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Transaction ID 32330335
Case No. 4797-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHAD J. SHANDLER, CREDITOR TRUSTEE OF INSILCO TECHNOLOGIES, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 4797-VCS
DLJ MERCHANT BANKING, INC., DLJ MERCHANT BANKING PARTNERS, L.P., DONALDSON, LUFKIN & JENRETTE SECURITIES CORP., DONALDSON, LUFKIN & JENRETTE, INC., n/k/a CREDIT SUISSE (USA), INC., DLJ CAPITAL FUNDING, INC., n/k/a, CREDIT SUISSE CAPITAL FUNDING, INC., MBP II PLAN INVESTORS, L.P., DLJ OFFSHORE PARTNERS II, C.V., DLJ MILLENNIUM PARTNERS-A, L.P., DLJ MILLENNIUM PARTNERS, L.P., DLJ ESC II, L.P., DLJ EAB PARTNERS, L.P., DLJ MERCHANT BANKING PARTNERS II-A, L.P., DLJ MERCHANT BANKING PARTNERS II, L.P., DLJ DIVERSIFIED PARTNERS, L.P., DLJ DIVERSIFIED PARTNERS-A, L.P., WILLIAM F. DAWSON, JR., THOMPSON DEAN, JOHN F. FORT, III, GEORGE A. PEINADO, KEITH PALUMBO, RANDALL CURRAN, DAVID HOWE, JAMES E. ASHTON, and MCDONALD INVESTMENTS, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 27, 2010
Date Decided: July 26, 2010

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STRINE, Vice Chancellor.

I. Introduction

In this opinion, I address a motion to dismiss claims brought on behalf of Insilco Technologies, Inc. ("Insilco"), a bankrupt corporation, by plaintiff Chad J. Shandler, who was appointed by the federal bankruptcy court as Creditor Trustee and to prosecute any claims belonging to Insilco. In his complaint, Shandler alleges that Insilco was victimized by fiduciary wrongdoing committed by its controlling stockholder, a group of affiliated funds (the "DLJ Funds") that Shandler alleges were dominated and controlled by defendants Donaldson, Lufkin & Jenrette, Inc. n/k/a Credit Suisse (USA), Inc. ("DLJ, Inc.") and DLJ Merchant Banking, Inc. ("DLJMB") (collectively, "DLJ"), and by a group of DLJ-affiliated directors who comprised a majority of Insilco's board.

In this decision, I address motions to dismiss filed by certain of the defendant directors and entities affiliated with DLJ, as well as defendant KeyBanc Capital Markets, Inc. ("KeyBanc"),[1] an investment bank that performed work for Insilco on a transaction, the fairness of which Shandler challenges. I largely dismiss all of the counts in the complaint against the moving directors and DLJ entities because the counts either fail to state a claim at all or, at best, state an exculpated duty of care claim. In one important respect, however, I sustain the complaint. I find that, insofar as the complaint challenges the fairness of a transaction whereby Insilco sold its automotive business to another corporation that DLJ controlled, it states a claim against DLJ, as a controlling stockholder group, and against all but two of the moving director defendants, for breach of the

[1] KeyBanc was formerly known as McDonald Investments, Inc. I use its current name as the parties have generally done in their briefs.

fiduciary duty of loyalty. I also find that the complaint states a claim against KeyBanc, who was hired by Insilco to give advice on the deal, for aiding and abetting a breach of fiduciary duty.

II. Background Facts

The following facts are drawn from the complaint and the documents that the complaint incorporates.

A. The DLJ Funds Acquire A Controlling Stake In Insilco

Before it was liquidated in bankruptcy in 2004, Insilco — a Delaware corporation that was wholly owned by Insilco Holding Co. — manufactured telecommunication and electrical component products for the computer, telephone, automotive, and medical equipment markets.[2] According to the complaint, in late 1997 or early 1998, DLJ, Inc., an investment bank, and its indirect wholly owned subsidiary,[3] DLJMB,[4] identified Insilco as an attractive equity investment.[5] According to the complaint, DLJ and DLJMB made investments using various affiliates they dominated and controlled, including the ten "DLJ Funds"[6] that are named as defendants in this action.[7]

