UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLOBAL CROSSING ESTATE REPRESENTATIVE, FOR ITSELF AND AS THE LIQUIDATING TRUSTEE OF THE GLOBAL CROSSING LIQUIDATING TRUST,	:	
Plaintiff,	:	04 Civ. 2558 (GEL)
v.	:	
GARY WINNICK, *et al.*,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS THE COMPLAINT BY ULLICO, INC., MRCO., INC. AND CANADIAN IMPERIAL BANK OF COMMERCE

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PRELIMINARY STATEMENT

The Global Crossing Estate Representative ("Estate Representative" or "Plaintiff") submits this single memorandum of law in opposition to motions by Defendants ULLICO, Inc. ("ULLICO"), MRCo., Inc. ("MRCo.")[1] and Canadian Imperial Bank of Commerce ("CIBC") to dismiss the Complaint.

INTRODUCTION

The Estate Representative

On September 16, 2002, the Global Crossing Debtors filed their Joint Plan of Reorganization (as amended, the "Plan") with the Bankruptcy Court, which confirmed it by order dated December 26, 2002.[2] The Plan set up a Liquidating Trust to receive the proceeds of identified claims, created the Estate Representative, and endowed it with the "power and authority to prosecute and resolve [those claims]" in litigation. Plan, Section 5.8(h)(i). The Estate Representative, in many practical respects the successor to Global Crossing's creditors' committee, is charged with acting as a "fiduciar[y] for and in the best interests of all holders of Claims in Class C [Lender Claims], Class D [Global Crossing Holdings Notes Claims], Class E [Global Crossing North America Notes Claims] and Class F [General Unsecured Claims] and in furtherance of the purposes of the Liquidating Trust." Plan, Section 5.8(j)(iii). To fund the Liquidating Trust, the Plan gave the Estate Representative the authority to pursue this action. Plan, Section 9.7.

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[1] MRCo. is a wholly-owned subsidiary of ULLICO. In August 2004 (after ULLICO filed its motion) counsel for MRCo. waived service of the summons and complaint pursuant to Rule 4(d), Fed. R. Civ. P. Thereafter, MRCo. moved to dismiss the Complaint as against it, relying entirely upon the memorandum filed on behalf of ULLICO.

[2] Copies of the December 26, 2002 Order and of the Plan are attached as Ex. 1 and 2, respectively to the Declaration of Arthur V. Nealon dated September 8, 2004 ("Nealon Decl.") submitted with the Estate Representative's opposition to the Citigroup and Andersen motions to dismiss the Complaint.

The Estate Representative's Complaint: Looting of the Company and Reclamation of Ill-Gotten Gains

The Complaint seeks to recoup money and property improperly transferred to the named defendants while Global Crossing was insolvent. It also seeks relief in the form of damages and/or restitution for breaches of fiduciary duty, common law fraud and waste based upon the same factual patterns. The Complaint names the moving defendants in the following counts:

(1) Counts 8-12 identify CIBC,[3] ULLICO and MRCo. as Advisory Services Agreement ("ASA") Defendants against whom claims are asserted for fraudulent or preferential transfers, corporate waste, breaches of fiduciary duty, and common law fraud;[4]

(2) Counts 17–19 identify CIBC as an Investment Bank Defendant and assert claims for fraudulent conveyances and avoidance of preferential transfers, aiding and abetting fraud, and aiding and abetting breaches of fiduciary duty;[5] and

(3) Counts 23–26 further charge CIBC with breach of fiduciary duty, fraud and corporate waste "due to [its] intimate involvement ... with the virtual and actual management of Global Crossing and its involvement on the Global Crossing's Board of Directors and /or its subsidiaries."

The central allegations as against moving defendants CIBC, ULLICO and MRCo. concern the looting of Global Crossing through improper Advisory Service Agreements that originated from the inception of Global Crossing in March 1997.

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[3] CIBC is defined to include a number of related entities it owns and/or controls: CIBC World Markets Corp., CIBC Capital Corp., CIBC World Markets plc, CIBC Capital Partners, CIBC, Inc., CIBC Oppenheimer Corp. and CIBC Capital Partners (Cayman). Compl. ¶ 39.

[4] The other ASA Defendants are Gary Winnick, Lodwrick Cook, Pacific Capital Group and PCG Telecom.

[5] The Citigroup Defendants are also Investment Bank Defendants and have moved separately to dismiss the Complaint as against them.

The ASAs

CIBC and ULLICO were 1997 investors, with Winnick, Cook, Abbott Brown, Barry Porter and David L. Lee, in a Cayman Islands corporation, referred to in the Complaint as GT Parent. Compl. ¶ 343. GT Parent became the corporate parent of the Bermuda corporation (ultimately renamed Global Crossing, Ltd. and referred to in the Complaint as "Global Crossing") that issued stock to the public in a mid-1998 initial public offering ("IPO"). Compl. ¶ 372. GT Parent was liquidated at the time of the IPO after all its equity holders had exchanged their equity interests for shares of Global Crossing stock. Compl. ¶¶ 372, 411. Effectively, the parent merged into the subsidiary. Global Crossing, the former subsidiary, was therefore the surviving entity and assumed GT Parent's assets and liabilities. Because of this history, this memorandum sometimes does not distinguish between GT Parent and Global Crossing.

As described more fully in the Complaint, the Advisory Service Agreements ("ASAs") were 1997 and 1998 agreements between various subsidiaries of Global Crossing and an entity named PCG Telecom Services, LLC ("PCG"), which was wholly owned by Winnick. Compl. ¶¶ 338-400. Those agreements provided that, in exchange for purported services, PCG would be entitled for 25 years to 2% of the gross revenues of the various contracting subsidiaries. Compl. ¶¶ 345, 388. PCG, in turn, made agreements with Winnick, CIBC, ULLICO, Brown, Porter, Lee and Cook ("the ASA beneficiaries") to split the boodle with them. Compl. ¶¶ 356, 365. To put it mildly, it was open to question whether the future "services" to be rendered by the ASA beneficiaries would ever in fact be rendered, and if so, what their value was, or what the impact of the payments might be on the corporate financial picture.

Shortly before the IPO, and before GT Parent was liquidated, its board of directors met on July 13, 1998. Compl. ¶ 393. Present and voting were representatives of CIBC and ULLICO. Compl. ¶ 393 (chart). The board approved the termination of the ASAs, in return for

which Global Crossing was authorized to and did issue $135 million in stock, valued at the IPO price, to the ASA beneficiaries. Compl. ¶ 394. The board arrived at this astonishing figure by estimating the "present value of the aggregate advisory fees" that would be paid to the ASA beneficiaries over the 25-year period of the ASAs. The technique was to simply aggregate the gross estimated fees and discount the resulting figure to present value. $2.7 million in advances was also forgiven. The buyout price was thus "determined as a result of a negotiation process including a [single unnamed] disinterested director and the various persons entitled to fees under the Advisory Services Agreements." Ex. A ("IPO Prospectus" dated August 13, 1998) to affidavit of Beth Ann Schultz, sworn to July 1, 2004 and submitted in support of CIBC's motion, at 66; Compl. ¶ 400. CIBC's share was $12.730 million and ULLICO's was $6.965 million.[6] *Id.*

The aggregate estimated advisory fees attributable to the ASAs were primarily measured by 2% of projected income streams from swap contracts involving "indefeasible rights of use" ("IRU") contracts. Those contracts involved, essentially, swaps of cable capacity on which Global Crossing recognized phony income that had no economic reality. Compl. ¶ 234. In 1998, Global Crossing recognized nearly $418 million, or 98% of its total Company-wide revenue, from IRU contracts. Compl. ¶ 434. The ASA defendants thus utilized those IRU swap contracts to create the perception of future corporate revenues and justify their looting of Global Crossing's coffers -- while the company was actually insolvent.

