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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| In re | ) | |
| | ) | |
| ADELPHIA COMMUNICATIONS CORP., et al., | ) | Chapter 11 Cases |
| a Delaware corporation, | ) | |
| | ) | Case No. 02-41729 (REG) |
| Debtors. | ) | |
| | ) | (Jointly Administered) |
| ADELPHIA COMMUNICATIONS CORP. AND | ) | |
| ITS AFFILIATED DEBTORS AND DEBTORS IN | ) | Adversary Proceeding |
| POSSESSION and OFFICIAL COMMITTEE OF | ) | No. 03-04942 (REG) |
| UNSECURED CREDITORS OF ADELPHIA | ) | |
| COMMUNICATIONS CORP., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| | ) | |
| BANK OF AMERICA, N.A. et al., | ) | |
| | ) | |
| Defendants. | ) | |

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS

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## INDEX OF ABBREVIATIONS

Abbreviations used throughout this Motion to Dismiss include the following:

**"ACC"** refers to Adelphia Communications Corporation.

**"Agent Banks"** refers to all banks serving as agents under any of the relevant facilities as identified in ¶¶ 21-70 of the Complaint.

**"Bank of America"** refers to Defendant, Bank of America, NA.

**"Century Credit Agreement"** refers to the Credit Agreement dated April 14, 2000 with Bank of America as Co-Administrative Agent and Century Cable Holdings, LLC, Ft. Myers Cablevision, LLC and Highland Prestige Georgia, Inc. as borrowers.

**"Century Debtors"** refers to all debtors who are obligors, pledgors or guarantors of the Century Facility as identified in ¶ 432 of the Complaint.

**"Century Facility"** refers to the credit facility described in and created by the Century Credit Agreement.

**"Century Lenders"** refers to all "Lenders" as defined in the Century Credit Agreement.

**"Committee"** refers to the Official Committee of Unsecured Creditors.

**"Complaint"** refers to the complaint filed by the Unsecured Creditors on or about July 6, 2003, in Adversary Proceeding No. 03-4942 (REG).

**"Debtors"** refers to Adelphia and its affiliated debtors and debtors-in-possession in case numbers 02-12834 (REG) through 02-41957 (REG), as described more fully in ¶ 20 of the Complaint.

**"Rigas Family"** or **"Rigas Family Members"** refers to members of the Rigas family as identified in ¶ 413 of the Complaint.

**"Rigas Family Entities"** refers to entities managed by Adelphia and owned by the Rigas Family that are identified in ¶¶ 405-411 of the Complaint.

Bank of America, N.A. in its capacity as administrative agent and lender under the Century Facility,[1] submits this memorandum of law in support of its motion to dismiss claims brought by the Debtors (who are nominal parties to this action) through the Official Committee of Unsecured Creditors (the "Committee") for lack of subject matter jurisdiction under Rule 12(b)(1), failure to state a claim under Rule 12(b)(6), and failure to plead allegations with sufficient particularity under Rules 8 and 9.

## PRELIMINARY STATEMENT

The Complaint is built on three faulty premises: (1) the structure of a loan imposing joint and several liability on multiple borrowers is somehow tortious or illegal; (2) each of the lenders is presumed to have had knowledge that loan proceeds were being misused by the borrowers; and (3) (in stark contrast to ACC's "independent" board members, who allegedly had *no* duty to investigate ACC's daily affairs) the lenders had an overarching duty to investigate the daily operations of each borrower, second-guess public disclosures of non-borrowers approved by the companies' boards and auditors, discover any wrongdoing, and disclose such wrongdoing to ACC's board (if not the world at large). The underpinning of the Complaint is that it is tortious for subsidiaries, ultimately owned by ACC, to agree to be jointly and severally liable for sums borrowed by entities owned by ACC's controlling shareholders, the Rigas Family. Yet the Century Debtors bargained for a deal with this very structure and disclosed the structure publicly on multiple occasions.

[1] In addition to claims brought against Bank of America as Administrative Agent under the Century Facility, the Complaint purportedly makes claims against Bank of America in its capacity as a syndicate member and/or agent in various other loan facilities. Although Bank of America does not plead in these capacities at this time and reserves the right to do so under the Stipulation and Order governing the briefing schedules related to the Complaint, for the same reasons the pleadings are deficient against Bank of America under the Century Facility, the claims against Bank of America under the other facilities also fail.

The Complaint also alleges misuse of the loan proceeds by the Debtors and the Rigas Family Entities, but fails to allege facts showing an individual lender had actual knowledge that any funds were being misused, a necessary element of all of the intentional tort claims. Instead, the Complaint urges a "*should-have-known*" scienter standard on the lenders. The lenders had no duty (or right) under the loan agreements to investigate how the loan proceeds were used, audit ACC's consolidated financial statements, or second-guess the financial disclosures approved by ACC's board and auditors. The allegations of misused funds and the lenders' alleged duties to investigate and disclose any such misuse of funds fail as a matter of law. Thus, absent a finding that the very structure of the co-borrowing facilities was fraudulent, the Complaint – like a house built on a faulty foundation – collapses.

The Committee is dominated by members who are holders of public debt issued by ACC. ACC is not a party to any of the loans in dispute, certainly not the Century Facility of which Bank of America is the administrative agent. The bond holders are not creditors of the Debtors which are obligated under any of the co-borrowing or non co-borrowing credit facilities. Thus, the bond holders have no interest in the estates of the various debtors obligated under the loan facilities. Yet, through this Complaint, the Committee tries to ignore this problem of lack of standing by surreptitiously cloaking themselves as creditors of all 230 debtors, while simultaneously disenfranchising the lender defendants of their creditor status and rights. Having now claimed the right to represent the interests of all 230 Debtors, the Committee presumes to request this Court to turn a blind eye to the deal actually struck by the true parties to the loans. Those loan terms, which the Committee ignores, include a disclaimer of consequential damages, a disclaimer of the existence of any fiduciary relationship among the lenders and the borrowers, and provisions that the borrowers will indemnify the lenders for the type of conduct alleged in

the Complaint. As a matter of law, neither ACC nor its bond holders, the "so-called unsecured creditors", are parties to the loan transactions which they challenge. Also, as a matter of law, the lenders cannot be liable in tort for either the structure of the loans or the lenders' compliance with their contractual duties.

The allegations in the Complaint fail for numerous additional reasons, not the least of which is the incomprehensible nature of the pleadings. Despite its terrific length, the Complaint is filled mostly with bare-bones recitals about the names and addresses of the parties (65 pages) and conclusory recitals of certain elements of the 52 separate causes of action (100 pages). The merits of the claims should not be measured by the weight of the Complaint, but by the substance (or lack of substance) of the allegations contained in that weighty document. Despite more than 10 months of investigation by creditors' counsel and a team of experts that included a review of more than five million pages of documents and multiple Rule 2004 examinations, the Committee submitted a Complaint devoid of specific factual allegations necessary to satisfy minimum pleading requirements. Indeed, the Committee accuses some 578 defendants of larceny, fraud, looting, and immoral, callous, malicious and unconscionable behavior. Yet the Committee point to no specific conduct by any specific lender to support these accusations. This lack of specificity is fatal to the Complaint.

Additionally, on its face, the Complaint includes common law intentional tort claims that belong to individual creditors, not the Debtors, and thus, have no place in the bankruptcy court. Many of these same intentional tort claims, including claims for aiding and abetting and equitable estoppel, are not even recognized under the applicable Pennsylvania law. The tort claims also fail under Pennsylvania's two-year statute of limitations.

The breach of fiduciary duty and gross negligence claims stand the established law of lender-creditor relationships on its head. The lenders did not owe fiduciary duties to their borrowers, much less other creditors or the public at large, and the Complaint does not allege any breach of any duty.

The Complaint does not contain allegations of actual knowledge of the Debtors' alleged misconduct by any particular lender, a necessary element of all of the claims except the preference and declaratory judgment claims. Failing to plead any actual knowledge by the lenders, the Committee is relegated to arguing that the lenders "*should have known*" about the allegedly illicit conduct by making inquiries of their borrowers' ultimate parent corporation, ACC; reviewing and analyzing ACC's and all of its other subsidiaries' bank accounts; and making the determination that ACC's auditors, Deloitte & Touche, did not know how to apply generally accepted accounting principles or generally accepted auditing standards. This "*should have known*" scienter standard is insufficient to support intentional tort allegations against any of the lenders.

The equitable claims and the "intentional" fraudulent transfer claims fail because the Committee has not pled specific allegations of fraud or egregious conduct. Nor are the constructive fraudulent transfer claims supported by sufficient factual allegations that the Debtors received less than reasonably equivalent value for the transactions under the credit agreements or that such transactions rendered the Debtors insolvent, unable to repay debts or undercapitalized.

Finally, the Committee does not plead violations of the Bank Holding Company Act. Rather, the only factual allegations in the Complaint plead that the Debtors themselves dictated the package of services any lender would provide on any given transaction. The Committee also

has not alleged an unusual banking practice, an anti-competitive practice, or damages, each required elements of an anti-tying claim under the Bank Holding Company Act.

**STANDARDS FOR DISMISSAL**

In deciding a motion to dismiss, courts will accept as true only well-pleaded factual allegations. *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (quoting *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (internal citation omitted)). A complaint that "consists of conclusory allegations unsupported by factual assertions" does not provide the defendants with proper notice of the claims against them. *Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 162 (S.D.N.Y. 2003) (quoting *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996)). Consequently, courts will not accept "conclusions of law or unwarranted deductions of fact" as true. *Dubai*, 256 F. Supp. 2d at 163 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)). Additionally, if an affirmative defense negating plaintiff's claims appears on the face of the Complaint, the claims should be dismissed under Rule 12(b)(6). *See Color Tile,* 322 F.3d at 158 (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998) (internal citations omitted)).

Courts will not accept as true allegations contradicted by documents. *See The Official Comm. of Unsecured Creditors of Lois/USA, Inc. v. Conseco Fin. Servicing Corp. (In re Lois/USA, Inc.)*, 264 B.R. 69, 90 (Bankr. S.D.N.Y. 2001). In addition to the face of the Complaint, the Court may consider exhibits attached to the Complaint or incorporated in it by reference, matters of which judicial notice may be taken, and documents within the possession of the Committee, on which the Committee relied in drafting the Complaint, or that are an integral

part of the claim. *Id.* at 89. Where the claims are based on a written instrument, the Court may also consider that instrument even if not attached. *Id.* at 90.

The overwhelming majority of claims in this Complaint are based on allegations of fraud. Consequently, the Complaint must comply with the strict pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See Thresher v. Gulf States Paper Corp.*, 244 F. Supp. 2d 175, 178 (W.D.N.Y. 2003); *Strougo v. Bear Stearns & Co., Inc.*, No. 95 Civ. 6532 (RPP). 1996 WL 67730, at *2 (S.D.N.Y. Feb. 16, 1996) (dismissing claims for breach of fiduciary duty and common law fraud for failure to plead with particularity as required by Rule 9(b)). Rule 9(b) requires a plaintiff to plead facts supporting each element of its claim with particularity, specifying the who, what, where, when, why and how of the alleged fraud. That is, the Complaint must specify who made the alleged statements, what those statements are, when and where they were made, and why they are allegedly deceptive or misleading. *In re Merrill Lynch & Co.*, No. 02 MDL 1484 MP, 2003 WL 21500293, at *13 (S.D.N.Y. June 30, 2003) (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)); *Lois*, 264 B.R. at 137 (quoting *Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998)). To satisfy this standard, fraud allegations should be based on actual facts and cannot be based simply upon information and belief.[2] *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987).

Moreover, where, as in this case, a vast number of defendants are named, it is essential for the plaintiff to make particularized allegations concerning *each* defendant's purportedly

[2] In narrow instances where the facts are peculiarly within the knowledge of the defendant, the plaintiff may allege facts based on information and belief if the basis of the belief is detailed in the complaint. *See DiVittorio*, 822 F.2d at 1247. This exception should not apply in a case such as this where the Unsecured Creditors have already conducted extensive discovery. *See Lois*, 265 B.R. at 138. In any event, the Unsecured Creditors have not alleged facts peculiarly within the knowledge of any particular defendant and have not pled facts upon which the belief is allegedly based. *See infra* § I.

fraudulent conduct. *See, e.g., DiVittorio*, 822 F.2d at 1247 (affirming dismissal of fraud claim where plaintiff failed to differentiate among defendants) (citing *Natowitz v. Mehlman*, 542 F. Supp. 674, 676 (S.D.N.Y. 1982)). The lumping of hundreds of defendants into broad factual allegations is not permitted. *Id.*

As this Court has recognized, in resolving a motion to dismiss "the court can take into account the investigation available to the plaintiff at the stage in the proceeding, and in particular the extent of access to information that the plaintiff had, including plaintiff's access to discovery." *Lois*, 265 B.R. at 138. In this case, the Committee has had significant access to the documents and personnel of the Debtors for more than 10 months; they have reviewed, with the assistance of expert consultants, more than 5 million pages of documents; and have conducted multiple Rule 2004 examinations of Defendants. (*See* Motion of Unsecured Creditors for Order Approving Stipulation Authorizing the Creditors' Committee to Prosecute Claims and Causes of Action Against the Pre-Petition Agents, ¶ 10 [Docket Nos. 1855, 1856]) In all, the Committee, along with the Equity Committee, and their respective experts, spent over $10 million in investigating potential claims prior to filing the Complaint. (*See* Interim Applications for Payment of Professional Services rendered by the Committee's Counsel and Other Professionals and by Equity Counsel and Other Professionals [Docket Nos. 1149, 1151-53, 1610, 1611, 1616, 1617, 1619, 2405, 2408]) Thus, the Committee is in possession of more than ample information to assess their asserted claims and the Complaint, therefore, should be subject to a much stricter review.