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[2] *See* Insilco Technologies, Inc. Form 10-K for the Fiscal Year Ended Dec. 31, 2002 at Item 1.
[3] *See* Compl. at 1 n.1; Credit Suisse (USA), Inc. Form 10-K405 for the Year Ending Dec. 31, 2000 (filed Mar. 30, 2001) at 2. DLJ, Inc. is the successor company of First Boston (USA), and is a wholly owned subsidiary of Credit Suisse (USA), Inc. Compl. at 1 n.1
[4] DLJMB often operated as DLJ, Inc. Compl. ¶ 50. Credit Suisse Group acquired DLJ, Inc. on November 3, 2000 and DLJ, Inc. now operates as a Credit Suisse (USA), Inc. Compl. at 1 n.1. For simplicity's sake, I use the DLJ moniker used by Shandler in his complaint.
[5] *Id.* ¶ 51.
[6] The DLJ Funds include: DLJ Merchant Banking Partners II, L.P., DLJ Merchant Banking Partners II-A, L.P.; DLJ ESC II, L.P.; DLJ EAB Partners, L.P.; DLJ Merchant Banking Partners II-A, L.P.; DLJ Merchant Banking Partners II, L.P.; DLJ Diversified Partners, L.P.; DLJ Diversified Partners-A, L.P.; MBP II Plan Investor, L.P.; and DLJ Offshore Partners, II, CV. *Id.* ¶ 2.

In August 1998, DLJ Inc. and DLJMB allegedly utilized the DLJ Funds to acquire 74% of Insilco's common stock in exchange for an investment of $43 million.[8] DLJ Inc. in particular paid over $28 million of the $43 million used to purchase those shares in the names of the DLJ Funds.[9] At the time that the DLJ Funds acquired a majority stake in Insilco, Insilco had three primary independent operating divisions: (1) a specialized automotive components business called "ThermaSys;" (2) a publishing business, which primarily printed and designed student yearbooks; and (3) a technology segment, split into four sub-units, that manufactured telecommunications and electrical components for, among other things, computer networking, digital telephones, and automotives.[10] Shandler alleges that ThermaSys and the publishing business were Insilco's most valuable assets.[11]

B. <u>DLJ Takes Control Of Insilco's Board And Business Strategy</u>

Shandler alleges that once DLJ obtained a majority equity stake in Insilco, DLJ moved rapidly to implement a new business strategy. This strategy was premised on the notion that Insilco would be more valuable if it focused on its technology business, and

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[7] Specifically, DLJMB controlled an affiliate entity called DLJ Merchant Banking II, Inc. ("DLJMBII"). *Id.* ¶ 45. DLJMBII was the managing partner of defendants DLJ Merchant Banking Partners II, L.P. ("Partners II"), DLJ Merchant Banking Partners II-A, L.P. ("Partners II-A"), DLJ Millennium Partners, L.P., and DLJ Millennium Partners-A L.P. *Id.* ¶ 45. DLJMBII was also the general partner of defendants DLJ EAB Partners, L.P., and DLJ Offshore Partners, II, C.V. *Id.* ¶ 46. Partners II and Partners II-A made side-by-side investments with two other DLJ Funds called DLJ Diversified Partners, L.P. and DLJ Diversified Partners-A, L.P. *Id.* ¶ 46. Additionally, DLJ, Inc. was the sole owner of an entity called DLJ CI, which owned the stock of DLJ LBO Plans Management Corporation ("LBO Corp."). LBO Corp. is the managing partner of defendant DLJ ESC II, L.P. *Id.* ¶ 47.

[8] *Id.* ¶ 51.

[9] *Id.* ¶ 49.

[10] *Id.* ¶ 53.

[11] *Id.* ¶ 6.

spun off ThermaSys and its publishing business. Consistent with a tension that permeates the complaint as a whole, Shandler alleges that DLJ was acting in its self-interest by pursuing this strategy to maximize the value of its equity position in Insilco. To this precise point, Shandler alleges that DLJ "caused Insilco to pursue an aggressive acquisition and divestiture strategy with a goal of preparing Insilco for a public offering pursuant to which the defendant DLJ Funds would 'cash out' [their] investment in Insilco."[12] Of course, in order for the strategy to work, the moves DLJ made to portray Insilco as a focused, technology-based company with genuine value and upside potential had to be sufficiently attractive to the market to position the company to successfully make a public offering. If that were the case, one would hope that a rational marketplace would therefore have had to be persuaded that Insilco had the capacity to pay its debts.