In all, the self-interested ASA defendants (including CIBC and ULLICO) received more than $400 million in money, stock, options and warrants from the ASA transactions, all of which took place while the Company was insolvent. Compl. ¶ 413.

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[6] There is no record of shareholder approval of this incredibly self-interested deal. Compl. ¶¶ 395, 398. At the same time, the board granted permission to Winnick, Brown, Porter and Lee to sell some of their own Global Crossing shares in the IPO in order to mitigate the tax effects of the transaction. Compl. ¶ 395.

CIBC

CIBC was an insider of Global Crossing from the Company's inception in 1997. Compl. ¶ 656. When Global Crossing was formed in March 1997, CIBC was given the right to designate five individuals to serve on Global Crossing's Board of Directors in exchange for an investment in the Company on insider terms. *Id.* By virtue of its designees' participation on the Global Crossing Board, its participation in the ASAs and its work as an adviser/investment banker for the Company, CIBC was privy to material financial information about Global Crossing that was not available to the investing public. *Id.* By means of its "5 seats on the Global Crossing Board of Directors, ... CIBC exercised control over the operations of the Company." Compl. ¶ 39.

In 1999 and early 2000 CIBC realized more than $1.3 billion on sales of Global Crossing stock. Between March 1997 and the time CIBC relinquished its board seats and disposed of its remaining Global Crossing stock in 2000 (Compl. ¶¶ 658-660), CIBC knowingly assisted the Insider defendants in misstating Global Crossing's financial condition. CIBC created and/or participated in transactions that the Insider defendants improperly reported, knowing the Insiders intended to improperly account for them in Global Crossing's financial statements. Compl. ¶ 655. CIBC had reason to know that Global Crossing was artificially inflating its reported revenue through improper IRU swap transactions, and also had reason to know that its registration statements contained materially false and misleading factual and financial statements regarding the nature of Global Crossing's earnings and the total value of its assets. Compl. ¶ 660.

In return for participating in this massive fraud, CIBC was paid handsomely. Not even including the proceeds CIBC received from the ASAs and their termination in 1998, CIBC realized over $3 billion in proceeds from the sale of Global Crossing securities. Compl. ¶ 659.

ULLICO/MRCo.

ULLICO and its wholly-owned subsidiary MRCo. were also handsomely compensated for participating in the fraud while the company was insolvent.

In connection with termination of the ASAs in August 1998, ULLICO received $6.965 million in pre-IPO stock. Compl. ¶ 394. In addition, advance payments that had been made to the ASA Defendants were cancelled in connection with termination of the ASAs. Thus, MRCo. was forgiven repayment of $194,696, which had been advanced to it. Compl. ¶¶ 385, 394. In addition to compensation under the ASAs, MRCo. also received from Global Crossing fees in the amount of $1 million for purported services in arranging a credit facility; such payments were without also consideration and constituted corporate waste. Compl. ¶ 370.

ULLICO, like CIBC, stood on both sides of the ASAs and was supremely self-interested. ULLICO was a significant shareholder of GT Parent at the time the ASAs were entered into in 1997 and 1998, and had a designated director on the Boards of Global Crossing, GT Parent and its affiliates at the time of the ASAs' termination. Compl. ¶¶ 356-364.

Accordingly, the Complaint seeks to set aside as fraudulent conveyances and waste of corporate assets all fees and compensation received by ULLICO, without legitimate business purpose, in bad faith and without adequate consideration. Compl. ¶¶ 825-835. The Complaint also seeks disgorgement of all proceeds received under the ASA transactions and damages for breach of fiduciary duties. Compl. ¶¶ 836-847. Furthermore, the Complaint seeks damages for fraud and to set aside unlawful conveyances and transfers of corporate assets, pursuant to Section 720 of the New York Business Corporations Law ("N.Y.B.C.L.") Compl. ¶¶ 848-854.

ARGUMENT

POINT I.

The Complaint Adequately States Claims Against CIBC and ULLICO Under the Federal Bankruptcy Code and the New York Debtor and Creditor Law.

A. Plaintiff States Claims under Bankruptcy Code Section 544(b).

The Complaint asserts transfer avoidance claims under Section 544(b) of the Bankruptcy Code, which in turn refers to state law. Defendants contend that these claims should be dismissed. CIBC Br. at 16-25; ULLICO Br. at 9-14. Their contentions are meritless.

1. Plaintiff Has Properly Alleged Standing To Pursue Claims Under Section 544(b), Since It Represents Holders of Global Crossing's $800mm Notes Offered In May, 1998.

Defendants first argue that the Complaint does not allege that a present creditor of the estate existed at the time of the alleged illicit transfers, as required by the case law under New York Debtor and Creditor Law, § 273.[7] CIBC Br. at 17; ULLICO Br. at 9-10. That is factually incorrect. As the Complaint reveals, the Estate Representative has been explicitly authorized to represent unsatisfied creditors in Class D. Compl. ¶¶ 18-19. Those creditors are the holders of Global Crossing Holdings Notes. On or about May 18, 1998, in a private placement, Global Crossing Holdings, Ltd., a wholly-owned subsidiary of Global Crossing, issued $800 million face value of 9 $^{5/8}$% Senior Notes due 2008, which were guaranteed by Global Crossing.[8] Shortly after Global Crossing's IPO in August 1998, Global Crossing Holdings, Ltd. (then known as Global Crossing Ltd., LDC) exchanged these Senior Notes for publicly registered notes containing substantially identical terms, which were also guaranteed by Global Crossing.[9] The holders of these latter notes constitute creditor Class D. The notes were antecedent debts of

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[7] Section 273 defines a fraudulent conveyance as one "incurred by a person who is or will thereby be rendered insolvent," and provides that if the conveyance is made "without a fair consideration," liability attaches "without regard to [the transferee's] actual intent."

[8] *See* IPO Prospectus at 7, 76, Exhibit A to Schultz Aff. *See also* Global Crossing Form 10K f/y/e 12/31/99 at 107, a copy of which is attached as Exhibit B to the Schultz Aff.

[9] *See* IPO Prospectus at 8, n. 2.

the debtor at the time of the termination of the ASAs in August 1998. Accordingly, under New York Debtor and Creditor Law §273, conveyances to CIBC and ULLICO made pursuant to termination of the ASAs were fraudulent as to all such unpaid noteholders.