## PENNSYLVANIA LAW CONTROLS

The Committee has not stated which law should apply to the claims they have asserted, instead pleading in the case of state law fraudulent transfer claims that *either* North Carolina,

Pennsylvania, Illinois, New York, or Texas law could possibly apply. (Complaint ¶ 608) Such indecision on the part of the Committee is symptomatic of the systemic flaws in the Complaint, such as the refusal or inability to focus on a particular Debtor and its financial state.[3]

It is Bank of America's position that Pennsylvania law governs the state law claims asserted in this case. When exercising bankruptcy jurisdiction over state law claims, courts apply the choice of law rules of the forum state. *Bianco v. Erkins* (*In re Gaston & Snow*), 243 F.3d 599, 601-02 (2d Cir. 2001). New York applies an "interest analysis" to determine the applicable law for tort claims. *Babcock v*. Jackson, 240 N.Y.S.2d 743, 752 (N.Y. 1963); *see also Lois*, 264 B.R. at 107 (citing *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996)). The "interest analysis" focuses almost exclusively on the parties' domiciles and the locus of the tort. *Lois*, 264 B.R. at 107. For the types of state law claims alleged in this case, including fraud, gross negligence, breach of fiduciary duty, aiding and abetting, equitable estoppel and state law fraudulent transfer, the substantive law of the state in which the injury was suffered – rather than the state where the fraudulent conduct was initiated – governs.[4] *See id.* at 108 ("[W]hen a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made") (citing *Sack v. V.T. Low*, 478 F.2d 360, 365-66 (2d Cir.1973)); *Color Tile*, 80 F. Supp. 2d at 135 (applying Texas law to negligence, breach of fiduciary duty and contract claims where most activity and defendant's principal place of business were located in Texas).

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[3] There being no current published financials for any of the 230 debtors, it is beyond credulity to believe that the Committee has facts to support a claim of insolvency. Insolvency is not presumed.

[4] To the extent the breach of fiduciary duty claims are based on alleged failures to perform duties arising under the Century Facility, such breach of fiduciary duty claims are governed by the New York choice of law provision in the Century Credit Agreement. (Century Credit Agreement, Joint Appendix 69, ¶ 13.6) *See Lois*, 264 B.R. at 105-06 (enforcing contractual choice of law provision to breach of fiduciary duty claims where duties among parties defined by contract).

In this case, the location of the alleged acts giving rise to the tort claims and the alleged injuries therefrom would have both occurred in Pennsylvania, where the Century Debtors had their principal place of business, and where the relevant financial transactions would have been consummated. (Complaint ¶ 20; Century Credit Agreement, Joint Appendix 69 at signature page (noting the address for all Restricted Borrowers as Coudersport, PA); SEC Form 8-K filed April 24, 2003, Joint Appendix 70 (identifying address for all Debtors as Coudersport, PA); Bankruptcy Petitions filed by Century Debtors (listing Coudersport, PA as their principal place of business [Docket No. 1, Case No. 02-41812 and Docket No. 1, Case No. 02-41948]) Under these circumstances, Pennsylvania law applies to the Committee's state law claims. *See Lois*, 264 B.R. at 108 ("Lois' headquarters and principal place of business were located in New York. If Lois was wronged as a result of the alleged representations, it was injured in New York.").

## ARGUMENT

### I. THE COMPLAINT FAILS TO SATISFY MINIMUM PLEADING REQUIREMENTS (ALL COUNTS)

The Complaint, while long on paragraphs, is very short on substantive factual allegations in violation of both Rules 8 and 9 of the Federal Rules of Civil Procedure. Because the Complaint also contains numerous conflicting allegations and conclusions that render the Complaint so vague and indefinite that the Defendants cannot reasonably respond, the Complaint violates Rule 12(e) of the Federal Rules of Civil Procedure.

As noted *supra* at pp 12-14, allegations of fraud cannot be made on information and belief. *See DiVittorio*, 822 F.2d at 1247. The claims in the Complaint rest on allegedly fraudulently-structured loan agreements and an allegedly fraudulent scheme related to the use of funds from those loan agreements. (*See, e.g.*, Complaint ¶¶ 4, 480, 583, 605, 818, 855, 861, 863, 868, 878, 938) Yet, the factual allegations asserted against the lenders are based almost entirely

"upon information and belief." For instance, allegations as to what the lenders knew and how they knew it are pled "upon information and belief." (Complaint ¶¶ 435, 441, 446, 451, 455, 485, 487, 492) Likewise, speculation that the lenders had any relationship with the Century Debtors other than that of a lender-creditor is based "upon information and belief." (Complaint ¶¶ 502, 510, 525) Disregarding these baseless allegations, which this Court should do, the Complaint does nothing more than accuse the lenders of loaning money to the Debtors consistent with the terms of the various loan agreements and without any knowledge of or intent to participate in any acts of fraud.

The Complaint also fails to specify the allegations against particular defendants. Where a plaintiff alleges that multiple defendants are liable for the same wrongdoing, the Complaint must specify the nature of each defendant's alleged participation in the wrongdoing. *See DiVittorio,* 822 F.2d at 1247 (citing *Natowitz,* 542 F. Supp. at 676); *Feinberg v. Katz*, No. 99 Civ. 45(CSH), 2002 WL 1751135, at *14-15 (S.D.N.Y. July 26, 2002) (conclusory allegations lumping together RICO defendants insufficient to state a claim for racketeering). A plaintiff may not rely upon blanket references to the acts of all defendants without identifying each defendant's specific conduct. *Lobatto v. Berney,* No. 98 CIV. 1984 SWK., 1999 WL 672994, at *9 (S.D.N.Y. 1999) (quoting *Scone Investments, L.P. v. American Third Market Corp.*, No. 97 Civ. 3802, 1998 WL 205338, at *4 (S.D.N.Y. Apr. 28, 1998)). A complaint that "clump[s] together [the alleged wrongdoing of all defendants] in vague allegations" cannot withstand a motion to dismiss. *Polar Int'l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225, 236 (S.D.N.Y. 2000) (quoting *Ellison v. American Image Motor Co.*, 36 F. Supp. 2d 628, 640 (S.D.N.Y. 1999)).

The Committee routinely lumps all 378 named and 200 unnamed defendants together in their allegations of alleged wrongdoing or plead in groups, such as unaffiliated "Agent Banks,"

"Investment Banks," and "Co-Borrowing Lenders." By making such global allegations against the Defendants, the Committee has failed to sufficiently plead allegations against any particular Defendant on any particular loan transaction. *See Lobatto,* 1999 WL 672994, at *10 (dismissing complaint that failed to "specifically identify each defendant's role in the fraud and the allegedly fraudulent statements made by each defendant."); *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 178 (5th Cir. 1997) ("A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail.").

The Complaint globally lumps and clumps acts by all Defendants that cannot apply equally to all 578 named and unnamed defendants. For instance:

- **Every lender** that participated in any lending arrangement that included both Debtors and Rigas Family Entities as borrowers knew "that the looting occurred" almost immediately after the deals "closed and that it continued thereafter." (Complaint ¶ 6)

- "**The Co-Borrowing Lenders** lent **[apparently all of] the Debtors** billions of dollars with knowledge or reckless disregard of the fact that the Rigas Family was causing [apparently all of] the Debtors to fraudulently conceal from the public[5] and other creditors . . ." (Complaint ¶ 9) (emphasis added)

- Apparently **all 578 "Defendants** provided extensive advisory services to the Debtors and injected themselves into a position of confidence and trust wherein they offered counsel on numerous business and financial issues." (Complaint ¶ 13) (emphasis added)

- All 578 of the **Defendants** "knew or recklessly disregarded the structure and fraudulent use of the [cash management system]." (Complaint ¶ 475)

Such group treatment does not satisfy the requirement that "each defendant's" participation in the wrongful conduct be stated with particularity. *See, e.g., DiVittorio*, 822 F.2d at 1247; *Lois*,

[5] Notably, the Century Debtors do not even have public creditors. Nor do the Century Debtors have any obligations to make public disclosures.

264 B.R. at 139-40 (finding a complaint failed to plead how acts of one lender might apply to second lender, against whom no direct conduct was specifically alleged).

Likewise, where the Complaint does limit its allegations to less than all of the Defendants, the allegations are nonetheless so general that it is not possible to identify the specific defendants who are alleged to have committed a specific act:

- "[T]he Rigas Family and **certain** Co-Borrowing Lenders structured the Co-Borrowing facilities knowing that the [Rigas Family Entities] . . . were entitled to draw and in fact did draw billions of dollars . . . and would not be able to repay" without Debtors' assets. (Complaint ¶ 5) (emphasis added)

- "Since well before the closing of the Co-Borrowing Facilities until shortly before the Debtors' bankruptcy filing, **many of the Defendants** provided significant underwriting, investment banking, advisory and other financial services to the Debtors and the Rigas Family." (Complaint ¶ 8) (emphasis added)

- "As a result of the extensive relationship with the Debtors and the Rigas Family, **these Defendants** obtained confidential information concerning the financial affairs of the Debtors and the Rigas Family." (Complaint ¶8) (emphasis added)

- "To obtain these fees, **several** of the Agent Banks violated their own lending policies . . . ." (Complaint ¶ 10) (emphasis added)

- "Aware of obvious red flags, **many** of the Co-Borrowing Lenders merely rubber-stamped the Co-Borrowing facilities . . . ." (Complaint ¶ 10) (emphasis added)

- "[T]he Debtors and **certain** of the Co-Borrowing Lenders structured each of the Co-Borrowing Facilities to leverage the Debtors' credit to provide the Rigas Family with access to billions of dollars of loans." (Complaint ¶ 446) (emphasis added)

- "[T]he Debtors informed **certain** of the Agent Banks that they 'specifically intended a portion of the facility to be distributed to the Rigas Family for purposes of participating in the upcoming [ACC] equity offering.'" (Complaint ¶ 450) (emphasis added) (underlining omitted)

- **"[M]any** Defendants had a . . . substantial relationship with the Debtors and the Rigas Family that provided them with significantly more information about the fraud." (Complaint ¶ 483) (emphasis added)

- "[**M]any, if not all,** Defendants knew or recklessly disregarded that ACC was understating its total bank debt . . . ." (Complaint ¶ 486) (emphasis added)

- "**Substantially all** Agent Banks had Investment Bank affiliates that rendered significant underwriting, investment banking, and other advisory services to the Debtors." (Complaint ¶ 495) (emphasis added)

- "[**M]any** of the Agent Banks and their affiliated Investment Banks provided significant debt and equity financing, underwriting, investment banking advice and other financial services to ACC, to certain of the RFEs, and directly to members of the Rigas Family." (Complaint ¶ 502) (emphasis added)

- "**Many** of the Agent Banks approved the Co-Borrowing Facilities even though their total credit exposure to the Debtors and the Rigas Family exceeded lending policy limits." (Complaint ¶ 512) (emphasis added)

In contrast to these global allegations, other than identifying Bank of America as a syndicate member in a particular loan facility, the Complaint rarely mentions Bank of America specifically by name, and each mention does nothing more than accuse the bank of complying with its loan agreement. (*See* Complaint ¶¶ 11, 462, 491, 498, 505, 510, 515-16, 525-26) Nowhere does the Committee connect the alleged conduct by Bank of America to any particular Debtor.

The Complaint is also full of ambiguous or conflicting statements that leave the Defendants without any idea of the true allegations against them. For instance, the Complaint alleges that "[p]rior to the closing of each of the Co-Borrowing Facilities, it was clear to the Co-Borrowing Lenders *[which lenders? the ones for a specific co-borrowing facility? or all of the lenders?]* that the RFE co-borrowers had insufficient assets . . . to repay their respective share of the amounts initially drawn and likely to be drawn thereafter." (Complaint ¶ 448) These broad and ambiguous allegations carry over into the 52 separate causes of action and render it impossible to decipher what conduct is alleged to support any particular claim.