To solidify its control, DLJ, according to the complaint, installed its designees as a majority of Insilco's board. In 1999, four individuals who were allegedly affiliated with DLJ, Inc. and DLJMB — defendants William Dawson, Thompson Dean, John Fort, and Keith Palumbo — were elected as directors of Insilco's seven-member board. The proxy statement submitted to Insilco's shareholders for the 1999 board election disclosed that Dawson was a principal of DLJMB and a senior vice president of defendant Donald, Lufkin & Jenrette Securities Corp. ("DLJ Securities"), that Dean was a managing director and managing partner of DLJMB, and that Palumbo was a vice president of DLJMB. But, according to the complaint, the proxy statement did not mention that Fort was

[12] *Id.* ¶ 54.

associated with DLJ, Inc. by his role as a member of the DLJ Merchant Banking Advisory Board.[13]

Insilco's other directors in 1999 were defendant Randall Curran, defendant David Howe, and CEO Robert Smialek. The complaint alleges that DLJ forced out Smialek and replaced him with Insilco's then-CFO David Kauer.[14] None of these directors were associated with DLJ. In 2000, Curran resigned from the board and was replaced by another DLJ insider, defendant George Peinado, a principal of DLJMB.[15] The addition of Peinado raised the number of DLJ "insider" directors to five out of seven, if Fort is counted as Shandler wishes. In mid-2000, the board appointed defendant James Ashton to the Insilco board by unanimous written consent. Although the board initially identified Ashton as independent and disinterested, he later identified himself as "associated with DLJ Merchant Banking Partners II."[16] In addition, Ashton had previously served as president and CEO of Fiberite Holdings, Inc. from 1995 to 1997, when a DLJ-related entity controlled that company.[17]

C. <u>DLJ Pursues An Allegedly Self-Interested Business Strategy For Insilco</u>

With the DLJ-affiliated directors making up a majority of the Insilco board, the board allegedly managed Insilco in such a way that benefitted DLJ to the detriment of Insilco. Specifically, Shandler claims that the Insilco board, and DLJ as majority shareholder, engaged in three forms of self-dealing to further the interests of DLJ. First,

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[13] *Id.* ¶¶ 31-32, 35, 58.
[14] *Id.* ¶ 56.
[15] *Id.* ¶ 59.
[16] *Id.* ¶ 60.
[17] *Id.* ¶ 60.

the board allegedly caused Insilco to retain various DLJ-related companies as financial advisors in connection with several M & A transactions and to facilitate Insilco's entry into certain credit agreements, and caused Insilco to pay those advisors excessive fees for those roles. Second, the board and DLJ allegedly caused Insilco to sell ThermaSys to a company controlled by the DLJ Funds for an unfair price.[18] Finally, once it was clear that DLJ's business strategy for Insilco had failed and the company was insolvent, the Insilco board, at the behest of DLJ, supposedly delayed the filing of insolvency petitions for Insilco so as to allow DLJ to recoup some of its losses through the generation of additional advisory fees and through sales by the DLJ Funds of the Insilco debt that they owned.

1. The Board Retains DLJ-Related Financial Advisors

According to the complaint, from 1998 to 2002, DLJ caused the board to repeatedly hire DLJ Securities and DLJ Capital Funding, Inc., n/k/a Credit Suisse Capital Funding ("DLJ Capital") (collectively, the "DLJ Advisors"), companies that were associated with DLJ, to generate fees for DLJ. Without attempting to identify what work was done and what the appropriate market rate for that work was, Shandler simply makes the cursory allegation that the fees paid to these advisors were "excessive," "unnecessary," and "exorbitant."[19] In particular, Shandler alleges that the board hired DLJ Capital and DLJ Securities to serve as financial advisors for eight M & A

[18] The complaint also makes a cursory allegation that Insilco sold its publishing business to an entity controlled by DLJ, Inc.'s former CEO for an unfairly low price. *See id.* ¶¶ 6, 122. This transaction occurred in March 1999, and the allegation is therefore time-barred. *See id* ¶ 64; *infra* pages 21-22.