2. Under Sections 274 and 275 Of The New York Debtor and Creditor Law, The Estate Representative Need Not Plead The Existence of a Creditor at the Time Of The Fraudulent Transfer.

Under New York Debtor and Creditor Law §§ 274-275, the Estate Representative need not plead the existence of a creditor at the time of the fraudulent transfers. Those sections provide:

> § 274 Conveyances by persons in business
>
> Every conveyance made without fair consideration when the person making it is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors *and as to other persons who become creditors* during the continuance of such business or transaction without regard to actual intent. (emphasis added).

> § 275 Conveyances by a person about to incur debts
>
> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, *is fraudulent as to both present and future creditors*. (emphasis added).

See Official Comm. of Asbestos Claimants of G-1 Holding, Inc. v. Heyman, 277 B.R. 20, 36 (S.D.N.Y. 2002) ("Section 274 expressly states that these remedies are for the benefit of creditors or persons who become creditors."). *See also Laco X-Ray Sys., Inc. v. Fingerhut*, 88 A.D.2d 425, 432, 453 N.Y.S.2d 757, 762 (2d Dep't 1982) (stating that § 274 applies to all existing creditors and persons who become creditors while business is in operation); *In re RCM Global Long Term Capital Appreciation Fund*, 200 B.R. 514, 523 n.2 (Bankr. S.D.N.Y. 1996)

(noting that a creditor need not exist at the time of transfer under § 544(b) as long as the state statute allows it, and citing § 274 as an example of such a statute).

Constructive fraud claims under New York Debtor and Creditor Law §§ 273-275 are governed by a six-year statute of limitations. CPLR § 213(1); *Lippe v. Bairnco Corp.*, 225 B.R. 846, 853 (S.D.N.Y. 1998) (citing *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993)). This action was commenced in January 2004. Thus, the Estate Representative may properly assert claims that derive from the fraudulent ASA conveyances made in mid-1998.

B. CIBC and ULLICO Received Transfers of an Interest in Property Which are Void Under the New York Debtor and Creditor Law.

Bankruptcy Code § 544(b)(1) provides that "the trustee [to whose rights the Estate Representative has succeeded] may avoid any transfer of *an interest of the debtor in property* ... that is voidable under applicable law." (emphasis added). As noted, the "applicable law" is state law, namely New York Debtor and Creditor Law §§ 273 *et seq.* CIBC and ULLICO argue (CIBC Br. at 19-20, ULLICO Br. at 10-11) that the Estate Representative's fraudulent transfer claims against them under this statute should be dismissed because the stock they received for agreeing to terminate their interests in the ASAs (which Global Crossing valued at $12,730,000 and $6,965,001 based on Global Crossing's IPO price) did not constitute "an interest of the debtor in property."[10] That argument is supported by one recent Ninth Circuit case decided under California law, which we urge is distinguishable and should not be followed.

To begin with, the prospectus for Global Crossing's 1998 IPO, which CIBC attaches in support of its position, belies the CIBC/ULLICO argument. That prospectus makes it plain that, in connection with the termination of the ASAs, Global Crossing recorded on its own books an

[10] ULLICO's wholly-owned subsidiary MRCo. also received forgiveness of the repayment of a $194,000 advance in connection with termination of the ASAs. Compl. ¶¶ 385, 394.

expense of $137.7 million, of which $12.7 million was attributable to CIBC and $7.0 million to ULLICO:

> "The Company has agreed to acquire the rights of the persons entitled to the fees under these [ASA] agreements in consideration for the issuance by the Company of Common Stock having an aggregate value of $135 million and the cancellation of approximately $2.7 million owed to the Company under a related advance agreement. *This charge of 137.7 million is reflected in the statement of operations for the six month period ended June 30, 1998."*

IPO Prospectus at 37, Ex. A to Schultz Aff. (emphasis added). That expense was recorded under "Operating, Administrative and Other" expenses and constituted most of the company's total expenses for the six months in question. IPO Prospectus at 28-29, n.1. This increased Global Crossing's net loss for the 6-month period ending June 30, 1998 from approximately $21 million to approximately $159 million. As of June 30, 1998, Global Crossing's books showed an accumulated deficit of over $159 million. IPO Prospectus at 28.

The notion that this recorded expense was not a transfer of corporate "property" is dizzying. The stock transferred to CIBC and ULLICO had an immediately ascertainable, tangible value. The expense of terminating the ASAs would have been recorded as an expense in essentially the same way if Global Crossing had just paid the ASA Defendants $137.7 million in cash. Presumably, since Global Crossing treated the transfer as an expense on its books, CIBC and ULLICO treated the receipt of the stock as income on theirs, and the income was taxable to them. Of course, Global Crossing made the payment in negotiable securities rather than cash -- to do so afforded the ASA Defendants a tremendous "up side" when, as could be readily predicted in the stock market of the time, Global Crossing's market price rose dramatically and (following a 2-for 4 stock split) they were able to cash in on the sixfold increase. Compl. ¶¶ 394,658; 1999 Form 10-K at F-8, Ex. B to Schultz Aff. CIBC and ULLICO

were unjustly enriched at Global Crossing's expense, and the Estate Representative is entitled to avoid these fraudulent conveyances to CIBC and ULLICO under 11 U.S.C. § 544(b)(1) and New York Debtor and Creditor Law § 273 *et seq.*

In re Curry & Sorenson, Inc., 57 B.R. 824, 829 (B.A.P. 9th Cir. 1986) and *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 596 (9th Cir. 2004), cited by the moving defendants, are not persuasive authority to the contrary. In *Curry*, two individual creditors of the debtor in bankruptcy (rather than the trustee) sued to set aside as a fraudulent transfer under California law the debtor's issuance of stock to the debtor's president. 57 B.R. at 827. Because the creditor-plaintiffs lacked prior approval of the Bankruptcy Court to file the claim, it was dismissed; as an alternative ground for dismissal, the Court in *dictum* opined that shares of stock had no intrinsic value to the corporation, and that transfer of the shares was not subject to avoidance under 11 U.S.C. § 548. *Id.* at 828. In *Decker*, the Ninth Circuit affirmed the dismissal of claims brought by a bankruptcy trustee against two individuals to whom the debtor had issued preferred stock for inadequate consideration. Citing the alternative dictum in *Curry*, the Ninth Circuit held that unissued stock was not an interest of the debtor in property, and that even assuming the defendants received their shares for less than reasonably equivalent value, the trustee could not avoid the transfer under 11 U.S.C. § 544(b)(1) and "applicable law" – California's Civil Code. *Decker*, 362 F.3d at 596.