No defendant should be required to parse through the allegations in the Complaint – to divine the proverbial "who, what, when, where, how and why." *See, e.g.*, FED. R. CIV. P. 9(b). At a minimum, the Complaint must tell each defendant who is the complainant and identify the conduct that defendant allegedly committed that would support a cause of action, and such allegations must be based on more than just rank speculation. Thus, the Complaint should be dismissed.[6]

Alternatively, the Complaint's lumping and clumping results in a pleading "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." *See* FED. R. CIV. P. 12(e). Thus, the Committee should be required to replead its allegations asserting a more definite statement as to the allegations by any particular Debtor against any specific defendant. *Id.*

## II. THE COMMITTEE LACKS STANDING TO PURSUE THE TORT CLAIMS ON BEHALF OF THE DEBTORS (COUNTS 36-39, 46, 48)

Where a corporation (through its management, agent or otherwise) cooperates in misconduct, neither the debtor nor the creditors' committee have standing to bring suit against third parties for their alleged participation in such wrongdoing. *The Mediators, Inc. v. Manney* (*In re The Mediators, Inc.*), 105 F.3d 822, 826 (2d Cir. 1997) (a corporation "has no standing to assert aiding-and-abetting claims against third parties for cooperating in the very misconduct that it had initiated"); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (same). Any such claim accrues to individual creditors, not to a debtor. *See Mediators*, 105 F.3d

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[6] There is no need to allow the Committee an opportunity to replead in light of the substantial discovery they have conducted prior to filing the Complaint and their own statements before this Court. (*See* Tr. 07/29/03 hearing on Stipulation, at 28-29 [Docket Nos. 1961, 1964], Joint Appendix 68 ("there are huge qualitative differences among the various defendants and among the various claims and a lot of work we put into it and **we don't need more time to come up with a complaint[;] we are satisfied with the work that we did."**))

at 826; *Wagoner*, 944 F.2d at 120; *Breeden v. Kirkpatrick & Lockhart, LLP*, (*In re Bennett Funding Group, Inc.*), 268 B.R. 704, 709 (S.D.N.Y. 2001) (applying rule in dismissing claims for malpractice, breach of fiduciary duty and negligent misrepresentation), *aff'd*, 336 F.3d 94 (2d Cir. 2003). Consequently, courts lack subject matter jurisdiction to entertain such actions brought by or for a debtor. *Mediators*, 105 F.3d at 826; *Wagoner*, 944 F.2d at 120; *Hirsch*, 72 F.3d at 1094; FED. R. CIV. P. 12(b)(1).

Similarly, the common law doctrine of *in pari delicto* prohibits a party who participates in wrongful conduct from recovering against another alleged participant. *Official Comm. of Unsecured Creditors v. R.S. Lafferty & Co.*, 267 F.3d 340, 360 (3rd Cir. 2001) (dismissing unsecured creditors' fraud claims against lenders on the basis of *in pari delicto* doctrine because debtors participated in alleged fraud).

The Complaint points to the Debtors and their senior management as primary participants in the alleged tortious conduct for which they seek to hold the Defendants liable. (*See* Complaint ¶ 417 ("Debtors and the Rigas Family used bank debt . . . to perpetrate a massive fraud on creditors other than Defendants"); ¶ 454-55 ("Debtors and the Rigas Family expressly advised the CCH Agent Banks that they intended to use the proceeds from the CCH Co-Borrowing Facility to acquire assets for the personal account of the Rigas Family."); *see also* ¶¶ 476, 859-75) In numerous counts, the Committee does not even attempt to mask that they are asserting claims on behalf of individual creditors and the public at large for harms allegedly caused by the Debtors. (Complaint ¶¶ 857, 865, 874, 883) In fact, several leading members of the Committee have already brought multiple suits in the Western District of New York on the same claims alleged in this Complaint.[7] *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1094 (2d Cir.

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[7] *See Appaloosa Investment Limited Partnership I, et al v. Deloitte & Touche, et al.*, Civil Action No. 03 CV 0236 (SCF), pending in the United States District Court for the Western District of New York, filed

1995) (noting existence of class action lawsuits by investors in concluding same claims had no place in bankruptcy proceedings). Because the Debtors are alleged to have participated in the very misconduct alleged in the Complaint, the tort claims belong, if at all, to individual creditors and thus, have no place in this bankruptcy proceeding.

## III. THERE CAN BE NO LIABILITY IN TORT FOR COMPLIANCE WITH THE TERMS OF A CONTRACT (COUNTS 33, 36-39, 46, 48)

It is well-established that where parties enter into a contract, their rights and obligations are defined by the contract and courts will not look beyond the terms of the agreement to determine such obligations. *See Sterbenz v. Attina*, 205 F. Supp. 2d 65, 70 (S.D.N.Y. 2002); *In re Minpeco, USA, Inc.*, 237 B.R. 12, 26 (Bankr. S.D.N.Y. 1997) ("[T]he contract as written governs the relationship of the parties and, . . . courts are not at liberty to impose obligations . . . which are inconsistent with the terms of the contract[.]"); *Pennsylvania Chiropractic Ass'n v. Independence Blue Cross*, No. 2705, 2001 WL 1807781, at *6 (Pa. Ct. Com. Pl. July 16, 2001) ("[T]he law will not imply a contract different than that which the parties have expressly adopted.") (citation omitted). Thus, courts consistently dismiss tort claims arising out of contractual obligations. *Freestone v. New England Log Homes, Inc.*, 819 A.2d 550, 553-54 (Sup. Ct. Pa. 2003) (dismissing claim for negligent advice where negligence alleged was merely "an outgrowth of the contractual obligation of [defendant]"); *Givoldi, Inc. v. United Parcel Serv.*,

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on March 26, 2003 (the "Appaloosa Suit"). All of the plaintiffs in the Appaloosa Suit are represented by members of the Unsecured Creditors' Committee. *See* Appointment of Committee of Unsecured Creditors, July 11, 2002 [Docket No. 108]. *See also W.R. Huff Asset Management Co., et al. v. Deloitte & Touche LLP, et al*, Civil Action No. 02 CV 0825 S(F), pending in the United States District Court for the Western District of New York (claims arise out of the purchase of notes); *W.R. Huff Asset Management Co., LLC, et al. v. Deloitte & Touche LLP*, Civil Action No. 02 CV 0417 S(F), pending in the United States District Court for the Western District of New York (claims arise out of the purchase of bonds) (collectively, the "Huff Suits"). W.R. Huff Asset Management Co. is a member of the Unsecured Creditors' Committee.

729 N.Y.S.2d 25, 27 (1st Dept. 2001) (dismissing claim for negligence where alleged legal duty actually arose from contract).

Moreover, compliance with the terms of a contract bars liability for alleged torts. *See Harris Trust & Sav. v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 29 (2d Cir. 2002) (finding that an insurer-manager could not breach his fiduciary duty by complying with the terms of an ERISA plan); *see also Hale Trucks of Md. v. Volvo Trucks of N. Am.*, 224 F. Supp. 2d 1010, 1025 (D. Md. 2002) (dismissing claim for breach of fiduciary duty notwithstanding defendant's intent to harm because the defendant's conduct conformed to the terms of the lending agreement between plaintiff and its lender); *Hackeling v. Charter Financial, Inc. (In re Luis Electrical Contracting Corp.)*, 149 B.R. 751, 759-60 (E.D.N.Y. 1992) (finding that complying with terms of a loan agreement did not support a fraudulent transfer claim, specifically stating "[t]he Defendants' performances pursuant to both the Loans and Leases gave rise to valid debts owed by the Debtor to the Defendants.").

Bank of America and the Century Debtors defined their respective rights and duties in the Century Credit Agreement.[8] Thus, the yardstick of the claims against Bank of America, and any alleged breach of duties, is the loan documents which were approved and signed by specific debtors and contemporaneously disclosed to the public in multiple filings with the Securities and Exchange Commission. Compliance with the terms of these loan agreements bars the claims that the Committee now seeks to bring.

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[8] These rights and duties included disclaimers of any fiduciary relationship among the parties, a waiver of recovery of any consequential damages, and an agreement by the Century Debtors to indemnify Bank of America and the other Century Lenders. Specifically, the relevant Debtors agreed to indemnify the Century Lenders from, among other things, claims relating to the actual or proposed use of the loan proceeds except to the extent the claim resulted from gross negligence or willful misconduct. (Century Credit Agreement, Joint Appendix 69, ¶ 11.12) The Committee has not stated legitimate claims for gross negligence or willful misconduct. Moreover, the indemnity provisions would bar claims for negligence and those claims based on a "*should have known*" scienter standard.

The Committee does not claim that Bank of America or the syndicate lenders failed to fulfill their obligations under the Century Credit Agreement in all respects. On the contrary, its complaint is that compliance with the terms of the Century Credit Agreement was unfair to the Debtors. (Complaint ¶¶ 4, 6, 447, 461) The Committee cannot ignore the Debtors' contractual agreement and may not convert Bank of America's compliance with the negotiated obligations under the Century Credit Agreement into tort liability.

## IV. THE TORT CLAIMS ARE TIME BARRED (COUNTS 36 – 39)

When exercising bankruptcy jurisdiction over state law claims under 28 U.S.C. § 1334(b), courts apply the choice of law rules of the forum state to determine the applicable statute of limitations. *Official Comm. of Asbestos Claimants of G-1 Holdings, Inc. v. Heyman*, 277 B.R. 20, 29-30 (S.D.N.Y. 2002) (applying New York's choice-of-law rules to determine the applicable statute of limitations in a case brought under § 1334(b)). Under CPLR 202, where, as in this case, the plaintiff is not a New York resident,[9] the applicable statute of limitations is the shorter of New York's limitations period or the limitations period of the state where the cause of action accrued. *Insurance Co of North Am. v. ABB Power Generation, Inc.,* 91 N.Y. 2d 180, 187-88 (N.Y. 1997).

Here, each of the claims accrued in Pennsylvania. *See supra* at pp. 14-16. The applicable limitations period in Pennsylvania for the Committee's tort claims is two years and limitations began to run when the alleged conduct giving rise to the tort occurred. 42 Pa.C.S.A. § 5524; *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 941 (Pa. Super. Ct. 2002) (two year statute of limitations under Pennsylvania law applies to breach of fiduciary duty, aiding and abetting and

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[9] The Century Debtors are not New York residents. (Complaint ¶ 20; Century Credit Agreement, Joint Appendix 69 at p. 81 (noting the address for all Restricted Borrowers as Coudersport, PA); SEC Form 8-K filed April 24, 2003, Joint Appendix 70 (identifying address for all Debtors as Coudersport, PA))

negligence claims); *F&G Assocs. v. Pomerantz*, 47 Pa. D. C. 4th 173, 175 (Pa. Ct. Com. Pl. 2000).

The Committee alleges the Agent Banks knew prior to the closing of the UCA/HHC Facility in 1999 that the Debtors and the Rigas family were using loan proceeds for purposes benefiting only the Rigas family. (Complaint ¶ 450) According to the Complaint, this alleged knowledge carried over to the Century Facility, which was executed April 14, 2000. (Complaint ¶¶ 454-55 ("Based on the substantial participation of CCH Lenders [in the Century Facility] that had participated in the UCA/HHC Co-Borrowing Facility, the CCH Lenders also knew that the Rigas Family had been using the proceeds of other co-borrowing loans for fraudulent purposes.")) Thus, allegations that the very structure of the loan agreements was tortious, claims of a scheme to misuse funds under the various loan agreements, and failure to disclose knowledge of any such scheme accrued no later than April 14, 2000 (if not 1999).[10] The statute of limitations, therefore, ran no later than April 14, 2002, two and one-half months prior to Debtors' bankruptcy filing.

## V. THE COMMITTEE FAILS TO STATE A CLAIM FOR AIDING AND ABETTING FRAUD (COUNT 38) OR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY (COUNT 37)

The Committee complains the Agent Banks aided and abetted officers or directors of ACC in alleged breaches of their fiduciary duties and acts of fraud against the Debtors. The aiding and abetting claims rest on several improper assumptions, not the least of which is the fact

[10] The claims are not saved by allegations of subsequent borrowings under the loan agreements. Allegations of a tortious scheme accrue "when the alleged breach of duty occurs," regardless if subsequent acts furthering the tort or continued financial harm allegedly occurs later. *F&G Assocs.*, 47 Pa. D. & C. 4th 173, 175 (quoting *Garcia v. Comm. Legal Servs. Corp.*, 524 A.2d 980, 986 (Pa. 1987)); *see Tyler v. O'Neill*, No. Civ. A. 97-3353, 1998 WL 961383, at *2 (E.D Pa. Dec. 15, 1998), *aff'd*, 189 F.3d 465 (3rd Cir. 1999); *see also Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 12 F. Supp. 2d 391, 417 (M.D. Pa. 1998) (applying Pennsylvania law and concluding that the "continuing tort doctrine does not extend the statute of limitations on negligence claims or other tort claims.").

that such claims have not been recognized under Pennsylvania law. Further, the allegations do not give rise to a claim of fraud or breach of fiduciary duty, particularly as to the Century Debtors and the Century Facility. The claims also fail because the Committee does not plead knowing participation and substantial assistance in any breach of fiduciary duty or fraud.

### A. Pennsylvania Does Not Recognize Claims For Aiding And Abetting Fraud

Pennsylvania does not recognize a cause of action for aiding and abetting fraud. *In re Jack Greenberg*, 240 B.R. 486, 524 (Bankr. E.D. Pa. 1999) (internal citation omitted); *see also S. Kane & Son Profit Sharing Trust v. Marine Midland Bank*, No. Civ. A. 95-7058, 1996 WL 325894, at *9 (E.D. Pa. Jun. 13, 1996) (summary judgment dismissing claim for aiding and abetting fraud because "Pennsylvania has not adopted [that] cause of action"); 37 AM. JUR. 2D FRAUD AND DECEIT § 302 (recognizing that Pennsylvania does not recognize a claim for aiding and abetting fraud) (citing *Greenberg*, 240 B.R. 486).