[19] Compl. ¶¶ 8, 64-65, 89-115, 132-33.

transactions that the board caused Insilco to enter into between January 1999 and January 2000.[20] These were transactions related to DLJ's strategy of focusing Insilco's identity and future on the technology industry.

Shandler also claims that the board and DLJ caused Insilco to undertake certain credit agreements and that DLJ Capital and DLJ Securities received fees for various roles in preparing and executing those credit agreements. On October 31, 1998, the Insilco board hired DLJ Securities to serve as the arranger and DLJ Capital to serve as the underwriter for a $300,000,000 amended credit facility, which closed shortly thereafter.[21] In January 2000, DLJ Capital was retained again to amend Insilco's credit facility after Insilco sold two companies and purchased another.[22] And, in August 2000, DLJ Capital was retained a third time to serve as the Lead Arranger and Syndication Agent for the refinancing of Insilco's credit facility (the "Credit Agreement").[23]

The Credit Agreement — which was officially termed the Second Amended and Restated Credit Agreement — was executed on August 25, 2000. In particular, the Credit Agreement provided for three credit facilities: (1) a $50 million, 6-year senior secured revolving loan (the "Revolving Loan"); (2) a $35 million, 6-year senior secured amortizing term-A loan (the "Term-A Loan"); and (3) a $125 million, 7-year senior

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[20] Specifically, from January 1999 to January 2000, Insilco: (1) purchased Eyelets for Industry; (2) sold its Steel Parts Corporation subsidiary; (3) sold its Taylor Publishing Company subsidiary; (4) purchased T.A.T. Technologies; (5) conducted a study of the Heat Exchanger industry; (6) sold Steward Connector Systems; (7) purchased Serck, a U.K. heat exchanger manufacturing company; and (8) purchased Precision Manufacturing. *Id.* ¶ 64.

[21] *Id.* ¶ 63.

[22] *Id.*

[23] *Id.*

secured amortizing term-B loan (the "Term-B Loan").[24] Initially, DLJ had the exclusive responsibility for funding the loans extended to Insilco under the Agreement, but eventually assigned some of its interest to other lenders.[25] That is, although the complaint says that DLJ later sold off a part of its senior lender interest, the only reasonable inference to be drawn from the complaint as a whole is that DLJ remained a major holder of the company's senior debt at all relevant times.[26]

For its role as the Lead Arranger and Syndication Agent of the Credit Agreement, Insilco paid DLJ Capital $5.3 million in fees, in addition to $1.4 million that DLJ Securities was paid for retainer and advisory functions that it had served in 2000.[27] That is, DLJ Capital and DLJ Securities were allegedly paid $6.7 million by Insilco in 2000 alone.

2. The Board Allegedly Sells ThermaSys To A DLJ-Related Entity For Unfair Value

Shandler's most clearly pled allegations relate to his claim that the board and DLJ caused Insilco to sell one particular asset of Insilco to a DLJ-related company at an inadequate price. That asset sale was the last in a series of transactions whereby Insilco had sold off various of its businesses outside of the technology sector, consistent with

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[24] *Id.* ¶ 88. The Revolving Loan matured on the sixth anniversary of the Credit Agreement but did not require payments of interest or principal before maturity. But, the term loan facilities required Insilco to make regular quarterly payments. The Term-A Loan required quarterly payments in each of its six years, which set amounts of payment required for each year, beginning in December 2000. Specifically, the Term-A Loan required payment of: $875,000 for the first two years; $1,312,500 for the third year; $1,750,000 for the fourth and fifth years; and (6) $2,187,500 for the sixth year. The Term-B Loan required quarterly payments of only $312,500 for the first six years, and quarterly payments of $29.4 million for the seventh year. *Id.*
[25] *Id.* ¶ 87, 103.
[26] *Id.* ¶¶ 103, 108, 111.
[27] *Id.* ¶ 87.