This Court, applying New York law under 11 U.S.C. § 544(b)(1), should not follow *Decker*.[11] To do so would result in manifest injustice and unjust enrichment of the ASA defendants to the extent of a $135 million windfall. Under New York law, a "Conveyance" for

[11] Similarly inapposite is *Victor v. Riklis*, No. 91 Civ. 2897 (LJF), 1992 U.S. Dist. LEXIS 7025, *10 (S.D.N.Y. 1992). In *Riklis*, Judge Freeh dismissed plaintiff's civil RICO claims and declined to exercise jurisdiction over the remaining claim for fraudulent conveyance. Therefore, the statement that "a corporation has no such interest in shares of its stock held by stockholders" is *dictum*.

purposes of a fraudulent conveyance claim includes "every payment of money ... or ... tangible or intangible property." New York Debtor and Creditor Law § 270.

C. Global Crossing Was Insolvent at the Time of the Fraudulent Transfers.

CIBC and ULLICO complain that the Complaint does not sufficiently allege insolvency at the time of the transfers. CIBC Br. at 20-22; ULLICO Br. at 12-13. This is nonsense. Allegations of insolvency at the time of the fraudulent transfers are plainly stated throughout the Complaint. *See, e.g.*, Compl. ¶¶ 667, 780. But even if insolvency were not explicitly alleged, the pleading should be sustained. *See Pereira v. Cogan* (*In re Trace Int'l Holdings, Inc.*), No. 00 Civ. 619 (RWS), 2001 U.S. Dist. LEXIS 2461, *25 (S.D.N.Y. Mar. 8, 2001) (listing cases where court accepted less than explicit allegations of insolvency and noting that defendant's argument that trustee only provided conclusory allegations that debtor was insolvent "overlooks the basic tenet that a complaint must be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

Additionally, contrary to ULLICO's argument, the Complaint also alleges that Global Crossing was unable to pay its debts. *See* New York Debtor and Creditor Law § 271 ("A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured"). Among other things, the Complaint alleges that (1) "Global Crossing's debt was wrongfully expanded out of proportion to the Company's ability to repay. ... [T]he Company's debt load increased substantially and its insolvency was further aggravated" (Compl. ¶ 667); (2) "The Insiders, ASA Defendants, Bank Defendants and Andersen destroyed or substantially impaired the prosperity, future business prospects and goodwill of Global Crossing ... all at a time when the Company was insolvent or virtually insolvent" (Compl. ¶ 778); (3) "As a direct and proximate result of the ASA Defendants' actions and omissions, Global Crossing was

injured and damaged in amounts to be determined at trial in at least the following ways: (1) its debt was wrongfully expanded out of all proportion to its ability to repay and it became insolvent and thereafter bankrupt; (2) it was forced to file bankruptcy and incurred and continues to incur substantial legal and administrative costs, as well as the costs of governmental investigations; (3) its relationships with its customers, suppliers and employees were undermined; and (4) its assets were dissipated" (Compl. ¶ 842).[12]

As to claims asserted under § 274 of the New York Debtor and Creditor Law, the Estate Representative need not even plead insolvency (or for that matter, fraudulent intent). That section allows recovery of fraudulent transfers when the defendants are reduced to a level of "unreasonably small capital" as a result of the transfers. *Moody v. Security Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992) ("Unreasonably small capital denotes a financial condition short of equitable insolvency."). As a result of defendants' transactions with the Company, Global Crossing was doomed to fail. *In re Manshul Construction Corp.*, Nos. 97 Civ. 8851 (JGK), 99 Civ. 2825 (JGK), 2000 U.S. Dist LEXIS 12576 *154 (S.D.N.Y. Aug. 20, 2000) ("The test [for determining when a debtor has unreasonably small capital] is aimed at transfers that leave the transferor technically solvent but doomed to fail. In order to determine the adequacy of capital, a court will look to such factors as the company's debt to equity ratio, its

[12] ULLICO's contention that the Complaint fails to allege insolvency at the time of the fraudulent transfers is based on its argument that the Complaint cannot reach most of the ASA transactions because Global Crossing itself "did not come into existence until March 1998"—after at least most of the ASAs were signed. ULLICO Br. at 13. As noted *infra*, the principal vice of the ASAs lay in the self-dealing attendant to their termination in August, 1998, so ULLICO's argument is largely beside the point. In any event, GT Parent, with whose subsidiaries CIBC and ULLICO entered into the ASAs, merged with Global Crossing through a stock-for-stock exchange. Compl. ¶ 372. Because Global Crossing is the surviving corporation, the Complaint's allegations of insolvency as to Global Crossing suffice, and it is unnecessary also to allege the insolvency of GT Parent.

historical capital cushion, and the need for working capital in the specific industry at issue.") (citations omitted).[13]

D. The Transfers in Question Were Not Made for Fair Consideration.

CIBC also argues that as a matter of law the transfer claims should be dismissed because the transfers were made for fair consideration. CIBC Br. at 22-23. To the contrary, CIBC's receipt of Global Crossing stock in connection with the termination of the ASAs was not, by any standard, the satisfaction of a legitimate antecedent debt. Instead, the ASAs were a sham from the start, designed simply to line the pockets of the defendants to the ultimate detriment of the Company. CIBC's receipt of underwriting and advisory fees was also part and parcel of the scheme and created additional debt-load. In any event, the issue of whether or not the stock issuance at the time of the termination of the ASAs -- or any of the other transfers alleged in the Complaint -- were without fair consideration is an issue of fact, and should not be decided on a motion to dismiss, prior to discovery.

As this Court recently held in *American Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*:

> "It would therefore be premature to dismiss the § 548(a)(1)(B) claim on the ground that the value transferred ... appears, in simple mathematical terms, to exceed that of the allegedly fraudulent transfers. The totality of the circumstances must be examined, and [plaintiff] has a right to offer evidence in an effort to show that, contrary to appearances, it did not receive 'reasonably equivalent value in exchange for the transfer.'"

[13] CIBC cites no case law to support its arguments that a complaint must identify each transfer the plaintiff seeks to avoid, and that the plaintiff must plead that the particular subsidiary or parent of the debtor was insolvent at the time of each particular transfer. In fact, the insolvency pleading will survive a motion to dismiss unless there is absolutely no support for the argument that the debtors were insolvent at the time of the alleged transfers. *See Kernaghan & Co. v. Global Intellicom, Inc.*, Nos. 99 Civ. 3005 (DLC), 99 Civ. 3015 (DLC), 2000 U.S. Dist. LEXIS 6650, *41 (S.D.N.Y. May 17, 2000) (denying defendant's motion to dismiss for failure to allege a breach of fiduciary duty, even though "allegations which would support the argument that Global was insolvent at the time of Muller's misrepresentations are implicit at best," because the plaintiff "pointed to defaults by Global on contractual and other financial obligations which could amount to Global's insolvency at the time of Muller's misrepresentations").

03 Civ. 6913, 2004 U.S. Dist. LEXIS 15732, at *68-69 (S.D.N.Y. Aug. 10, 2004) (citations omitted).

Moreover, transfers made to a corporation's shareholders or directors are, *ipso facto*, without fair consideration. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2d Cir. 1995) (*aff'd in part, rev'd in part on other grounds and remanded*, 61 F.3d 1054 (2d Cir. 1995) ("New York courts have carved out one exception to the rule that preferential payments of pre-existing obligations are not fraudulent conveyances: preferences to a debtor corporation's shareholders, officers, or directors are deemed not to be transfers for fair consideration."). *See also Farm Stores, Inc. v. School Feeding Corp.*, 102 A.D.2d 249, 254 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 1065 (1985); *Southern Indus., Inc. v. Jeremias*, 66 A.D.2d 178, 184-85 (2d Dep't 1978).