### B. Pennsylvania Does Not Recognize Claims For Aiding And Abetting Breach Of Fiduciary Duty

The Pennsylvania Supreme Court also has not recognized or adopted a cause of action for aiding and abetting breach of fiduciary duty. *Daniel Boone Area School Dist. v. Lehman Bros., Inc.*, 187 F. Supp. 2d 400, 413 (W.D. Pa. 2002) (dismissing claim for aiding and abetting breach of fiduciary duty because such a claim has not been recognized under Pennsylvania law). As the court in *Daniel Boone* recognized, a claim for aiding and abetting breach of fiduciary duty is based on Restatement (Second) of Torts § 876(b), which the Pennsylvania Supreme Court has not adopted. 187 F. Supp. 2d at 413; *accord Clayton v. McCullough*, 670 A.2d 710, 713 (Pa. Super. Ct. 1996) ("Clearly we are not bound by section 876(b) of the Restatement 2d, as it has not been adopted by the Pennsylvania Supreme Court"). Allowing such a claim would work "a significant expansion of Pennsylvania tort liability." *Daniel Boone*, 187 F. Supp. 2d at 413.

Although some lower courts have speculated that, if faced with the question, the Pennsylvania Supreme Court might recognize a claim for aiding and abetting a fiduciary duty,[11] in the absence of such recognition, this Court should follow *Daniel Boone*.

### C. The Committee Otherwise Fails To State A Claim For Aiding And Abetting Breach Of Fiduciary Duty Or Fraud

Even if Pennsylvania recognized either of the asserted aiding and abetting claims, the Committee has not stated such a claim. Under Section 876(b) of the Restatement (Second) of Torts, the elements of a claim for aiding and abetting breach of fiduciary duty would be: (1) a breach, by a fiduciary, of obligations to another; (2) knowledge by defendant that the other's conduct constitutes a breach of fiduciary duty; and (3) substantial assistance or encouragement by defendant in the breach. Restatement (Second) of Torts, § 876(b). While Pennsylvania does not recognize the cause of action, to state a claim for aiding and abetting fraud under New York law, a plaintiff must plead facts showing: (1) the existence of a fraud; (2) defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission, leading to plaintiff's damages. *Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (citing *Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000)).

#### 1. The Committee Has Not Alleged The Existence Of An Underlying Fraud Or Breach of Fiduciary Duty

Despite repeated perfunctory statements that the Rigas Family perpetrated a massive fraudulent scheme, the details of that scheme are not apparent.

[11] *See Kaiser v. Stewart*, No. Civ. A 96-6643, 1997 WL 476455, at *16-17 (E.D. Pa. Aug. 19, 1997) (predicting that Pennsylvania Supreme Court would adopt a claim for aiding and abetting breach of fiduciary duty if faced with the question).

Fraud requires a misrepresentation or omission of material fact related to a particular transaction upon which the Debtors justifiably relied. *Thompson v. The Glenmede Trust Co.*, No. 04428, 2003 WL 1848011, at *1 (Pa. Ct. Com. Pl. Feb. 18, 2003). What exactly is the material omission or misrepresentation related to the Century Facility? On what misrepresentation or omission did the Debtors reasonably rely, especially the "Debtors" (e.g., ACC) who were not parties to the Century Facility? The bulk of what the Complaint characterizes as fraud is nothing more than use of funds by one borrower in a way that allegedly did not benefit the other borrowers. The remaining fraud allegations refer to the failure to disclose the allegedly unfair nature of these transactions. (Complaint ¶¶ 860, 861, 868) However, under the terms of the publicly-disclosed Century Credit Agreement, Highland Prestige Georgia, Inc. ("Highland Prestige") a Rigas Family Entity, just like the other co-borrowing Debtors, had a contractual right to borrow money and hold the Century Debtors jointly and severally liable for that obligation. (*See, e.g.,* Century Credit Agreement, Joint Appendix 69, ¶¶ 7.3 (defining conditions precedent to borrowings under the facility), ¶ 9.6 ("Restricted Borrowers shall be jointly and severally liable for the Obligations.")) The structure of the Century Facility and use of proceeds from that loan facility were express in the credit agreement and thus, were neither omissions nor misrepresentations of material fact upon which the Century Debtors justifiably relied. *See*, *e.g.*, *Forms, Inc. v. American Standard, Inc.*, 546 F. Supp. 314, 319-20 (E.D. Pa. 1982) (finding conduct consistent with the express terms of a contract does not constitute a misrepresentation and noting that "even if a factual misrepresentation did occur, [plaintiff] could not justifiably rely on such a misrepresentation since it was contrary to the plain language of the letter."), *aff'd*, 725 F.2d 667 (3d Cir. 1983).

To the extent the Committee complains that funds borrowed were not ultimately used for purposes outlined in the credit agreements, such a claim may give rise to a breach of contract claim by the Century Debtors and the Century Lenders against Highland Prestige; it does not constitute fraud on the part of the lenders. *See Hoydal v. City of New York*, 545 N.Y.S.2d 823, 824 (N.Y. App. Div. 1989) ("It is well established that a 'breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.'") (quoting *Clark-Fitzpatrick, Inc. v. Long Is. R.R.,* 516 N.E.2d 190 (N.Y. 1987)).[12]

Additionally, the Century Debtors are estopped from claiming that ACC's independent directors relied on any misrepresentations or omissions regarding the structure of the loan agreement or use of the loan proceeds. The terms of the agreements, including the fact that they imposed joint and several liability on the co-borrowers, were approved by the board of directors and were publicly disclosed. (*See* Century Credit Agreement, Joint Appendix 69 and 75, ¶¶ 8.2, 8.4, Exs. G-1 and G-2; *see also* SEC 10-Q filed August 14, 2000, Joint Appendix 76, §2) *See Luis*, 149 B.R. at 758 (finding lender justified in relying upon certified copy of board resolution and opinion letter when delivered by officer clothed with authority).

The Committee alleges the same conduct in support of the breach of fiduciary claims. (*See* Complaint ¶ 860) As with the fraud allegations, compliance with a publicly- disclosed loan agreement does not constitute a breach of fiduciary duty. *See supra* § III. Likewise, the Committee fails to plead any facts that demonstrate anyone associated with the Century Debtors

[12] Because the Century Credit Agreement contains a New York choice of law provision, New York law applies to claims arising under or controlled by the contract. However, the outcome would be the same under Pennsylvania law. *See Atchison Casting Corp. v. Deloitte & Touche, LLP*, 2003 WL 1847665, at *1 (Pa. Com. Pl. 2003) (tort claims must be dismissed under the "gist of the action" doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims ...") (quoting *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002)).

owed or breached a fiduciary duty. The Complaint alleges breaches of fiduciary duty by directors and officers of ACC. (Complaint ¶¶ 860 (alleging that "each member of the Rigas Family breached his fiduciary duties to the Debtors as officers and directors of ACC"); ¶ 861 ("Brown and Mulcahey breached [their] fiduciary duties to the Debtors as officers of ACC.") ACC, however, is not a party to the Century Facility. (Century Credit Agreement, Joint Appendix 69) The Complaint does not allege a fiduciary relationship by such directors with any of the other 229 Debtors. The Complaint does not allege that any officer or director of the Century Debtors committed any breach of fiduciary duty. Indeed, the Committee could not do so; the "Unrestricted Borrowers" under the Century Facility, Century Cable Holdings, LLC and Ft. Myers Cablevision, LLC, are limited liability corporations organized under the laws of the State of Delaware. (Century Credit Agreement, Joint Appendix 75, Schedule 8.3) Under Delaware law, limited liability corporations are creatures of contract and any fiduciary duties should be defined by contract. 6 DEL. CODE ANN. tit. 6 § 18-1101(b); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290-91 (Del. 1999). Here, the Complaint does not even identify the members of these limited liability corporations, much less the source of any fiduciary duties owed by any member of these corporations.

The problem with the Committee's case is that it is not really seeking to redress a harm to the Debtors, but rather, an alleged harm to the "public investors" and "arms-length creditors" arising from ACC's allegedly fraudulent financial disclosures. (*See* Complaint ¶ 865 ("public investors and arms-length creditors relied upon ACC's public filings, which . . . were inaccurate")) As noted *supra* such alleged harm to individual creditors and the public at large cannot be addressed in this forum. *See supra* § II. In any event, there is no fraud on the public investors and arms-length creditors from the alleged failure to disclose all outstanding (i.e.

funded) obligations under the Century Facility. Indeed, it is the right to borrow $2.75 billion at any given moment (as opposed to the amount actually borrowed on a particular date) that would have been relevant to any reasonable investor or creditor of ACC. The borrowers under the Century Facility had the right to borrow the entire remaining balance the day after its financial statements were published, and this right to borrow and hold the other borrowers jointly and severally liable for that debt was publicly-disclosed. (Century Credit Agreement, Joint Appendix 69, ¶¶ 7.3, 9.6) Thus, even the claims of fraud against the public at large must fail.

#### 2. The Committee Has Not Alleged Bank Of America Had Actual Knowledge Of Another's Alleged Breach Of Fiduciary Duty Or Fraud

Claims for aiding and abetting both breach of fiduciary duty and fraud require actual knowledge by the defendant of the underlying breach or fraud. *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996) (breach of fiduciary duty), *aff'd*, 152 F.3d 918 (2d Cir. 1998); *Steed Fin. LDC v. Laser Advisers, Inc.*, 258 F. Supp. 2d 272, 282 (S.D.N.Y. 2003) (fraud). Constructive knowledge is not sufficient. *Kolbeck*, 939 F. Supp. at 246; *Steed*, 258 F. Supp. 2d at 282.

Nowhere does the Committee plead facts supporting actual knowledge by Bank of America of any wrongdoing by the Rigases or any other officer or director of ACC or any Century Debtor. Rather, the Complaint makes conclusory allegations and speculates, "upon information and belief," that because of the longstanding relationship of the Agent Banks with ACC, and their participation in numerous lending transactions, the banks either "*must have known*" or "*should have known*" what the officers and directors were doing. The Committee concludes that the Agent Banks must have received notification of the Rigas Family's alleged fraudulent scheme from the Rigases themselves. (*See* Complaint ¶¶ 8, 450, 454-55, 458, 482-83) However, because constructive knowledge is insufficient for aiding and abetting liability, the

Committee's allegations that Bank of America *"should have known"* of the alleged fraud and breach of fiduciary duty are not relevant.

After more than a year of discovery, the Committee cites to only one document allegedly providing notice of the alleged multi-billion dollar fraud perpetrated by the Rigas Family. (*See* Complaint ¶ 454) That document, a letter from James Brown of ACC, which is contained in Request for Proposal sent to potential lenders, states in part:

> [t]he use of proceeds for this facility will be primarily to fund ACC's purchase of the Cleveland, Ohio cable system from Cablevision Systems Corporation ($990 mm), to fund ACC's purchase of certain cable assets from Prestige Communications ($700mm) *and to fund the Rigas families [sic] purchase of certain cable assets from Prestige Communications ($400 mm).*

(Complaint ¶ 454) (emphasis in original). This letter shows only that all three of the borrowers under the Century Facility intended to borrow a portion of the funds. The use of funds under the Century Facility to acquire cable assets was expressly contemplated under the publicly-disclosed terms of the Century Credit Agreement. Moreover, the cable assets purchased by Highland Prestige would have increased the value of Highland Prestige's security interests contributed to the Century Facility. There is no explanation in the Complaint how or why this publicly-disclosed, contractually permitted use of funds was allegedly fraudulent or to whom.

The Committee fails to identify any alleged notice to Bank of America of any fraud. The Committee fails to identify any alleged speaker, the person at Bank of America spoken to, the content of any communication, the time and place of any alleged communication, or any other information concerning any such alleged communication. *See* FED. R. CIV. P. 9(b).

### 3. The Committee Has Not Alleged Substantial Assistance In Another's Breach Of Fiduciary Duty or Fraud

To impose liability on Bank of America for the acts of the Rigases or other ACC board members, the Committee had to plead substantial assistance by Bank of America in an alleged

fraud or breach of fiduciary duty. *See Cromer Finance*, 137 F. Supp. 2d at 470. Substantial assistance exists only "where a defendant 'affirmatively assists, helps conceal, or by virtue of failing to act **when required to do so** enables the fraud to proceed.'" *Id.* (quoting *Nigerian Nat'l Petro. Corp. v. Citibank, N.A.*, No. 98 Civ. 4960 (MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (emphasis added)). The Committee was required to plead the time, place and manner of the alleged substantial assistance by Bank of America in any fraud or breach of fiduciary duty with the particularity required by Rule 9(b). *Varnberg v. Minnick*, 760 F. Supp. 315, 330 (S.D.N.Y. 1991). Substantial assistance also requires a plaintiff to show that the actions of the aider and abettor proximately caused the harm upon which the primary liability is predicated. *Kolbeck*, 939 F. Supp. at 249. "But-for" causation is not sufficient; aider and abettor liability requires the injury to be a direct or reasonably foreseeable result of the conduct. *Id.*

The Committee does not identify any alleged assistance by the Century Lenders in the aiding and abetting claims. (*See* Complaint ¶¶ 862, 871) At most, the Complaint alleges that Bank of America loaned money in compliance with the terms of a credit agreement and failed to discover and then to inform ACC's independent directors how the borrowings were being used. (*See* Complaint ¶¶ 860, 868) Those allegations are patently insufficient to comply with the specificity requirements of FRCP Rules 8 and 9. Moreover, such alleged conduct does not constitute "substantial assistance."

