrist, P.C., 314 F. Supp. 2d 363, 372-74 (S.D.N.Y. 2004), amended and clarified on other grounds after reconsideration, No. 03-6942, 2004 U.S. Dist. LEXIS 21589 (S.D.N.Y., Oct. 25, 2004). DB Defendants did not ask the Court to reconsider its decision, but rather now ask it to certify for interlocutory appeal the following question:

> Whether the Private Securities Litigation Reform Act of 1995 bars Plaintiffs' Racketeer Influenced and Corrupt Organizations Act claims because the alleged predicate acts in Plaintiffs' Complaint are actionable as securities fraud.

DB Defendants' Motion for Certification for Interlocutory Appeal ("DB Def. Mot.") at 3.

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[3] Plaintiffs have already conceded to dismissing a subset of their RICO claims against DB Defendants: (1) for allegedly aiding and abetting of RICO violations in violation of 18 U.S.C. § 2; and (2) for allegedly investing racketeering funds in violation of 18 U.S.C. § 1962(a). See Order at 1 n.1.

Discussion

I. Legal Standard

A district court may certify an order for interlocutory appeal if it concludes that the order: (1) involves a controlling question of law, (2) as to which there is a substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. See 28 U.S.C. 1292(b) ("Section 1292(b)"); Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974). While the district court has sole discretion in deciding whether to certify an order, the decision to do so is appropriate only in exceptional circumstances because of the strong policy preference against piecemeal litigation. See 28 U.S.C. § 1292(b); Bradburn Parent Teacher Store, Inc. v. 3M, 02-7676, 2005 U.S. Dist. LEXIS 15815, at *7 (E.D. Pa. Aug. 2, 2005) (citations omitted). "The key consideration [in deciding to certify] is . . . whether the order . . . truly implicates the policies favoring interlocutory appeal[,] . . . includ[ing] the avoidance of harm to a party *pendente lite* from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." Katz, 496 F.2d at 756.

II. Analysis

A. Controlling Question of Law

"A controlling question of law must encompass at the very

least every order which, if erroneous, would be reversible on final appeal." Katz, 496 F.2d at 755. DB Defendants argue that the Court's Order clearly encompasses a controlling issue of law because reversal by the Third Circuit would result in dismissal of Plaintiffs' remaining RICO claims. The Court agrees. Nothing could be more clear; were the Third Circuit to agree with DB Defendants' argument that the PSLRA bars Plaintiffs' remaining RICO claims, the only possible result would be reversal of this Court's Order. Plaintiffs contention that there is no controlling question of law is patently absurd.

The Court's Order did not involve a well-settled application of the PSLRA. Rather, Plaintiffs' allegations required the Court to consider how broadly (or narrowly) to construe the statutory term "in connection with the purchase or sale of security" in determining whether the PSLRA barred their RICO claims. 15 U.S.C. § 78j(b) (Section 10(b) of the Securities and Exchange Act of 1934); see also Rule 10b-5, 17 C.F.R. § 240.10b-5. Both the Supreme Court and Third Circuit agree that this statutory phrase is to be construed broadly but neither has considered its application to the type of factual situation before the Court nor one that is even sufficiently analogous. See SEC v. Zandford, 535 U.S. 813, 820 (2002); Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc., 189 F.3d 321, 329-30 (3d Cir. 1998). While Plaintiffs correctly suggest that *Bald Eagle* provides guidance

for district courts in adjudicating PSLRA issues, it does not resolve the threshold question of whether the alleged conduct is actionable securities fraud. The Court concludes that its Order presents a controlling question of law.

B. Substantial Ground for Difference of Opinion

A party *may* establish that substantial grounds for difference of opinion exist by demonstrating that *different courts* have issued conflicting and contradictory opinions when interpreting a particular question of law. See, e.g., Bradburn Parent Teacher Store, Inc., 2005 U.S. Dist LEXIS 15815 at, *12; Kolbeck v. Gen. Motors Corp., 702 F. Supp. 532, 542 (E.D. Pa. 1989).[4] This does not require, however, showing a disagreement among the courts of appeals. See, e.g., Kolbeck, 702 F. Supp. at 534 n.1, 542 (establishing that a substantial ground for difference of opinion exists by pointing to conflict between different district courts). DB Defendants have aptly demonstrated that a substantial ground for difference of opinion exists as to whether the PSLRA bars Plaintiffs' RICO claims. Indeed, this Court's Order even acknowledged that multiple district courts (outside this Circuit) have concluded that the PSLRA barred RICO claims arising from the implementation of tax shelters that are the same or similar to the one described in

[4] The Court intentionally uses the word 'may' insofar as district courts have recognized that there are other ways to demonstrate a 'substantial ground for difference of opinion' exists as to a particular question of law.