E. The Complaint Adequately Alleges that Improper Transfers Were Made for the Benefit of CIBC and ULLICO.

The Estate Representative seeks, in Counts 8 and 12, to avoid as fraudulent transfers payments to CIBC and ULLICO of fees, commissions and other compensation made without adequate consideration and without legitimate business purpose. The moving defendants argue that these claims should be dismissed because the Estate Representative has not named the correct parties. ULLICO Br. at 15, 17; CIBC Br. at 23-25.

The Complaint alleges that CIBC and ULLICO operated through various subsidiaries that they owned and controlled. Indeed, CIBC is *defined* as including a half-dozen subsidiaries that it owned and/or controlled (Compl. ¶ 39), through which CIBC beneficially received $135 million in fees and other improper compensation. Similarly, the Complaint alleges that ULLICO operated through its wholly-owned subsidiary MRCo., which is named as a defendant (if only in the caption of the case) and has been separately served. Compl. ¶ 40. *Inter alia*, MRCo. held shares in GT Parent (Compl. ¶ 360) and received $1 million in improper fees (Compl. ¶ 370), as

well as $194,696 in improper advances. Compl. ¶ 385. The Complaint adequately alleges that the named defendants were the beneficiaries of the fraudulent transfers. *Cf. Cassirer v. Sterling Nat'l Bank & Trust Co. (In re Schick),* 223 B.R. 661, 664-65 (Bankr. S.D.N.Y. 1998), (cited by CIBC) (sustaining preference claims against defendants who were either initial or subsequent beneficial transferees.).

Moreover, CIBC's and ULLICO's beneficial receipt of compensation in connection with termination of the ASAs is confirmed in Global Crossing's 1998 Form 10-K at 46, a copy of which is attached as Exhibit A to the accompanying Declaration of Arthur V. Nealon dated September 30. 2004 ("Nealon Decl. II"). As stated therein:

> "The shares of common stock issued in connection with the termination of the Company's obligations under the advisory services agreements were received by the following persons in the following amounts:
>
> | Recipient | Shares of Common Stock |
> |---|---|
> | ... | ... |
> | CIBC | 1,340,000 |
> | ULLICO | 733,158"[14] |

At the pre-IPO price per share of $19.00, CIBC thus received compensation valued at $12,730,000 and ULLICO received $6,965.001. Compl. ¶ 394. All of this was without business purpose, without adequate consideration, and approved by a Board of Directors controlled by the Insider Defendants and the designees of CIBC and ULLICO, which were self-interested. Compl. ¶¶ 396-397,827).

This is hardly the "ordinary" case in which a parent corporation may not be liable for acts or omissions of its subsidiaries in the ordinary course of their businesses. Accordingly, the authorities cited by CIBC are readily distinguishable. CIBC Br. at 25.

[14] Global Crossing's 1998 Form 10-K also describes MRCo. as owning 33,180,260 shares of common stock as of 3/12/99, and attributes such share ownership to Director Michael Steed, the ULLICO/MRCo. executive designed as their representative on the Board. *Id.* at 44-45.

In *United States v. Bestfoods*, 524 U.S. 51, 61 (1998), cited by CIBC, the Supreme Court reversed a decision of the Sixth Circuit Court of Appeals, holding that a parent corporation was not liable for costs of cleaning up industrial waste generated by its subsidiary's operation of a chemical plant. The Supreme Court remanded the case for further evidence concerning whether the parent was involved in the environmental issues at the subsidiary's plant, despite a finding by the Sixth Circuit that "the parents did not utilize the subsidiary corporate form to perpetrate fraud or subvert justice." *Id.* at 60. Here, the Estate Representative does allege fraud by CIBC and ULLICO, and their subsidiary corporate forms should not be permitted to subvert justice.

Similarly, in *In re Maung Ng We v. Merrill Lynch & Co.*, No. 99 Civ. 9687 (CSH), 2000 U.S. Dist. LEXIS 11660 (S.D.N.Y. 2000), cited by CIBC, Judge Haight dismissed breach of fiduciary duty claims against Singapore-based Merrill Lynch International Bank Limited ("MLIB") and declined to hold MLIB's corporate parents, with whom plaintiff had no dealings, liable on a *respondeat superior* basis. In that case, there were no facts to indicate the corporate parents controlled MLIB in the transactions complained of. That is not the case here, since a fair reading of the Complaint requires the conclusion that CIBC and ULLICO were the intended and beneficial recipients of the transfers, regardless of corporate formality. Because the transfers were made without business purpose and without adequate consideration, they were constructively fraudulent and the Estate Representative should be able to recover such conveyances from each identified transferee.

In *Yung v. Integrated Transportation Network Group, Inc.*, No. 00 Civ. 3965 (DAB) (HBP), 2001 U.S. Dist. LEXIS 24715 (S.D.N.Y. Sept. 4, 2001), cited by CIBC, Magistrate Judge Pitman recommended dismissal of the action on grounds of *forum non conveniens* or, in the alternative, dismissal of securities fraud claims for failure to plead with particularity under Rule

9(b), with leave to file amended claims specifying the alleged fraudulent conduct of each defendant. Magistrate Pitman's observation that "the acts of a subsidiary are not automatically the acts of a parent," was qualified by his *caveat* that "there are exceptions to this rule where one corporation...abuses the corporate form to perpetrate fraud." *Id.* at *65 (citations omitted). Here, CIBC and ULLICO are accused of fraud, and should not be permitted to abuse the corporate form to avoid responsibility for fraudulent transfer of property they received.

POINT II.

The Complaint Adequately Alleges Claims Against CIBC and ULLICO for Breach of Fiduciary Duty.

A. Plaintiff has Standing to Assert Breach of Fiduciary Duty Claims Against CIBC and ULLICO.

CIBC and ULLICO argue that the Estate Representative has no standing to sue any of the ASA Defendants for breach of fiduciary duty because they only owed fiduciary duties to GT Parent -- which is now out of existence -- and not to Global Crossing. CIBC Br. at 23-25; ULLICO Br. at 15-16. This argument is easily disposed of. When GT Parent was liquidated through a stock-for-stock exchange with its subsidiary Global Crossing, the former subsidiary succeeded to its fiduciary relationships. *Platt Corp. v. Platt,* 21 A.D.2d 116, 249 N.Y.S.2d 75 (N.Y. App. Div. 1st Dep't 1964), *aff'd,* 15 N.Y.2d 705, 256 N.Y.S. 2d 335 (1965). As Justice Eager explained for the Appellate Division:

> "Policy and equitable considerations weigh heavily in favor of rather than against the conclusion that the causes of action [for breach of fiduciary duties and in tort] against the defendants did not become obliterated by the merger of the wronged corporation into another corporation. To hold that a merger generally would have the effect of destroying such causes of action would be tantamount to paving the way for deliberate corporate pilfering by *management and then for the immunization of the guilty officers* from liability therefor by their arranging for a merger or consolidation of the corporation into or with another corporation."