DLJ's strategy of streamlining and focusing Insilco on that sector. In keeping with that strategy, DLJ also allegedly caused Insilco to make certain acquisitions of businesses related to that sector.[28]

In the complaint, however, Shandler only focuses substantively on attacking one of the transactions, the sale of ThermaSys. In early 2000, defendant Dawson allegedly recommended to Insilco's CEO Kauer that Insilco engage in a so-called "value creation strategy" which involved Insilco selling ThermaSys for cash, and thereafter restructuring Insilco's debt (the "ThermaSys Transaction").[29] Rather than implement that strategy in the usual fashion that would involve the appointment of a special committee of independent directors to, in the first instance, determine whether such a sale was in Insilco's interest and at what price a sale made sense, the Insilco board instead struck a preliminary bargain whereby an entity in which the DLJ Funds owned a majority stake would buy ThermaSys for $147 million.[30] Only after the deal terms were struck was defendant Ashton appointed to the board on July 5, 2000 and immediately named as a single person special committee. The resolution appointing Ashton indicated that he was "completely disinterested in the Proposed [ThermaSys] Transaction and [had] no financial interest in common with the proponents of the Proposed [ThermaSys] Transactions."[31] The complaint alleges that the resolution was misleading, one must assume (as the complaint is otherwise silent on this point) because the resolution does not

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[28] In the complaint, Shandler details that Insilco sold three businesses in 1999, and purchased four in 1999 and 2000. *Id.* ¶ 64.
[29] *Id.* ¶ 68.
[30] *Id.* ¶ 68.
[31] *Id.* ¶ 73.

address the fact that Ashton had served as the CEO of a DLJ portfolio company from 1995 to 1997.[32]

Within five days, Ashton ratified all prior actions of the board related to the deal, including its prior retention of supposedly independent counsel Baker Botts and financial advisor, defendant KeyBanc, a subsidiary of Key Corp., and blessed the $147 million sales price.[33] According to the complaint, Ashton made no effort to negotiate better terms or to seek other buyers for ThermaSys. Rather, Ashton relied upon a fairness opinion by KeyBanc, a banker who Shandler alleges had a previous underwriting relationship with DLJ.[34]

KeyBanc made a presentation on July 14, 2000 at which it conveyed its opinion that the fair value of the ThermaSys Transaction was $143 million as of July 14, 2000 (the "Fairness Presentation"), and, thus, that the $147 million price was fair to Insilco.[35] But, according to the complaint, the Fairness Presentation was flawed because it adopted an EBITDA multiple that was below the floor of the range of EBITDA multiples for automotive transactions during that time period. Specifically, Shandler argues that KeyBanc's Fairness Presentation represented that the average EBITDA multiple of automotive transactions from January 1998 to July 2000 was 7.7, with the high of that range being 12.3 and the low being 5.6.[36] But, the Thermasys Transaction used an EBITDA multiple of only 4.1. If the Thermasys Transaction had been at the average

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[32] *Id.*
[33] *Id.* ¶ 75.
[34] *Id.* ¶ 79.
[35] *Id.* ¶ 78.
[36] *Id.* ¶ 76.

EBITDA multiple of 7.7, Shandler argues, the price of ThermaSys would have been $274.89 million.[37]

Moreover, Shandler argues that KeyBanc had given DLJMB a fairness opinion for the ThermaSys Transaction just three weeks before KeyBanc was retained by Insilco. An internal analysis of the Investment Committee of DLJMB valued the ThermaSys Transaction at $174 million as of February 29, 2000, but reduced that valuation estimate to $150 million on June 8, 2000.[38] According to an internal memorandum, DLJMB's reduced valuation relied, in part, on a fairness opinion that KeyBanc had created for DLJMB.[39] That is, KeyBanc had been advising DLJMB on the ThermaSys Transaction weeks before it was hired by Insilco to provide the same service.

After the ThermaSys Transaction closed, Ashton was installed as the chairman of the ThermaSys board, and later as CEO of ThermaSys.[40] Thus, Ashton again became what he had been from 1995 to 1997 — the CEO of a DLJ portfolio company.[41] A year later, on August 6, 2001, Ashton allegedly abstained from voting on a transaction involving the DLJ Funds, acknowledging his association with DLJ.[42] Although the complaint suggests that this rendered the prior board resolution false, the complaint does not address whether Ashton's later acknowledgement was because of some prior

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[37] *Id.*
[38] *Id.* ¶ 77.
[39] *Id.* ¶ 78.
[40] *Id.* ¶ 80.
[41] *Id.* ¶¶ 60, 80.
[42] *Id.*

connection with DLJ that preceded his service on the Insilco board, or rather because Ashton was by then the CEO of ThermaSys, which was now a DLJ portfolio company.