Making funds available to one who uses them in dereliction of their fiduciary duties or to perpetrate a fraud does not demonstrate "substantial assistance." *See Cromer Finance*, 137 F. Supp. 2d at 470-72 (holding that despite investment banks' actual knowledge of the manager's fraudulent scheme and its facilitation of the continuance of that scheme through its extension of credit, plaintiffs' allegations were insufficient to demonstrate "substantial assistance" or

"knowing participation" in the fund manager's breach or fraud). Likewise, a failure to inform ACC that certain borrowings were transferred to Rigas Entities cannot constitute substantial assistance. Because Bank of America was not a fiduciary to the Century borrowers, nor did it have any contractual obligations to ACC related to the Century Facility (*see infra* § VI), any alleged failure to disclose the Rigases' conduct cannot give rise to aider and abettor liability. *Kolbeck*, 939 F. Supp. at 247 ("inaction, or a failure to investigate, constitutes actionable participation only when a defendant owes a fiduciary duty directly to plaintiff; that the primary violator owes a fiduciary duty to the plaintiff is not enough"); *see also Dillon v. Militano*, 731 F. Supp. 634, 639 (S.D.N.Y. 1990) (independent duty to act required for inaction to be deemed "substantial assistance"). Moreover, the Committee fails to plead any injury to the Century Debtors from the Century Lenders loaning money under the Century Facility and not disclosing Highland Prestige's alleged uses of such borrowed funds, much less the type of direct and foreseeable injury necessary to support an aiding and abetting claim.

## VI. THE COMMITTEE FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT 36)

To state a claim for breach of fiduciary duty under Pennsylvania law, a plaintiff must plead facts sufficient to demonstrate: (1) a fiduciary relationship; (2) a breach of fiduciary duty; and (3) resulting damages. *Destefano & Assocs., Inc. v. Cohen*, No. 2775 June Term 2000, 2002 WL 1472340, at *3 (Pa. Ct. Com. Pl. May 23, 2002). The Committee fails to plead a fiduciary duty, breach of fiduciary duty, or damages to the Debtors.

### A. There Is No Fiduciary Relationship Between The Century Debtors And Bank of America

It is well-established that a lender is not a fiduciary of its borrower and a banking relationship does not give rise to a fiduciary relationship. *Morris v. First Union Nat'l Bank*, No.

Civ. A. 01-1953, 2002 WL 47961, at *3 (E.D. Pa. Jan.14, 2002) (citing *Waye v. Commonwealth Bank*, 846 F. Supp. 321, 325 (M.D. Pa. 1994)). Thus, to establish a fiduciary relationship between a lender and borrower, the borrower must plead facts demonstrating it placed confidence in the lender, the lender expressly accepted the role of fiduciary and then exercised substantial control over the borrower's business affairs. *Bohm v. Commerce Union Bank of Tennessee*, 794 F. Supp. 158, 164 (W.D. Pa. 1992) (citing *Yohe v. Yohe*, 353 A.2d 417, 421 (Pa. 1976)); *Blue Line Coal Co. v. Equibank*, 683 F. Supp. 493, 496 (E.D. Pa. 1988) (citing *Stainton v. Tarantino*, 637 F. Supp. 1051, 1066 (E.D. Pa. 1986)). The Committee has not identified which specific Debtors had a relationship with Bank of America, let alone a fiduciary relationship.

#### 1. Bank of America Disclaimed Any Agreement To Act As A Fiduciary To The Debtors

Parties can agree not to be fiduciaries. *Asian Vegetable Research & Dev. Ctr. v. Institute of Int'l Ed.*, 944 F. Supp. 1169, 1177-79 (S.D.N.Y. 1996).[13] The parties to the Century Facility contractually agreed that the relationship of the Century borrowers and lenders was of a debtor-creditor nature:

> The Agents and the Lenders **have no fiduciary relationship with or fiduciary duty to any Loan Party** or Subsidiary thereof arising out of or in connection with the Loan Documents, and the relationship between Agents and the Lenders on the one hand, and Loan Parties and their Subsidiaries, on the other hand, in connection with the Loan Documents is solely that of a debtor and creditor.

[13] The Century Credit Agreement contains a New York choice of law provision. (Century Credit Agreement, Joint Appendix 69, ¶ 13.6) Thus, any fiduciary duties related to conduct under the Century Facility are governed by New York law. *See, e.g., Lois*, 264 B.R. at 105-06 (enforcing contractual choice of law provision to breach of fiduciary duty claims where duties among parties defined by contract).

(Century Credit Agreement, Joint Appendix 69, ¶ 11.5) (emphasis added) Faced with these clear disclaimers of any fiduciary relationship, the Unsecured Creditors cannot and did not allege that Bank of America assumed a position of fiduciary. *Id.*; *accord Lois*, 264 B.R. at 131-32.

**2. Bank Of America Did Not Exercise Substantial Control Over The Debtors**

The Committee asserts a fiduciary relationship between Debtors and the Agent Banks based merely on: (1) the volume of transactions between ACC and the Agent Banks collectively (Complaint ¶¶ 8, 501-507); and (2) the Committee's allegation that the Agent Banks and the Investment Banks provided advice to the Debtors and the Rigas Family in accessing the commercial lending and capital markets (Complaint ¶ 13, 505, 851). Such allegations are patently insufficient to establish substantial control.

Neither a volume of transactions nor the provision of advice is sufficient to establish a fiduciary relationship, particularly where the advice is being provided to a sophisticated, multi-billion dollar conglomerate. *See Bohm*, 794 F. Supp. at 164 ("The fact that [plaintiff] placed confidence in [defendant] to manage and administer the funds does not create a fiduciary relationship. Similarly, the fact that [defendant] gave advice, particularly regarding international transactions, to [plaintiff] does not establish a fiduciary relationship."); *Cosoff v. Rodman*, (*In re W.T. Grant* Co.) 699 F.2d 599, 610-11 (2d Cir. 1983) (monitoring borrower's operations and proffering management advice, without more, does not constitute control). To establish the requisite control, the borrower must demonstrate that the lender was involved in the actual day-to-day management and operations of the borrower or that the lender had the ability to compel the borrower to engage in unusual business transactions. *In re Johnson*, 292 B.R. 821, 828 (Bankr. E.D. Pa. 2003) (citing *Blue Line*, 683 F. Supp. at 496 (internal citations omitted)); *see also Krivo Indus. Supply Co. v. Nat'l. Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir.

1973) ("Merely taking an active part in the management of the debtor corporation does not automatically constitute control."); *James E. McFadden, Inc. v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102, 1105 (E.D. Pa. 1985) (creditor must assume absolute and total control not just take steps to minimize risk).

The case of *In re The Cara Corporation*, 148 B.R. 760 (Bankr. E.D. Pa. 1992) is illustrative. In that case, the debtor claimed a fiduciary relationship arose between it and its bank as a result of: (1) the longstanding duration of their relationship; (2) the bank's renewal and increase of the debtor's line of credit over the years; (3) the bank's extension of credit above the debtor's borrowing limits; and (4) monthly meetings between officials of the bank and the president of debtor to review debtor's business developments and financial status, including identifying to the bank with whom the debtor was doing business. 148 B.R. at 772. The court found that such allegations could not establish the requisite substantial control over debtor's affairs or that the bank had accepted the fiduciary relationship. *Id.*

The Committee has not alleged any control whatsoever by Bank of America. The Committee has not alleged that Bank of America was involved in the day-to-day management and operations of Debtors. It also has not alleged any facts demonstrating that Bank of America, or any other lender for that matter, had the ability to compel the Century Debtors to engage in unusual business transactions. On the contrary, the Committee alleges that the Debtors dictated the terms of lending between the parties. (*See* Complaint ¶ 509 (terms of lending "effectively were dictated by the Rigas Family to the Agent Banks"); ¶ 510 (Agent Banks acceded to terms established by Rigas Family to secure investment bank business); ¶ 511 ("members of the Rigas Family expressly conditioned the granting of investment banking business on participation in the Co-Borrowing Facilities"); and ¶ 514 ("The Rigas Family clearly recognized that offering the

enticement of investment banking fees would cause the Agent Banks to participate in the Co-Borrowing Facilities.”).

**B. The Committee Fails To Allege Breach Of Any Alleged Fiduciary Duty**

The Committee also fails to allege Bank of America breached any duty to any of the Debtors. The Complaint makes the conclusory and incorrect assertion that the Agent Banks breached their alleged fiduciary duties by: (1) approving participation in the co-borrowing facilities; and (2) authorizing funding under those facilities, despite alleged knowledge that (a) the co-borrowing facilities were “fraudulently structured,” (b) the Rigas Family intended to use funds from the facilities for their own purposes, and (c) the Rigas Family was causing ACC to fail to disclose the true extent of its liability under the Facilities. (Complaint ¶ 853)

The breach of fiduciary duty allegations are too vague and ambiguous to put the Agent Banks on notice as to the claim being asserted or how to respond to that claim. *See* FED. R. CIV. P. 8, 9, 12(e). For instance, to whom was a duty allegedly owed? Paragraph 851 pleads that all of the Agent Banks owed all of the Debtors fiduciary duties, but not all Agent Banks had a relationship with all of the Debtors who allegedly breached a duty. It is unclear what conduct is assigned to the Agent Banks (much less the Century Lenders) and what the Investment Banks allegedly did. Who was allegedly harmed? There is no mention of any harm to the Debtors generally, or any specific Debtor, in Count 36 of the Complaint. Paragraph 857 focuses only on harm to the “public investors, arms-length creditors, and public generally.” Additionally, what conduct by whom, allegedly constituted a breach of any particular duty (and to whom)? Because the Complaint fails to articulate any breach of duty by Bank of America, the Complaint has failed to state a claim against Bank of America for breach of fiduciary duty.

## VII. THE COMPLAINT FAILS TO STATE A CLAIM FOR GROSS NEGLIGENCE (COUNT 39)

Gross negligence is the "failure to perform a duty in reckless disregard of the consequences or with such want of care and regard for the consequences as to justify a presumption of willfulness or wantonness." *Williams v. State Civil Serv. Comm'n*, 306 A.2d 419, 422 (Pa. Commw. Ct. 1973).

The Committee contends "[e]ach of the Agent Banks" committed gross negligence by entering into and performing their obligations under the terms of the operative loan agreements, including: (1) approving participation in each of the co-borrowing facilities; and (2) authorizing funding under those facilities despite any alleged knowledge of the Rigas Family's use of the funds. (Complaint ¶ 878) These allegations do not rise to the level of wanton or willful misconduct necessary for gross negligence. Complying with a contract is not gross negligence.

### A. The Committee Fails To Allege Bank Of America Owed Debtors A Duty Of Care

The Committee bases its claim on the conclusory allegation that Bank of America – and every other Agent Bank – owed Debtors a duty of care "[b]y virtue of its fiduciary duty, special relationship and/or superior knowledge with respect to Debtors[.]" (Complaint ¶ 877) A bank generally owes no duty to its borrowers or its guarantors. *See Berry v. First Nat'l Bank*, 892 F. Supp. 127, 128-29 (W.D. Pa. 1994). As addressed above, Bank of America was not a fiduciary of Debtors (*see supra* § VI.A.); the Complaint does not allege actual knowledge by Bank of America of any wrongdoing, much less superior knowledge (*see supra* § V.C.2); and, in any event there is no duty to disclose superior knowledge absent a fiduciary relationship. *See Daniel Boone*, 187 F. Supp. 2d at 408; *S. Kane & Son*, 1996 WL 325894, at *9; *City of Harrisburg v.Bradford Trust Co.,* 621 F. Supp. 463, 473 (D. Pa. 1985).

### B. The Committee Fails To Allege Bank Of America Breached A Duty Of Care

The Committee does not allege facts demonstrating that Bank of America breached any duty owed to the Unsecured Creditors. As with the other tort claims, the crux of the gross negligence claim is that the funds drawn on the Century Facility were used in a way that did not benefit the Debtors. (Complaint ¶ 878) However, compliance with the terms of a loan agreement does not give rise to gross negligence. *See supra* § V. C. 1.