Id., 21 A.D.2d at 124, 249 N.Y.S.2d at 83.

CIBC also argues that under the doctrine announced in *Bangor Punta Operations, Inc. v. Bangor & A.R. Co.*, 417 U.S. 703, 710-12 (1974), this case is akin to a corporation suing its former management for transactions that new management knew about when it purchased and took control of the corporation. CIBC Br. at 26-29. That line of reasoning is similar to the *in pari delicto* argument employed by the Citigroup and Andersen defendants (see our separate brief) and is equally unavailing. *Bangor Punta* held that when Amoskeag Co. acquired all the stock of a railroad for a fair price, it was equitably barred from recovering the amount it had paid for the stock from the railroad's former owners based on claims of mismanagement. Because Amoskeag did not own any stock at the time of the alleged mismanagement, it did not have any standing to assert derivative shareholder's rights.

That doctrine has no applicability here. The Estate Representative was formed to pursue the interests of four classes of Global Crossing's creditors, not its shareholders. This is hardly a case where a recovery would go directly to the corporation whose prior management engaged in misconduct. *See UCAR Int'l Inc. v. Union Carbide Corp.*, No. 00 CV 1338 (GBD), 2004 U.S. Dist. LEXIS 914, *14 (S.D.N.Y. Jan. 26, 2004) (applying the *Bangor Punta* doctrine where "recovery is not sought as a means to compensate the shareholders directly or any innocent third-parties, such as creditors."). Instead, as explained in detail in our brief in opposition to the dismissal motions of Citigroup and the Andersen defendants, "[t]he Estate Representative does not have, and has never had, any commonality of interest with the stockholders who owned Global Crossing, the wrongdoers formerly in control of its board of directors, or even the presumably clean entities now in control of New Global Crossing." Br. at 3.

Bangor Punta is further distinguishable because the ASA transactions were tainted with fraud. The *Bangor Punta* Court, "noting that plaintiff had not alleged that the stock transaction

was tainted by fraud or deceit, 'implicitly assumed that the price of the shares reflected the mismanagement,' and assumed that the purchaser had knowledge of the misconduct at the time of the stock sale." *UCAR*, 2004 U.S. Dist. LEXIS 914 at *22 (quoting *Feinberg v. Katz*, No. 99 Civ. 45 (CSH), 2002 U.S. Dist. LEXIS 13771, *4 (S.D.N.Y. July 26, 2002). However, "[a] fraud perpetrated in the transaction itself would indicate that the purchaser did not received [*sic*] all that he or she had bargained for when obtaining the shares." *UCAR*, 2004 U.S. Dist. LEXIS 914, at 22. Accordingly, unlike in *Bangor Punta*, a recovery by the Estate Representative on behalf of Global Crossing's defrauded creditors will hardly constitute unjust enrichment.

B. CIBC and ULLICO Owed Fiduciary Duties to Global Crossing.

1. ULLICO Owed a Fiduciary Duty By Virtue of Its Agent's Position on the Global Crossing Board.

ULLICO contends that because it was not an officer, employee or director of Global Crossing, it owed no duty to Global Crossing. ULLICO Br. at 15-17. ULLICO is wrong. Through the malfeasance of its designated agent on Global Crossing's Board, ULLICO as an institution profited at Global Crossing's expense. ULLICO is therefore liable, on a *respondeat superior* basis, for breaches of fiduciary duty as alleged in Counts 8 and 11 of the Complaint.

Michael Steed was Senior Vice President of investments for ULLICO and its "family of companies," MRCo.'s President, and President of Trust Fund Advisors, ULLICO's investment manager subsidiary. Steed was elected a director of GT Parent, Global Telesystems Holding Ltd. ("GT Holdings"), and GT on March 25, 1997—the same day that the ASA, the CIBC Side Letter, and the ULLICO Side Letter were executed. Compl. ¶¶361-362. ULLICO, Steed's master, profited immensely at the expense of Global Crossing. However, ULLICO could not lawfully do so. "Directors...owe the corporation their undivided loyalty and are not permitted to derive a personal profit at the expense of the corporation." *Schachter v. Kulik*, 96 A.D.2d 1038,

1039, 466 N.Y.S.2d 444, 446 (N.Y. App. Div. 2d Dep't 1983), *appeal dismissed*, 61 N.Y.2d 758 (1983).

As ULLICO's employee, Steed represented ULLICO's self-interest rather than Global Crossing's in connection with the ASA transactions. Traditional agency principles require that Steed's breach of the fiduciary duty he owed to Global Crossing be imputed to ULLICO. *See, e.g.*, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 211 (2d Cir. 1968)("[a] corporation can act only through its agents and officers and can know only what its agents and officers know." (citing Restatement (Second) of Agency §9(3)(1957)), *rev'd en banc on other grounds*, 405 F. 2d 215 (1968), *cert. denied, Manley v. Schoenbaum*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969); *In re Maung Ng We v. Merrill Lynch & Co., Inc.*, No. 99 Civ. 9687 (CSH), 2000 U.S. Dist. LEXIS 11660, *13 ("When the elements of an agency relationship have been proven, the corporation acting as principal will be held liable for a tort committed by the agent while acting within the scope of the agency.") [15]

In *Committee of Creditors Holding Unsecured Claims v. Citicorp Venture Capital (In re Papercraft Corp.)*, 165 B.R. 980 (Bankr. W.D. Pa. 1994), *aff'd*, 187 B.R. 486 (Bankr. W.D. Pa. 1995), *rev'd on other grounds*, 211 B.R. 813 (W.D. Pa. 1997) the employer of a designated director of the debtor was held liable, on a *respondeat superior* basis, for breach of a fiduciary duty owed to the debtor. "Muqaddam, [the employer's] officer and one of the Debtor's directors, was its instrumentality." *Id.* at 988. "In so doing, his actions as a director of Debtor were taken with improper motive; that is, to benefit [his employer], not to serve Debtor or its creditors." *Id.* at 990.

[15] This Court recently applied agency principles in determining whether a corporation will be vicariously liable for the acts of its directors and officers under RICO. "The weight of the authority in this District supports imposing vicarious liability on corporations in RICO actions based on the centrality of the role played by the corporate entity...." *USA Certified Merchs., LLC v. Koebel*, 262 F. Supp. 2d 319, 329 (S.D.N.Y. 2003).

> "As a matter of law, Muqaddam was CVC's agent and, under the doctrine of *respondeat superior*, CVC is liable for Muqaddam's breach of fiduciary duty. ... [U]nder these circumstances CVC is bound by Muqaddam's actions. Muqaddam was acting within the scope of his employment with CVC ... and his conduct was in furtherance of CVC's business inasmuch as he was charged with the responsibility of monitoring CVC's investments and ensuring their performance."