In sum, Shandler alleges that the ThermaSys Transaction is a classic example of unfair self-dealing and that Ashton's hurried blessing of a fully-baked deal, rather than representing a genuine effort to simulate arms-length bargaining, actually highlights the unfairness of the transaction.

3. The Board Delays Insilco's Bankruptcy Filing

Shandler alleges that DLJ's strategy for Insilco soon unraveled. Even though it had revised its credit agreements as recently as August 2000, by late 2000, Insilco began to experience serious financial difficulty. As of December 31, 2000, Insilco's working capital was just half of its level from the previous year, dropping to $75 million from $150 million.[43] And, Insilco had over $380 million in debt but only $356 million in assets.[44]

In early 2001, Insilco was suffering the effects of a downturn in the economy, particularly in the telecommunications industry, and its customers were reducing orders. Insilco avoided breaching its debt covenants in the first quarter of 2001, but by mid-year was in default. As of mid-year 2001, the complaint alleges, Insilco was insolvent. The complaint alleges that the board knew at that time that Insilco could not survive in its current form and that bankruptcy was inevitable. But the complaint says that DLJ prevented Insilco from seeking bankruptcy protection immediately or exploring other

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[43] *Id*. ¶ 90.
[44] *Id*.

strategic options.[45] The complaint then immediately contradicts itself in material part by saying that the board and DLJ delayed a bankruptcy filing so that it could retain Bain & Company to review Insilco's options and to consult with a DLJ-related workout specialist about its options.[46] These moves, of course, are exactly the kind one takes when one is "consider[ing] strategic alternatives."[47]

To enable Insilco to weather the moment, Insilco's lenders asked that Insilco generate cash, and suggested that the DLJ Funds contribute additional equity capital. The DLJ Funds were initially open to making the capital infusion but, after an internal meeting at DLJMB, the DLJ Funds decided to advance the funds as debt rather than equity.[48] Insilco's lenders eventually agreed to waive Insilco's defaults under the Credit Agreement after the DLJ Funds agreed to make a "cash infusion" of $15 million,[49] and the Credit Agreement was amended to reflect this infusion effective June 30, 2001 (the "Term-C Loan").[50] Shandler alleges that the Term-C Loan violated the terms of an Insilco 12% note indenture (the "12% Note"), which prohibited the issuance of debt that was subordinate to the senior debt in the Credit Agreement but senior in right of payment to the Noteholders.

Shandler further avers that the Insilco board and DLJ knew or "should have known" that the time bought by the Term-C Loan funds would not avert eventual

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[45] *Id*. ¶ 96.
[46] *Id*.
[47] *Id*.
[48] *Id*. ¶ 98.
[49] *Id*. ¶ 99.
[50] *Id*. ¶ 100.

bankruptcy. According to the complaint, the "purpose and effect was merely to prolong and deepen the period of insolvency prior to the filing of the insolvency petitions to permit defendants DLJ Capital and the DLJ Securities (sic) to collect fees, to buy time to sell and assign the DLJ Funds' interests in the revolving facility and Term-A and Term-B facilities and, thereby reduc[e] the exposure of the defendants DLJ Funds to the risk of Insilco's bankruptcy."[51]

The stop-gap financing provided by the Term-C Loan did not get Insilco over the hump. On November 13, 2001, Insilco reported that its insolvency had worsened, and that its third quarter sales totaled only $65.5 million compared to $114.2 million the prior year.[52] By early 2002, DLJ allegedly knew the game was up for sure but still caused Insilco to refrain from filing for bankruptcy immediately. Shandler alleges that DLJ wanted to sell Insilco outside of a bankruptcy proceeding because that would insulate DLJ from claims in bankruptcy relating to its prior self-dealing with Insilco. The complaint is, again, very confusing on this point because it then alleges that DLJ, in response to further defaults, soon sought to arrange a sale of Insilco's assets in a Chapter 11 bankruptcy proceeding.[53]