### C. The Committee Fails To Allege Reckless Indifference Or Intent To Harm By Bank Of America

The Committee also has not pled facts establishing Bank of America acted with the requisite reckless disregard, willfulness or wantonness. *See Williams*, 306 A.2d at 422. The Committee merely concludes "[t]he conduct of each of the Agent Banks was wrongful and without justification or excuse," the Agent Banks acted "with actual malice and/or a wanton and willful disregard of Debtors' rights," and such conduct was "unconscionable and unjustifiable." (Complaint ¶ 882) Such general and conclusory allegations are patently insufficient. *Galisson v. Shawnee Mountain Ski Area*, 32 Pa. D. & C.4th 450, 458 (Pa. Com. Pl. 1996) (dismissing gross negligence claim for failure to allege actions by defendant evidencing reckless disregard). For instance, what conduct was wrongful, which agent bank acted wanton or willfully and which Debtors' rights were allegedly violated? Nowhere does the Complaint allege specific acts of misconduct by Bank of America, much less the type of wanton or willful misconduct necessary to show gross negligence. *Id.*

### D. The Gross Negligence Claim Is Barred By The Economic Loss Doctrine

The Committee seeks to recover only for economic harm; they allege no personal or property damage. (Complaint ¶ 883) Pennsylvania law precludes recovery in gross negligence for injuries that are solely economic. *Clemente v. Republic First Bank*, No. 00802, 2003 WL

21244659, at *1 (Pa. Ct. Com. Pl. May 9, 2003) (dismissing claims of negligence and gross negligence seeking solely economic loss); *Thompson v. The Glenmede Trust Co.*, No. 04428 Feb. Term 2002, 2003 WL 1848011, at *2 (Pa. Ct. Com. Pl. Feb. 18, 2003) (claims for gross negligence barred by economic loss doctrine). The doctrine recognizes that "tort law is not intended to compensate parties for losses suffered as a result of breach of duties assumed only by agreement." *Cortez v. Keystone Bank, Inc.*, No. 98-2457, 2000 WL 536666, at *8 (E.D. Pa. May 2, 2000) (internal citations omitted); *see also Auger v. Stouffer Corp.*, No. 93-2529, 1993 WL 364622, at *3-5 (E.D. Pa. Aug. 31, 1993) (claims for gross negligence and negligence barred by economic loss doctrine). This principle is even more appropriate where, as here, the Debtors have contractually disclaimed consequential damages. (Credit Agreement, Joint Appendix 69, ¶ 11.12)

## VIII. THE COMMITTEE FAILS TO STATE A CLAIM FOR EQUITABLE RELIEF (COUNTS 33, 46 AND 48)

Failing on the intentional tort claims, the Committee turns to equity, arguing that the Court should employ principles of equity to make the outcome of the bankruptcy proceedings fair to the creditors. The Complaint proceeds from the false legal premise that bankruptcy courts have a general broad-reaching equitable power to disallow otherwise valid claims. This notion has been rejected by the United States Supreme Court, and a number of lower courts, which have found that a bankruptcy court's equitable powers are narrowly limited to the confines of the Bankruptcy Code. *See Norwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 969 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *Raleigh v. Ill. Dep't Rev.*, 120 S. Ct. 1951, 1957 (2000) (stating bankruptcy court is not authorized to make wholesale substitution of underlying law controlling creditors' entitlements pursuant to equitable power); *see also In re Murgillo*, 176

B.R. 524, 532-34 (9th Cir. 1995) (holding that bankruptcy courts do not have a general equitable power to disallow otherwise valid claims separate from section 510(c)). Thus, the common law equity claims, including unjust enrichment, and equitable estoppel are preempted by Section 510(c) of the Bankruptcy Code.

Additionally, some courts have applied the same reasoning to a claim for recharacterization of debt. *Compare In re Pacific Express, Inc.*, 69 B.R. 112, 115 (9th Cir. 1986) (rejecting the bankruptcy court's authority to recharacterize debt)[14] *to Bayer Corp. v. MascoTech, Inc. (In re Autostyle Plastics, Inc.)*, 269 F.3d 726, 748-49 (6th Cir. 2001) (distinguishing recharacterization of debt claim from equitable subordination claim). *Accord Moglia v. Quantum Industrial Partners, LDC (In re Outboard Marine Corp.)*, No. 02 C 1594, 01 A 0471, 00 B 37405, 2003 WL 21697357, at *4-5 (Bankr. N.D. Ill. 2002) (disagreeing and concluding that bankruptcy court may recharacterize debt as equity). This Court should adopt the Ninth Circuit standard and likewise hold that the bankruptcy courts lack authority to recharacterize debt.

This leaves only a claim for equitable subordination. However, equitable subordination is a very narrow remedy that applies only where a party's conduct is egregious and the Complaint fails to allege any such egregious conduct against Bank of America.

### A. The Committee Fails To State A Claim For Unjust Enrichment (Count 46)

Even if this Court could consider an unjust enrichment claim, a claim for unjust enrichment cannot stand where the benefit at issue is the subject of a written contract. *Birchwood Lakes Comm. Assoc. v. Comis*, 442 A.2d 304, 309 (Pa. Super. Ct. 1982) ("Unjust enrichment is not applicable where the relationship among the parties is based on an express

[14] *Accord In re Lewiston Steam & Power Assocs.*, No. 886-00477-6, 1989 WL 1109341, at *3 (Bankr. N.D. Oh. Aug. 24, 1989).

agreement.") (citing *Third Nat'l Bank & Trust v. Lehigh Valley Coal Co.*, 44 A.2d 571 (Pa. 1945); *Roman Mosaic & Tile Co. v. Vollrath*, 313 A.2d 305 (Pa. Super. Ct. 1973)). Here, the alleged unjust enrichment arises from loan transactions under the Century Facility. (Complaint ¶ 925) Thus, the claim is barred by the existence of a written agreement.

### B. The Equitable Estoppel Claim Is Barred As A Matter Of Law (Count 48)

#### 1. Pennsylvania Law Does Not Recognize An Affirmative Claim For Equitable Estoppel

Equitable estoppel is not a cognizable cause of action under Pennsylvania law. *See, e.g., Carlson v. Arnot-Ogden Mem'l Hosp.*, 918 F.2d 411, 416 (3rd Cir. 1990) (applying Pennsylvania law) (equitable estoppel is not a separate cause of action.); *Graham v. Pennsylvania State Police*, 634 A.2d 849, 851-52 (Pa. Commw. Ct. 1993) ("[E]quitable estoppel . . . has only been recognized as a defense and not a cause of action in itself."); *In re Chateaugay Corp.*, 116 B.R. 887, 912 (Bankr. S.D.N.Y. 1990) (stating that, under Pennsylvania law, "[e]quitable estoppel is a defense which precludes a person from denying or asserting a claim.") Thus, the claim fails as a matter of law.

#### 2. The Committee Fails To Plead Equitable Estoppel

Moreover, the Committee has failed to plead equitable estoppel. To recover for equitable estoppel, the Committee had to plead facts supporting a claim that Bank of America (1) intentionally or negligently misrepresented a material fact; (2) knew or had reason to know that the Century Debtors would rely justifiably on the misrepresentation; and (3) induced the Century Debtors to act to their detriment because of their reliance on the misrepresentation. *Cicchiello v. Bloomsburg Zoning Hearing Board*, 617 A.2d 835, 837 (Pa. Commw. Ct. 1992). The Complaint does not satisfy these elements.

The Committee fails to plead any affirmative misrepresentation by Bank of America, much less any material misrepresentation. *See supra* § V.C.1. Rather, the allegations are based on an alleged failure to discover material facts that allegedly should have been disclosed to "the Debtors." (*See* Complaint ¶¶ 938-39) The Committee also fails to plead knowledge by Bank of America or reliance by the Century Debtors. *See supra* § V.C.1.&2.

### C. The Committee Fails To State A Claim For "Recharacterization Of Debt" (Count 34)

The Committee seeks to recharacterize billions of dollars of loan indebtedness based on alleged inequitable conduct by the "Co-Borrowing Lenders." (Complaint ¶¶ 838-42) The Committee has a fundamental misunderstanding of a recharacterization of debt claim. Recharacterization involves determining whether a purported loan is in fact a disguised capital contribution (*i.e.*, equity); it has nothing to do with whether a claim should be subordinated based on inequitable conduct. *See Bayer Corp. v. MascoTech, Inc. (In re Autostyle Plastics, Inc.)*, 269 F.3d 726, 748-49 (6th Cir. 2001); *Official Comm. of Unsecured Creditors of Interstate Cigar Co. v. Bambu Sales, Inc. (In re Interstate Cigar Co.)*, 182 B.R. 675, 678 (Bankr. E.D.N.Y. 1995). Recharacterization turns on whether a *purported* loan actually constitutes equity, whereas equitable subordination turns on whether a *legitimate* creditor's claim should be subordinated because of inequitable conduct. *Autostyle Plastics*, 269 F.3d at 748-49 (emphasis added). In this case, the Committee pleads itself out of a claim of recharacterization by expressly pleading the existence of a loan transaction. (Complaint ¶¶ 3, 417, 421, 424, 427, 432)

The Complaint actually uses the term "indebtedness" when referencing the very loan advances made the basis of the recharacterization claim. (Complaint ¶ 840) ("The **indebtedness** from such uses of the Co-Borrowing Facilities would be shifted to an RFE, notwithstanding the fact that the Debtors remained liable for all draw downs under the Co-Borrowing Facilities.")

(emphasis added). Furthermore, when introducing the Century Facility, the Complaint uses such phrases as "credit facility(ies)," "bank debt," "bank debt facilities," "Credit Agreement" and "term loan." The Century Facility was not a loan by shareholders or insiders to their company for an increased interest in the company, which would be a more traditional recharacterization scenario. *See Autostyle Plastics*, 269 F. 3d at 748-49 (plaintiff attempted unsuccessfully to recharacterize loans from company shareholders as capital contributions). Rather, the Century Facility was made by a syndicate of banks, with terms, interest, fees and substantial security interests. (*See* Century Credit Agreement, Joint Appendix 69) (Complaint ¶¶ 417, 432) Nowhere does the Committee allege that the Century Facility was a disguised capital contribution. This Court should reject the Committee's recharacterization claim because the Complaint itself alleges unequivocally that the loan transactions at issue in this case constituted "bank debt." Thus, the recharacterization of debt claim fails as a matter of law.

**D. The Committee's Claim For Equitable Disallowance Fails As A Matter Of Law (Count 33)**

As this Court has found, equitable subordination can only be used to reorder priorities, not to disallow them. *Lois*, 264 B.R. at 132 n.158; *see also In re Sunbeam*, 284 B.R. 355, 363 (Bankr. S.D.N.Y. 2002). Thus, as a matter of law, there is no claim for equitable disallowance.

**E. Claims For Equitable Subordination Are Barred As A Matter Of Law (Count 33)**

Equitable subordination is an unusual remedy that should be applied only in the narrowest of circumstances, none of which have been alleged against Bank of America. *See In re Le Café Crème, Ltd.*, 244 B.R. 221, 235 (Bankr. S.D.N.Y. 2000) Where, as in this case, the creditor is not a fiduciary (*see supra* § VI.A.), equitable subordination is not available unless the proponent can show gross and egregious conduct that is tantamount to fraud, misrepresentation,

overreaching, spoliation or conduct involving moral turpitude. *See Sunbeam,* 289 B.R. at 364; *see also Lois*, 264 B.R. at 135.

The Committee has failed to plead any allegations of fraud or egregious misconduct by Bank of America with particularity. *See supra* §§ I, V, VI, and VII. In essence, the claim for equitable subordination is nothing more than a recycling of all of the tort claims. For the reasons stated in response to the common law tort claims, the Committee has not even pled facts supporting misconduct by Bank of America, much less the type of egregious conduct necessary to support equitable subordination. *See supra* §§ I, V, VI, and VII. Indeed, other than identifying Bank of America as a syndicate member in a particular loan facility, the Complaint rarely mentions Bank of America specifically by name, and each mention accuses Bank of America of nothing more than complying with its loan agreement:

- Bank of America had a business relationship with Debtors and the Rigas Family. (Complaint ¶ 508)
- Bank of America made margin loans to members of the Rigas family. (Complaint ¶¶ 11, 462, 515-16)
- Bank of America's records reflect that Highland Prestige, a borrower under the Century Facility, drew $145 million, as permitted under the Century Facility. (Complaint ¶ 491)
- Bank of America approved funding of the co-borrowing facilities based on the fees it was to recover. (Complaint ¶ 498, 525)
- Bank of America helped structure the facilities. (Complaint ¶ 505)
- Bank of America conducted an internal status report after public disclosure of ACC's alleged problems and did not act surprised. (Complaint ¶ 526)
- Bank of America earned fees from the loan transactions. (Complaint ¶ 510)

These allegations amount to nothing more than a claim that Bank of America acted like a bank and complied with its obligations under the Century Facility. Such allegations do not give rise to the type of egregious conduct necessary to support the remarkable remedy of equitable subordination. *See, e.g., Sunbeam*, 284 B.R. at 369.

Nor do the global allegations against the Agent Banks show the type of egregious conduct necessary to support a claim of equitable subordination. For instance, the Committee claims the banks generally should have discovered misuse of funds by ACC or the Rigas Family and should have informed the public. At the outset, the Committee fails to plead any facts demonstrating that Bank of America could have discovered information reflected only in ACC's internal records and not provided to Bank of America. In any event, the failure to demand and review internal records of ACC cannot constitute inequitable conduct because Bank of America had no duty under the Century Facility or otherwise to read ACC's financial statements, second-guess the business judgment of its borrowers or investigate the accounting methods approved by Deloitte & Touche. *See, e.g., Id.* at 369 (finding no inequitable conduct because lenders did not owe duty as part of loan transaction to conduct due diligence over press release). Syndication of the Century Facility does not evidence inequitable conduct as syndication of large loans is a common and acceptable practice. *Id.*

Additionally, a claim may not be equitably subordinated unless that claimant's conduct was inequitable. *See Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 876 (2d Cir. 1991). To the extent the Complaint seeks to ground its equitable subordination claim against Bank of America on the alleged conduct of some other entity, the Complaint must be dismissed.