Plaintiffs' Complaint. See Order at 2 n.2; DB Def. Mot. at 6 n.4 (citing cases).

C. Materially Advances Litigation

Finally, Section 1292(b) requires the district court to conclude that permitting an interlocutory appeal of an otherwise non-appealable order "may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b). The Third Circuit has explained that this requires the district court to assess "settlement possibilities, [] the potential length of a possibly avoidable trial, and similar matters." Katz, 496 F.2d at 754; see also Ford Motor Credit Co. v. S.E. Barnhat & Sons, Inc., 664 F.2d 377, 380 (3d Cir. 1981) ("[Section 1292(b)] is designed to allow for early appeal of a legal ruling when resolution of the issue may provide more efficient disposition of the litigation."). Simply put, these considerations are best summed up as all relating to efficient use of judicial resources. Given the relatively early procedural posture of this case (motion to dismiss stage with little, if any, discovery haven taken place), resolving whether Plaintiffs can maintain RICO claims notwithstanding the PSLRA bar by interlocutory appeal is a more efficient means of moving this litigation forward, i.e. it may materially advance its outcome. As Defendants correctly point out, if the Third Circuit reverses this Court, Plaintiffs' lone basis for federal subject matter jurisdiction would be gone and

so too the need to conduct extensive discovery relating to RICO claims involving complicated factual issues. Moreover, without any remaining federal claims, this Court is likely to follow the guidance of the Supreme Court and Third Circuit (especially in the absence of any discovery) and decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. See, e.g., Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to exercise jurisdiction over the remaining state-law claims.") (citations omitted); Weaver v. Marine Bank, 683 F.2d 744, 746 (3d Cir. 1982) ("[If the federal count is subject to dismissal on a motion for summary judgment, then the district court should ordinarily refrain from exercising jurisdiction over the state law claims in the absence of extraordinary circumstances.") (citations, internal quotes and alterations omitted). Accordingly, the Court concludes that an interlocutory appeal may materially advance the ultimate termination of this litigation.

Conclusion

DB Defendants have established the three elements of Section 1292(b) necessary for the Court to certify its Order for

interlocutory appeal. The Court's Order: (1) involved a controlling question of law, (2) for which there is a substantial ground for difference of opinion, and (3) whose resolution on appeal may materially advance the ultimate termination of this litigation. The Court is also satisfied that this case, in its current procedural posture, presents the type of exceptional circumstances that justify certification of its Order for interlocutory appeal. The Court will not, however, certify DB Defendants suggested question. Rather, the Court certifies a question that it believes is more closely tailored to the underlying factual background of this case. Finally, the Court urges the Third Circuit to consider this appeal sooner than later because it presents an important question of statutory interpretation the resolution of which would provide much needed guidance with respect to the scope of both civil RICO and federal securities fraud claims. The need for guidance is especially acute in this case because no other court of appeals has considered this issue. Moreover, the RICO claims in this case are not uniquely singular to this action but have been brought nationwide by different plaintiffs premised on similarly structured (and allegedly illicit) tax shelters. An appropriate order follows.

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ORDER

And now, this 13th day of December, 2006, upon consideration of DB Defendants' Motion for Certification for Interlocutory Appeal (Doc. No. 100), the Court GRANTS in PART the Motion and CERTIFIES its August 14, 2006 Order (Doc. No. 99) for interlocutory appeal. The Court further ORDERS that the following controlling question of law is also certified for interlocutory appeal:

> Whether the Private Securities Litigation Reform Act of 1995 bars Plaintiffs' remaining RICO claims when Plaintiffs allege that they were fraudulently induced into purchasing a tax shelter, which included a later purchase of a security as part of its strategy, because this purchase satisfies the "in connection with the purchase or sale" element of a securities fraud claim and therefore constitutes actionable securities fraud?

The Court further ORDERS that all discovery as between Plaintiffs and the DB Defendants is STAYED pending resolution of this appeal.

BY THE COURT:

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