At this point in the complaint, Shandler focuses more on whether DLJ was placing its interest as a senior creditor ahead of the interests of other less-senior creditors, such as the unsecured creditors.[54] According to the complaint, DLJ had conflicts arising out of

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[51] *Id.* ¶ 101.
[52] *Id.* ¶ 104.
[53] *Id.* ¶ 112.
[54] *Id.* ¶¶ 111, 114.

its many roles as majority equity holder, financial advisor, lender, syndication agent, and lead arranger for Insilco's debt agreements.[55] DLJ allegedly "required their appointees (who controlled the Board) to maximize the recovery for [the] DLJ Funds *and the Lenders* at the expense of Insilco's other creditors."[56] Insilco's "lenders" of course, included DLJ as major Revolving, Term-A, and Term-B Loan lenders under the Credit Agreement and sole provider of the Term-C Loan.[57] Among the many confusing aspects of this convoluted part of the complaint, the complaint never defines the term "*L*enders" that it capitalizes and uses.[58] But the complaint does make clear that DLJ was a major "Lender" in its obscure lexicon.[59] Most sensibly, the term Lenders seems to refer to Insilco's senior creditors.

Supposedly to the end of benefitting the so-called Lenders and the DLJ Funds (who owned a majority of Insilco's equity),[60] DLJ and the board supposedly worked with the company's senior lenders, some of whom DLJ controlled, for a period of forbearance, during which the company worked to find a buyer.[61] In the forbearance agreement, Insilco's lenders secured a pledge of the remainder of Insilco's foreign subsidiaries.[62] The period of forbearance did not yield a buyer, Insilco missed other obligations for

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[55] *Id*. ¶ 111.
[56] *Id*. (emphasis added).
[57] *Id*. ¶¶ 98, 101, 103, 108.
[58] *Id*. ¶ 98.
[59] *Id*. ¶¶ 101, 103, 108, 111.
[60] *Id*. ¶¶ 98, 103.
[61] *Id*. ¶ 113.
[62] *Id*. ¶ 114.

payments, including those it owed to DLJ a lender under the Credit Agreement, and Insilco was forced to file for bankruptcy in December 2002.[63]

D. Insilco Commences Bankruptcy Proceedings

Insilco filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on December 16, 2002.[64] Insilco continued to operate its business as debtor-in-possession. On February 13, 2004, Insilco's debtors filed an Amended Joint Liquidating Plan Pursuant to Chapter 11 of the Bankruptcy Code (the "Liquidating Plan") and, on June 10, 2004, the Bankruptcy Court confirmed the Liquidating Plan, which became effective on October 6, 2004.

Central to the Liquidating Plan was an Asset Allocation and Settlement Agreement (the "Settlement Agreement") among Insilco's debtors, Insilco's Creditors Committee, senior lenders, and other key parties.[65] The Settlement Agreement created a

[63] *Id.* ¶ 114.
[64] *Id.* ¶ 40.
[65] *See* Brauerman Aff. Ex. 2 (Insilco Technologies, Inc. Amended Disclosure Statement and Amended Joint Liquidating Plan) (the "Liquidating Plan") at 16; *id*. Ex. 3 (Asset Reallocation and Settlement Agreement) (the "Settlement Agreement"). The Moving Defendants filed an affidavit in support of their motion to dismiss, which contained the Liquidating Plan, Settlement Agreement and other documents — including Insilco's certificate of incorporation, a proxy statement that Insilco filed with the SEC, and other documents that were filed in Bankruptcy Court. I take judicial notice of these documents for background purposes only, and where their undisputed terms are properly considered, such as in addressing DLJ's res judicata argument. *See West Coast Management & Capital LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006) (taking judicial notice of federal court decisions and orders in determining whether a federal court decision barred a subsequent suit in the Court of Chancery).