Id. at 991.[16]

So too, here. Steed, ULLICO's "Senior Vice President of Investments," made sure ULLICO'S investments were maximized but failed miserably as a Director of Global Crossing. ULLICO is responsible for his failures.[17]

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[16] As noted by the Second Circuit in *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 798 n.3 (2d Cir. 1980) "New York law dictates that the law of the state of incorporation governs an allegation of breach of fiduciary duty owed to a corporation." Global Crossing was incorporated in Bermuda, not a state of the U.S. but rather a foreign country. As provided by Fed. R. Civ. P. 44.1, a party intending to raise an issue concerning the law of a foreign country must give notice by pleadings or reasonable written notice. Here, ULLICO has provided no notice, reasonable or otherwise, that it has raised an issue concerning Bermuda law, and CIBC has only mentioned Bermuda law in a footnote, asserting its (incorrect) argument that because the Estate Representative fails to state a claim under New York law, "the Court need not reach the question of whether or under what circumstances Bermuda law imposes a fiduciary duty on a minority shareholder." CIBC Br. at 29 n.12. Such "notice" is insufficient to raise an issue of Bermudian law. *See Haywin Textile Prods., Inc. v. Int'l Fin. Inv. & Commerce Bank Ltd.*, 137 F. Supp. 2d 431, 435 (S.D.N.Y. 2001) (holding that where defendant cited to several Bangladeshi cases and legal treatises, but did not attach copies of cited authorities, defendant had failed to adequately identify Bangladeshi law).

The Bermuda Companies Act of 1981, Title 17, Item 5, Part VI, §97 provides for the duty of care of officers of a corporation (the definition of which includes director), *Id.* at Part I, §2(1):

> "(1) Every officer of a company in exercising his powers and discharging his duties shall
> (a) act honestly and in good faith with a view to the best interests of the company; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

Despite CIBC and ULLICO's failure to provide notice of Bermuda law, an initial search reveals no Bermuda case law as to whether or not the master-servant relationship between ULLICO and Steed imputes Steed's breaches to ULLICO.

However, in cases involving the law of common law countries, "New York courts generally assume that the foreign law is the same as New York law." *Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978). Since Bermuda is a common law country, this Court should assume that the law of Bermuda is the same as the law of New York. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492 (S.D.N.Y. 2001). Even disregarding that assumption, forum law is to be applied in the absence of proof of foreign law. "When there is no presumption that New York law is the same as foreign law and no evidence has been presented as to foreign law, New York courts have decided the cases in accordance with New York law." *Id.* at 85-86 (citations omitted).

As demonstrated above, New York law follows traditional agency principles regarding the corporation's liability for the acts of its principal, committed within the scope of the agency.

2. CIBC Owed a Fiduciary Duty to Global Crossing Through its Five Seats on the Global Crossing Board, and Through its Controlling Interest in the Company's Stock.

The discussion of *respondeat superior*, above, applies in spades to CIBC. CIBC held no less than five positions on the Global Crossing Board of Directors. Bloom served as "managing director of CIBC Oppenheimer Corp. ("CIBC Oppenheimer"), a wholly-owned subsidiary of CIBC; co-head of CIBC Oppenheimer's High Yield Group; and co-head of CIBC World Market High Yield Merchant Banking Funds." Levine was "managing director of CIBC Oppenheimer; managing director of CIBC Wood Gundy Capital (SFC) Inc. ("CIBC Wood Gundy"); and manager of CIBC World Markets High Yield Merchant Banking funds." Both served on the GT Parent and GT Holdings boards beginning March 25, 1997. Compl. ¶¶ 351, 355. By virtue of these directorships, CIBC, like ULLICO, owed a fiduciary duty to Global Crossing. *See* Section II(B)(2), *supra*. *See also American Tissue, Inc. v. Andersen*, 275 F. Supp. 2d 398, 404 (S.D.N.Y. 2003) (taking note of the "fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation"(citations omitted)).

Additionally, CIBC shared a controlling ownership interest in Global Crossing, creating an independent fiduciary duty to the Company. As the Complaint alleges, CIBC was a significant shareholder of Global Crossing just prior to the IPO: "[i]mmediately before the IPO,

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[17] ULLICO's reliance (ULLICO Br. at 18) on cases applying California law (*Medical Self Care v. NBC*, No. 01 Civ. 4191 (LIS) (RLE), 2003 U.S. Dist. LEXIS 4666 at *21-22 (S.D.N.Y. Mar. 28, 2003)) or Delaware law (*CCBC.com, Inc. v. Thomson Financial, Inc.*, 270 F. Supp. 2d 146, 151 (D. Mass. 2003) and *US Airways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482, 494 (S.D.N.Y. 1997)) is misplaced. Moreover, these authorities are factually distinguishable - none involved crass self-dealing and unjust enrichment of the sort engaged in by CIBC's and ULLICO's board designees. In *US Airways*, the plaintiff alleged that the defendant's designated directors on plaintiff's board withheld information concerning defendant's discussions with a competitor. In *Medical Self Care*, there were "no facts from which a reasonable factfinder could conclude" a breach of fiduciary duty on the part of defendant's designated board representative. 2003 U.S. Dist. LEXIS 4666 at *22. And in *CCBC.com*, the Court permitted the plaintiff to replead a claim against the defendant for aiding and abetting its designated directors' breach of fiduciary duty if defendant allegedly "knew that its representatives violated their fiduciary duty." 270 F. Supp. 2d. at 152. Here, CIBC and ULLICO not only "knew" of their representatives' breach of fiduciary duty, they directed it and profited from it.

CIBC was a 25.03% shareholder of GT Parent; had five seats on the GT Parent board, was an underwriter of the Global Crossing IPO; and had been involved in numerous Global Crossing financings. . . ." Compl. ¶ 352. From 1997 until the Company filed for bankruptcy, Global Crossing paid CIBC in excess of $55.6 million in fees. Compl. ¶ 353. CIBC also received over $3 billion in proceeds from the sale of Global Crossing stock. Compl. ¶ 357. The Complaint alleges that in 1998, at the time of the ASAs termination, CIBC and PCG collectively owned more than 50% of the stock of Global Crossing. Compl. ¶ 372. ("After the conversion, PCG had a 26.85% beneficial ownership interest and CIBC had a 25.03% beneficial ownership interest in Global Crossing Ltd. ... Together, their ownership interest appears to have constituted the controlling block of Global Crossing's issued and outstanding stock."). This collective ownership vested both companies with a fiduciary duty.

The cases cited by CIBC in support of its assertion that, as a minority shareholder, CIBC cannot have had control over Global Crossing, are inapposite. In *Brandt v. Hicks, Muse & Co.*, (*In re Healthco Int'l, Inc.)*, 203 B.R. 515, 518 (Bankr. D. Mass. 1996), the court held that defendant Gemini did not owe a fiduciary duty simply by virtue of its position as a shareholder, because Gemini owned only 9.96% of the debtor's outstanding shares of common stock. However, the complaint was sustained as to breaches of fiduciary duty by the three directors (out of seven) that Gemini placed on the company's board.