Nor do allegations that Bank of America participated in co-borrowing facilities in exchange for fees justify equitable subordination. Indeed, such facts "fall far short of establishing the type of self-dealing or otherwise inequitable conduct which courts have found necessary for . . . equitable subordination." *Stratton v. Equitable Bank, N.A.*, 104 B.R. 713, 731 (Bankr. D. Md. 1989), *aff'd*, 912 F.2d 464 (4th Cir. 1990). Even if one of the lenders had knowledge of irregularities in one or more of the Debtors' financial affairs, this fact would not give rise to an equitable subordination claim. *Id.*

Finally, the Committee has failed to allege injury or unfair advantage to other creditors of the *Century Debtors* caused by any conduct of Bank of America. In support of its claim for equitable subordination, the Committee complains globally of harm to arms-length creditors of "the Debtors." (Complaint ¶ 831) However, it is not clear from the Complaint that the Century Debtors have creditors other than the Century Lenders.

### F. Equitable Subordination Would Not Be Consistent with the Bankruptcy Laws

Section 510(c) of the Bankruptcy Code provides that the Court may "subordinate all or part of an allowed claim to all or part of another allowed claim or all or part of any allowed interest to all or part of another interest." 11 U.S.C. § 510(c). Only claims of the same position as other claims may be subordinated. Interests cannot be subordinated to claims or vice versa. *See* 4 Collier on Bankruptcy ¶ 510.05 (15 ed. Rev. 2001); *Badger Freightways, Inc. v. Continental Ill. Nat'l Bank & Trust Co. of Chic.* (*Badger Freightways, Inc.*), 106 B.R. 971, 980 (Bankr. N.D. Ill. 1989). Bank of America's claims against the Century Debtors cannot be subordinated to the interests of ACC bondholders because the bond holders are not like interests of a common debtor as required under Section 510(c). The Complaint does not identify any

creditors of the various Century Debtors. Accordingly, the equitable subordination claim must fail as a matter of law.

## IX. THE COMMITTEE FAILS TO STATE A CLAIM FOR FRAUDULENT TRANSFER (COUNTS 5-8 AND 31)

The Committee claims all obligations of the Century Debtors to repay amounts borrowed by Highland Prestige Georgia, L.P. (a Rigas-owned, ACC-managed entity, "Highland Prestige") under the Century Facility are fraudulent transfers that should be avoided. However, the Century Debtors agreed to be jointly and severally liable with Highland Prestige. This agreement was disclosed to the world in filings made with the Securities Exchange Commission. (*See* SEC 10-Q filed May 15, 2000, Joint Appendix 69; SEC Form 10-Q filed April 14, 2000, Joint Appendix 76) The fact that the Century Debtors are contractually obligated to repay the debts of another entity does not constitute a *per se* fraudulent transfer and the allegations in the Complaint do not otherwise satisfy the elements of either an actual or constructive fraudulent transfer claim. 11 U.S.C. § 548; *See*, *e.g.*, *Luis*, 149 B.R. at 759 ("A loan made to a borrower is no less a loan if it is remitted to a third party at the borrower's direction and on the borrower's behalf.")

### A. The Complaint Fails To Allege An Actual Intent By The Century Debtors To Hinder, Delay Or Defraud Creditors (Counts 5, 7 and 31)

The linchpin of a claim of intentional fraudulent transfer is the existence of an actual intent by the Debtor to hinder, delay or defraud creditors by virtue of the relevant transaction. *See* 11 U.S.C. § 548. The alleged "transfers" in Counts 5 and 7 are the granting of security interests to the Century Lenders under the Century Facility and promising to repay amounts borrowed by Highland Prestige under that facility. (Complaint ¶¶ 577, 578, 580) The alleged "transfers" in Count 31 are funds allegedly used to repay margin loans. (Complaint ¶ 806) The Committee does not allege any acts of fraud related to these transfers. *See supra* §§ I and V.

Instead, with respect to the Century Facility, the Complaint pleads only that it was unfair to the Century Debtors to be saddled with the obligations of another entity, Highland Prestige. (*See* Complaint ¶¶ 581-82) It does not explain how or why allegedly unequal loan distributions are intentionally fraudulent, nor could it. *See, e.g., Sunbeam*, 284 B.R. at 370-71 ("[A] lender may extend a loan to an entity even if it is aware that the borrower ultimately intends to use the funds to repay antecedent debt, or to invest in a speculative venture."); *see also supra* § V. Similarly, with respect to the so-called "margin loans" in Count 31, the Committee does not even identify from which Debtor's estate funds were allegedly transferred, much less what about such transactions was fraudulent.

The Committee may believe that the Century Debtors were on the bad end of a business deal with Highland Prestige, but it has not pled the type of specific conduct by the Century Debtors that would support a fraudulent transfer claim. *Atlanta Shipping Corp. v. Chemical Bank*, 818 F.2d 240, 251 (2d Cir. 1987) (fraudulent transfer claims must be pled with specificity under Rule 9(b)); *Nisselson v. Drew Indus., Inc.* (*In re White Metal Rolling & Stamping Corp.*), 222 B.R. 417, 429 (Bankr. S.D.N.Y. 1998). Indeed, contrary to the Committee's conclusory and baseless effort to portray the Century Facility as some sort of secret attempt to defraud creditors, the Century Facility was publicly-disclosed. (*See* SEC Form 10-Q filed May 15, 2000, Joint Appendix 69; SEC Form 10-K filed August 14, 2000, Joint Appendix 76) The public disclosure identifies plainly that (1) Highland Prestige could draw down the entire facility; (2) the facility was intended to fund the very transactions the Unsecured Creditors now claim were somehow improper (e.g., purchase of subscribers from Prestige Communications); (3) the Century Debtors were guaranteeing the facility; and (4) certain Debtors had pledged their assets to secure the facility. The Court plainly may take judicial notice of the fact that such publicly-disclosed

activity is, of course, no fraud at all. *See, e.g., In re Minnesota Breast Implant Litigation*, 36 F. Supp. 2d 863, 882 (D. Minn. 1998) (dismissing fraudulent transfer claim "[b]ecause it is undisputed that the actual sale of the implant business was publicly-disclosed").

The fraudulent transfer claims also suffer from vague and indefinite allegations to which a defendant cannot reasonably be expected to respond. *See supra* § I. For instance, although the Complaint claims that only $600 million was transferred under the Century Facility within one year of the Petition Date, the Complaint does not identify how much of this $600 million is allegedly attributable to amounts borrowed by Highland Prestige. (Complaint ¶ 586)

Moreover, it is unclear on the face of the Complaint which alleged transfers the Century Debtors are seeking to recover or whether such transfers relate back to loans advanced more than one year prior to the Petition Date. Accordingly, the fraudulent transfer claims should be dismissed for failure to sufficiently plead the allegations. *See, e.g., In re Erie Marine Enterprises, Inc.*, 216 B.R. 529, 537-38 (Bankr. W.D. Pa. 1998) (dismissing complaint in favor of creditor on actual fraud theory stating that "[i]t is difficult to perceive how the payments made by the Debtor to [the creditor] on a debt which was justly owed can be tortured into an act done with the intent to hinder, delay and defraud creditors").

**B. The Committee Fails To State A Claim For Constructive Fraudulent Transfer (Counts 6 and 8)**

To avoid a pre-petition transfer of assets under a constructive fraud theory, the Committee must show there was a transfer of assets made for "less than reasonably equivalent value." 11 U.S.C. § 548(a)(1)(B). In addition, the Committee must show that the Century Debtors were one of the following: (1) insolvent when the transfer was made or became insolvent as a result of the transfer; (2) engaging in a business transaction for which they possessed "reasonably small capital"; or (3) intending to incur debts that they would not be able

to pay back. *Id.* The Committee has not even attempted to make this showing as to the Century Debtors.

### 1. The Committee Fails to Plead That Any Particular Transfer Was Made For Less Than Reasonably Equivalent Value

It is not sufficient to simply lump every loan transaction together and claim the "Debtors" collectively received no value whatsoever from any of those transactions. The Committee alleges that Highland Prestige borrowed more under the Century Facility than it could repay. The Committee then concludes that the Century Debtors "did not receive **any value**, let alone reasonably equivalent value, from [any of] the borrowings by [Highland Prestige]." (Complaint ¶¶ 593 (emphasis added), 456) This conclusion is incorrect as a matter of law.

The Century Debtors received some value from the Century Facility. In claiming no value, the Committee ignores that the Century Debtors also had the right to borrow unequal amounts under the facility and obligate Highland Prestige for those borrowings. (*See* Century Credit Agreement, Appendix B) Moreover, the face of the Complaint acknowledges that the Century Debtors intended to and did borrow significant sums under the Century Facility for their own acquisitions. (Complaint ¶ 545) This right to borrow money has a value, which must be considered in determining whether a transfer was made for reasonably equivalent value, particularly where the borrowers actually exercised that right.[15] *See Anand v. National Rep. Bank of Chic.*, 239 B.R. 511, 517 (N.D. Ill. 1999) ("[T]he debtor receives value simply by securing a debt."); *Stratton*, 104 B.R. at 727-28 (finding transfer for reasonably equivalent value where made pursuant to "the terms of a valid, contractual obligation"); *Nordberg v. Continental Bank, N.A. (In re Topcor, Inc.)*, No. Civ. A. 3:01-CV-510-M, (N.D. Tex. Feb. 13, 2002); *Mellon*

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[15] Value is determined at the time of the alleged transfer. *See Covey v. Commercial Nat'l Bank*, 960 F.2d 657 , 659 (7th Cir. 1992); *In re Morris Communications*, 914 F.2d 458, 466 (4th Cir. 1990).

*Bank*, 945 F.2d at 647. Based on the Committee's failure to plead facts documenting the transactions lacked reasonably equivalent value, the constructive fraudulent transfer claim must fail.

### 2. The Alleged Transfers Did Not Render The Debtors Insolvent, Unable To Repay Debts Or Undercapitalized

The Complaint does not contain factual allegations to support the conclusion that the Debtors were insolvent or rendered insolvent by any transfer under the Century Facility. On the contrary, the allegations in the Complaint conclude only that the Debtors, collectively, *are currently* insolvent. (Complaint ¶ 614) However, insolvency must be measured by comparing each of the borrower's assets to its liabilities at the time of each alleged transfer. *Mellon Bank*, 945 F.2d at 648; *see also MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs.*, 910 F. Supp. 913, 938 (S.D.N.Y. 1995). Thus, insolvency in this case should be measured by comparing each Century Debtor's assets and liabilities on the date of each alleged transfer. *See Mellon Bank*, 945 F.2d at 648-49.

The Complaint does not supply the tools to make this determination. Nowhere does the Committee allege the state of any Debtor's assets and liabilities at the time of any alleged transfer and certainly does not make such allegations specifically as to any Century Debtor. There being no current audited or published financials for any of the "Debtors" or the "Century Debtors," the Unsecured Creditors could not allege facts to support insolvency and insolvency should not be presumed.[16] Indeed, given that certain of the Century Debtors do not even have

[16] "Since the Petition Date and in conjunction with the pending re-audit, audit and restatement of the Debtors' financial statements, the Debtors have been conducting a review of prepetition intercompany accounts. As of the date hereof, however, the Debtors' reviewed has not been finalized. **INTERCOMPANY ACCOUNT BALANCES (INCLUDING ACCOUNT BALANCES OWING TO AND OWING FROM ANY RIGAS MANAGED ENTITIES (AS DEFINED BELOW) ARE NOT LISTED IN THE BANKRUPTCY SCHEDULES … AND THE BANKRUPTCY SCHEDULES**

non-bank debt liabilities, there is no basis to support any conclusion of wholesale insolvency of the Century Debtors even today, much less at the time of specific transfers.

Moreover, the Century Debtors made express representations at the time of signing the Century Facility that they were solvent. Additionally, as a result of the "savings clause," the Century Debtors did not incur any obligation that would render it insolvent. (*See* Century Credit Agreement, Joint Appendix 69, ¶¶ 8.17, 9.6) The Committee fails to supply any explanation as to why these representations should be disregarded or why the Court should ignore the parties' agreement that the Century Debtors' obligations would be limited to the extent of their solvency. *See Luis,* 149 B.R. at 758 (finding the Debtor is estopped from denying liability where corporate officer made representations that were reasonably relied upon in good faith).

The Complaint is likewise silent as to the Century Debtors' ability to repay debts at the time of the alleged transfers or that any particular transfer left the Century Debtors undercapitalized. *See MFS/Sun*, 910 F. Supp. at 943 (applying New York fraudulent transfer laws). Accordingly, the Committee has failed to state a claim for constructive fraudulent transfer.