In re Tri-Star Pictures, Inc., 634 A.2d 319, 329 (Del. 1993), cited by CIBC, actually supports the Estate Representative's position, since it establishes that under Delaware law a minority shareholder can be held responsible for breaches of fiduciary duty when its holdings are combined with those of other shareholders to effect practical control of the corporation through interlocking relationships among the directors responsible to each separate shareholder. The

court held that "[a]s alleged here, Coca-Cola, although not a majority shareholder, affirmatively attempted to dictate the destiny of Tri-Star. It therefore assumed a fiduciary duty to all Tri-Star shareholders." *Id.* at 328. Coca-Cola owned 36.8% of Tri-Star's common stock, and three other corporations owned 19.8% in the aggregate-- a combined total of 56.6% of Tri-Star's stock. *Id.* at 321-22. The plaintiff relied on Coca-Cola's agreements with these other stockholders to designate nominees to the Tri-Star Board, and to vote for each other's choices. *Id.* at 328. In light of these allegations, the Delaware court held, "we cannot conclude at this stage, as the trial court did, that Coca-Cola had no fiduciary relationship to the minority." *Id.* at 329. The evidence of the interlocking relationships in that case was more than sufficient to infer a fiduciary duty on the part of Coca-Cola even though it was only a minority shareholder; the court did not attempt to set forth the minimum standard by which a fiduciary relationship may be found. *Tri-Star* thus supports the Complaint's allegations that CIBC had a "controlling" interest in Global Crossing.

Beam v. Stewart, 845 A.2d 1040, 1050-51 (Del. 2004) merely states that "[a]llegations of mere personal friendship or a mere outside business relationship, *standing alone*, are insufficient to raise a reasonable doubt about a director's independence." *Id.* at 1050 (emphasis added). Obviously, the Complaint here alleges much more than just "mere personal friendship" between Winnick and the CIBC directors, and massive self-dealing is alleged.

POINT III.

The Complaint Adequately Alleges Fraud Claims Against CIBC and ULLICO.

A. The Complaint Pleads Fraud With Sufficient Particularity to Satisfy Rule 9(b).

The fraud-based claims asserted against defendants CIBC and ULLICO are pleaded with sufficient particularity to give the defendants adequate notice. CIBC and ULLICO, operating

through their proxies on the board of directors, deliberately misled the Company concerning the financial health and prospects of the Company.

CIBC knew of the Company's insolvency because its representatives had access to adverse non-public information about the "Company's business, operations, operational trends, finances, revenue recognition, and backlog policies, markets and present and future business prospects." Compl. ¶ 32. CIBC also underwrote at least four public offerings of debt or stock of the Company and its affiliates. Compl. ¶ 506. CIBC knew of the manipulation of the Company's financial statements through its five board representatives, who resigned in mid-2000 so that CIBC could sell out its holdings of Global Crossing stock -- without having to publicly report the sales at a time CIBC knew that Global Crossing's financials were a sham and that Global Crossing was insolvent. Compl. ¶¶ 397, 552. By then, CIBC knew that the debt which it had assisted the Company to raise as its underwriter, based upon misleading financial statements, was far beyond Global Crossing's ability to repay. Compl. ¶ 530.

The circumstances under which the ASAs were terminated, as detailed above, also bespeak actual fraud. Two of CIBC's employees on the board of directors of GT Parent voted in favor of the original ASAs Compl. ¶ 348. The CIBC Side Letter and ULLICO Side Letter were both executed without consideration. Compl. ¶¶ 356-63. The termination of the ASAs was approved in a vote in which the CIBC - affiliated directors and the ULLICO director participated. Compl. ¶ 393. These facts alone give defendants sufficient notice of their involvement in a fraudulent scheme.

Moreover, the Estate Representative should be given a certain amount of latitude in this pleading as, "[c]ourts have recognized that it is appropriate to be flexible in the particularity requirement of Rule 9(b) in the context of fraud claims brought by a statutory trustee in

bankruptcy." *Heyman*, 277 B.R. at 36. "Courts usually evaluate averments of fraud more liberally in the bankruptcy context than in other civil actions." *American Tissue,* 2004 U.S. Dist. LEXIS 15732, at *71 (quoting *Harrison III v. Entm't Equities, Inc.*, 138 B.R. 390, 395-96 (Bankr. S.D.N.Y. 1992)). This is particularly so where a third party outsider to the fraudulent transactions is bringing the action. *Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Bevs., Inc.)* 238 B.R. 558, 581-82 (Bankr. S.D.N.Y. 1999). *See also Securities Investor Protection Corp. v. Stratton Oakmont, Inc.,* 234 B.R. 293, 310 (Bankr. S.D.N.Y. 1999) ("Greater liberality in the pleading of fraud is particularly appropriate in bankruptcy cases, because, as here, it is often the trustee, a third party outsider to the fraudulent transaction, that must plead the fraud on secondhand knowledge for the benefit of the estate and all of its creditors."). By contrast, in non-bankruptcy cases, "[t]he Second Circuit has 'construed Rule 9(b) strictly....'" *Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 113 (S.D.N.Y. 2004) (internal citation omitted).

B. The Complaint Adequately Pleads Reliance.

CIBC and ULLICO were fiduciaries of the Company. *See* Section II(B), *supra.* Accordingly, each had a duty to disclose material facts concerning "the true nature and/or purpose of the transactions" at issue. Omission to do so creates a presumption of reliance. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54, 92 S. Ct. 1456, 1472, 31 L. Ed. 2d 741, 761-62 (1972) ("This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact."). Whether reliance is reasonable is usually a question of fact. *See Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993) (reliance may be evaluated in light of, among other things, "the existence of a fiduciary relationship").

C. The Complaint Adequately Pleads Scienter.

Even in a non-bankruptcy context, "[g]reat specificity as to scienter is not required because 'a plaintiff realistically cannot be expected to plead a defendant's actual state of mind.'"

Cohen v. Koenig, 25 F.3d 1168, 1173 (2d Cir. 1994) (quoting *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987)). However, Rule 9(b) does require "that allegations of scienter be supported by facts giving rise to a 'strong inference' of fraudulent intent.... To satisfy the scienter requirement, a plaintiff need not allege facts which show a defendant had a motive for committing fraud, so long as plaintiff adequately identifies circumstances indicating 'conscious behavior' by the defendant from which an intent to defraud may fairly be inferred." *General Elec. Capital Corp. v. Adams Communs. Corp.*, No. 91 Civ. 2729 (CSH), 1991 U.S. Dist. LEXIS 13072, *20-21 (S.D.N.Y. Sept. 18, 1991) (citations omitted). "Constructive knowledge of fraudulent schemes will be attributed to transferees who were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but who failed to make such inquiry." *HBE Leasing*, 48 F.3d at 636.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the motions to dismiss the complaint by the Andersen Defendants and the Citigroup Defendants be denied.

Dated: New York, New York
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Respectfully submitted,

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