**C. The Committee's State Law Fraudulent Transfer Claims Fail For Lack Of Standing (Counts 7 and 8)**

Section 544(b) of the Bankruptcy Code gives the trustee or debtor-in-possession the right to bring state law fraudulent transfer claims on behalf of the Debtors' creditors.[17] However, the

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**WILL BE AMENDED AS A RESULT OF THE PENDING RE-AUDIT, AUDIT AND RESTATEMENT OF THE DEBTORS' FINANCIAL STATEMENTS."**)

[17] Pennsylvania, Illinois and North Carolina all follow the Uniform Fraudulent Transfer Act. *Triangle Bank v. Eatmon*, 547 S.E.2d 92, 94-95 (N.C. Ct. App. 2001) (citing N.C. Gen. Stat. § 39-23.4(a)(1)(1997)); *Matthews v. Serafin*, 744 N.E.2d 934, 937-38 (Ill. App. Ct. 2001) (citing 740 Ill. Comp. Stat. 160/5(a)(1) (West 2002)); *Armstrong-Berger, Inc. v. Dickson/Wells Architects, Inc.*, No. 05-94-012250CV, 1995 WL 464283, at *2-3 (Tex. App. 1995) (citing TEX. BUS. & COMM. CODE §

claims can only be brought on behalf of creditors who had a claim against the Century Debtors at the time the transfers were made. *Kaliner v. Load Rite Trailers, Inc. (In re Sverica Acquisition Corp., Inc.)*, 179 B.R. 457, 465 (Bankr. E.D. Pa. 1995) (analyzing Pennsylvania fraudulent transfer law under former statute). Because the debtor-in-possession's rights under Section 544 are derivative of whatever rights the alleged creditor had under state law, it is imperative that the Complaint identify the alleged creditor of a Century Debtor on whose behalf the claim is brought so that the defendant can affirm or deny the validity of that entity's claim. *Kaliner,* 179 B.R. at 465 (analyzing Pennsylvania fraudulent transfer law under former statute).

The Complaint alleges only in the most conclusory manner "[a]t all relevant times hereto, there were actual creditors of the CCH Co-Borrowing Debtors holding unsecured claims allowable against the CCH Co-Borrowing Debtors' estates within the meaning of Section 502(d) and 544(b) of the Bankruptcy Code." (Complaint ¶ 608) This allegation falls far short of identifying specific creditors on whose behalf the Complaint is brought, especially in light of the fact that some of those Century Debtors have *no* creditors other than the Century Lenders. *See* Schedules of Liabilities filed by various Century Debtors (Cause No. 02-41772) [Docket No. 3]; (Cause No. 02-41767) [Docket No. 3]; (Cause No. 02-41763) [Docket No. 3]; (Cause No. 02-41768) [Docket No. 3]; (Cause No. 02-41785) [Docket No. 3]; (Cause No. 02-41787) [Docket No. 3]; (Cause No. 02-41788) [Docket No. 3]; (Cause No. 02-41791) [Docket No. 3]; (Cause No. 02-41792) [Docket No. 3]; (Cause No. 02-41809) [Docket No. 3]; (Cause No. 02-41810) [Docket No. 3]; (Cause No. 02-41814); *Kaliner*, 179 B.R. at 465. Having failed to identify the

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24.005(a)(1) (West 2002)); *In re C.F. Foods, L.P.*, 280 B.R. 103, 108-11 (Bankr. E.D. Pa. 2002) (citing 12 PA. CONS. STAT. ANN. § 5104(a)(1) (1999)). New York continues to apply the Uniform Fraudulent Conveyance Act, which imposes the added element on a constructive fraudulent transfer that the transfer be made "without fair consideration." *See* N.Y.Debt. & Cred.Law § 272.

creditors on whose behalf the claims are brought, the Committee's state law fraudulent transfer claims must be dismissed pursuant to Rule 12(b)(6).

### D. The Complaint Fails To Allege Any Harm To Creditors Of The Century Debtors (Counts 7 and 8)

To bring a fraudulent transfer claim under state law, the Committee must also show that a creditor was actually harmed as a result of the allegedly fraudulent transfer and such creditor had a right to avoid the transfers under Pennsylvania law. *See Kaliner*, 179 B.R. at 465. Such harm cannot exist where, as here, the allegedly fraudulent conduct stems from compliance with the terms of a credit agreement filed with the Securities Exchange Commission. *See supra* § V. Furthermore, the Complaint does not even identify the specific creditors of the Century Debtors, much less describe the nature of any injury suffered by a creditor. (*See, e.g.,* Complaint ¶¶ 608-09)

## X. THE COMMITTEES' PREFERENCE CLAIMS RELATED TO THE CENTURY FACILITY FAIL (COUNT 50)

To avoid a payment as a preference, the Committee was required to plead in relevant part: (1) a transfer of an interest of a specific debtor in property within 90 days of bankruptcy; (3) while that debtor was insolvent; (3) that enabled Bank of America to receive more than it would receive in a Chapter 7 bankruptcy proceeding. *See* 11 U.S.C. § 547(b). Payments made to a fully secured lender do not constitute a preference because the secured claims would be satisfied in full in a chapter 7 liquidation. *See Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 803 (1st Cir. 1992); *Venice-Oxford Assocs., L.P. v. Multifamily Mortgage Trust 1996-1 (In re Venice-Oxford Assocs., L.P.)*, 236 B.R. 820, 831 (Bankr. M.D. Fla. 1999) ("Transfers to a secured creditor within 90 days of bankruptcy do not

ordinarily exceed the value of the collateral, and thus do not deplete the debtor's estate or deprive similarly situated creditors of their fair share of the creditor's collateral . . . .").

The Committee has not pled insolvency. *See supra* § IX.B.2. Moreover, the Committee does not allege facts to support that the Century Lenders' interests were undersecured.

## XI. THE COMMITTEE FAILS TO STATE A CLAIM UNDER THE BANK HOLDING COMPANY ACT (COUNT 32)

The Committee fails to make any allegations that Bank of America tied its loans to any investment service. To the contrary, the Committee specifically alleges that the Debtors dictated the terms of the Bank of America loans. The Committee also has not alleged an unusual banking practice, an anti-competitive practice or damages, each of which are required elements of an anti-tying claim.

To recover for a violation of the anti-tying provisions of the Bank Holding Company Act (the "BHCA"),[18] a claimant must show: (1) there was an unusual banking practice; (2) the practice was an anticompetitive tying arrangement; (3) there was a benefit to the bank; and (4) the claimant was damaged. *See, e.g., Chase Manhattan Bank, N.A. v. Remington Prods., Inc.*, 865 F. Supp. 194, 199 (S.D.N.Y. 1994), *aff'd*, 71 F.3d 407 (2d Cir. 1995); *Gumowitz v. Citibank, N.A.*, No. 91 CIV. 5399 (DNE), 1993 WL 364476, at *2 (S.D.N.Y. Sept. 13, 1993). Absent

[18] The anti-tying provisions of Section 1972(1) of the Act provide, in relevant part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement –
>
> (A) that the customer shall obtain some additional credit, property or service from such bank other than a loan, discount, deposit or trust service; and
>
> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company.

12 U.S.C § 1972(1).

these required factual allegations, the BHCA claim is patently deficient. *See Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984) (plaintiff must allege sufficient facts to establish each of the elements of a BHCA anti-tying claim); *Sterling Coal Co. v. United Am. Bank*, 470 F. Supp. 964, 965 (E.D. Tenn. 1979) (corporation failed to allege or show any damages flowing from the alleged violation of the BHCA). The few allegations purporting to address the claim affirmatively demonstrate that the Committee does not state a BHCA claim.

### A. The Committee Concedes That Bank of America Did Not Tie Lending To The Purchase Of Investment Banking Services

The Committee has conceded, by the few factual allegations in the Complaint, that Bank of America did not "tie" together its lending and investment banking services. The Committee does not even mention Bank of America in its claims under the BHCA. The Complaint only generally alleges, in conclusory terms, that:

> the Agent Banks conditioned their extensions of credit to the Debtors, and/or fixed or varied the consideration thereof, and/or otherwise required the Debtors in conjunction with the foregoing to obtain some additional credit, property or service from a bank holding company of such bank or from, among other entities, the Investment Banks.

(Complaint ¶ 813) In contrast to these conclusory allegations, the Committee alleges in the Complaint that it was the **customer** used the promise of future investment transactions to achieve favorable lending terms:

- "In addition . . . the Agent Banks acquiesced to **lending terms** (duration, interest rates, etc.) **that were . . . dictated by the Rigas Family to the Agent Banks**." (Complaint ¶ 509) (emphasis added)

- "[**m]embers of the Rigas Family expressly conditioned** the granting of investment banking business on participation in the Co-Borrowing Facilities." (Complaint ¶ 511) (emphasis added)

- "**The Rigas Family clearly recognized** that offering the enticement of investment banking fees would cause the Agent Banks to participate in the Co-Borrowing Facilities." (Complaint ¶ 514) (emphasis added)

The BHCA does not prohibit a bank's customer from awarding investment banking services based upon acquiescence to requested commercial lending terms. *See* 12 U.S.C. § 1972(1) (only restricting the conduct of a **bank**); *Johnstone v. First Bank Nat. Assoc.*, No. 95C 2008 1998 WL 565193, at *6 (N.D. Ill. Aug. 31, 1998) (rejecting BHCA claim where "it [wa]s undisputed that it was not defendants but [plaintiffs' affiliate] who initially proposed the terms and conditions of the entire scheme. Because the bank did not use the promise of credit to entice plaintiffs into purchasing the Crivello notes, the arrangement, however unorthodox or profitable it might have been, does not constitute an illegal tying arrangement."); *Stefiuk v. First Union National Bank of Florida*, 61 F. Supp. 2d 1294, 1299 (S.D. Fl. 1999), *aff'd*, 207 F.3d 664 (11th Cir. 2000) (rejected anti-tying claim because plaintiff "was not 'forced' to get the 'tied' product").

### B. The Committee Has Not Alleged An Unusual Banking Practice

There is nothing unusual about related lenders and investment banks offering multiple services to their customers. In fact, the legislative history of the BHCA expressly discussed that the Act's passage should not prevent the continued practice of "relationship banking" or "one-stop shopping." *See* Letter from Deputy Attorney General Richard G. Kleindienst to the Honorable Wright Patman (Nov. 17, 1970) at Cong. Rec. H11783 (Dec. 16, 1970) (desire to preserve "full service banking"); Cong. Rec. S15713 (Sept. 16, 1970) (statement of Sen. Bennett) (acknowledging value of "one-stop shopping, whether it be for groceries or financial services").

The ability of banks to provide "one-stop shopping" to their customers was significantly enhanced after passage of the Graham-Leach-Bliley Act in 1999 ("GLB Act"), which made a number of fundamental changes in the manner in which banks could conduct business with their customers. Most notably, the GLB Act eliminated the legal separation between banks and

securities firms (and insurance companies) by repealing the 66-year-old Glass-Steagall Act's prohibition against affiliations between commercial banks and investment banks. *See* Pub. L. No. 106-102, 113 Stat. 1338, § 101 (1999). Accordingly, the assertion that the provision of multiple services to some of the Debtors, including both lending and investment banking services, is somehow improper or unusual is wholly without merit and seeks to reinstate Glass-Steagall.

**C. The Committee Has Not Alleged An Anticompetitive Banking Practice**

The Committee does not offer a single allegation of anti-competitive practice. Rather, the Committee has expressly alleged that there was nothing anti-competitive in the way Bank of America provided its lending services in that it was the Debtors, and not the bank, that allegedly imposed conditions on the lending transactions. *See supra* § XI A. Such a scenario – in which the buyer, not the seller, requires the condition – cannot possibly be deemed in any way an anticompetitive practice by, according to the Unsecured Creditors, the subservient bank.

**D. The Committee Has Not Alleged The Debtors Suffered Damage**

The Committee also has not pled, nor could it as a matter of law plead, any basis for the bald assertion that the Debtors suffered damage as a result of Bank of America's alleged "tying." An obligation to repay a loan – even if that loan were procured through an improper tying arrangement (and this one was not) – does not allege damage. *See, e.g., Remington Products*, 865 F. Supp. at 199-200 (dismissing counterclaim as a matter of law because "[t]he statute does not absolve successful § 1975 plaintiffs from the obligation to fulfill contracts that result from a tying arrangement."). The Committee merely recites, in an utterly conclusory fashion, that "[a]s a result of the activities of the Agent Banks, the Debtors have suffered damage." (Complaint ¶ 814) Nowhere does the Committee attempt to describe the supposed damage, who specifically

caused the damage, or which of the numerous Debtors were supposedly harmed by Bank of America.

## CONCLUSION

For the foregoing reasons, the Bank of America, N.A. asks this Court to dismiss the Complaint.

DATED: October 2, 2003.

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**REFERENCES TO JOINT APPENDIX**

For the Court's convenience, the Agent Banks are submitting a Joint Appendix. Bank of America adopts and incorporates herein by reference the portions of the Joint Appendix cited in the Motion and identified below.

22. Transcript Excerpts of August 22, 2002 Hearing on DIP Agreement

68. Transcript from the 7-29/03 Hearing on Stipulation

69. SEC Form 10-Q filed May 15, 2000 (w/ Century Credit Agreement, dated 04-14-2000 attached)

70. SEC Form 8-K filed April 24, 2003

75. Excerpts of the Century Credit Agreement, dated April 14, 2000

76. SEC Form 10-Q filed August 14, 2000 (Excerpts)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Defendant Bank of America, N.A.'s Motion to Dismiss was served upon all parties on the attached Service List by United States first class mail, postage prepaid, in accordance with the Federal Rules of Bankruptcy Procedure on this 2nd day of October, 2003.

/s/ Robin E. Phelan

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