Creditor Trust, and Shandler became the Creditor Trustee.[66] Shandler's duties are governed by the terms of the Insilco Liquidating Trust Agreement between the debtors and Shandler.[67] For present purposes, what is important is that the Creditor Trustee, as successor-in-interest to Insilco, had the right to bring any causes of action belonging to Insilco.[68] The Settlement Agreement also allocated Insilco's assets among the signatories of the Agreement, or their constituencies, on an agreed basis, released certain of Insilco's non-DLJ senior lenders from certain claims, and released the Term-C lenders from claims arising from the Term-C Loan.[69] Specifically, the released Term-C lenders included DLJ Securities, DLJ Capital, and eight of the DLJ Funds (the "Term-C Lenders").[70]

E. Shandler Brings Claims In The Bankruptcy Court

Shortly after his appointment as Trustee, on December 14, 2004, Shandler brought claims on behalf of Insilco against DLJ, the DLJ Advisors, the individual members of the Insilco board,[71] and KeyBanc in Bankruptcy Court based on the same allegations raised

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[66] *See* Brauerman Aff. Ex. 4 (Motion of the Official Committee of Unsecured Creditors for an Order Appointing a Chapter 11 Trustee or in the Alternative an Examiner with Expanded Powers) (the "Trustee Motion").
[67] Settlement Agreement ¶¶ H. K.
[68] Liquidating Plan at ¶ H(3) (stating that the Creditor Trustee was authorized "to pursue and prosecute, to settle, or to decline to pursue, the Rights of Action, including all pending adversary proceedings and contested matters, whether or not such causes of action ha[d] been commenced . . . and [was] substituted as the real party in interest in any such action" on behalf of Insilco).
[69] Settlement Agreement ¶¶ 4A, 4C; *In re Insilco Techs., Inc.*, 330 B.R. 512, 521 (Bankr. D. Del. 2005), *aff'd*, 394 B.R. 747 (D. Del. Sept. 15, 2008) (noting that claims involving the Term-C Loan had been dismissed because the court determined that "the 'Term C Lenders,' (which were defined to include the same entities that [were] defined as 'DLJ' in the Amended Complaint) had been released as part of the Settlement Agreement").
[70] Settlement Agreement ¶ 4C.
[71] Shandler named the following eight Insilco directors as defendants: Dawson, Dean, Fort, Peinado, Palumbo, Curran, Howe, and Ashton.

here.[72] Specifically, Shandler's complaint alleged that the defendants had harmed Insilco and its creditors by "wrongfully exercising their control over the company and taking unfair and harmful actions to advance their own interests, while compromising, prejudicing, and aversely affecting [Insilco's] interests."[73] The DLJ entity defendants and certain Insilco directors who were full-time DLJ employees filed a motion to dismiss on March 18, 2005.[74] On September 27, 2005, the Bankruptcy Court dismissed many of Shandler's claims because it lacked subject matter jurisdiction over his non-core breach of fiduciary duty claims.[75] That is, the Bankruptcy Court found that many of Shandler's claims, including his breach of fiduciary duty claims, were not "core" proceedings under Title 11 of the Bankruptcy Code.[76] The United States District Court for the District of Delaware affirmed the Bankruptcy Court's dismissal of the proceeding on September 15, 2008.[77]

F. Shandler Brings Suit In This Court And The Defendants Move For Dismissal

After the Bankruptcy Court's dismissal became final on October 14, 2008,[78] Shandler filed this action on August 11, 2009, re-pleading the "non-core" breach of fiduciary duty claims and related claims against DLJ, the DLJ Advisors, and the Insilco directors. Specifically, the complaint brings claims for breach of fiduciary duty,

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[72] *Shandler v. DLJ Merchant Banking, Inc.*, Adv. Pro. No. 04-57950 (KJC); *see Insilco*, 330 B.R. at 512.
[73] *Insilco*, 330 B.R. at 515.
[74] Specifically, DLJ, DLJ Capital, DLJ Securities, and directors Dean, Dawson, Peinado, and Palumbo moved to dismiss. *Id*. at 515 n.6.
[75] *Id*. at 519-20.
[76] *Id*.
[77] *In re Insilco Techs., Inc.*, 394 B.R. 747 (D. Del. Sept. 15, 2008).
[78] Compl. ¶ 44.

professional malpractice, and unjust enrichment. In his breach of fiduciary duty claims, Shandler alleges the individual Insilco directors breached their fiduciary duties by causing Insilco to pay excessive fees to the DLJ Advisors, selling ThermaSys for less than fair value, and delaying Insilco's bankruptcy filing to benefit DLJ at Insilco's expense.[79] Shandler alleges that all the DLJ entities acted together as Insilco's controlling stockholder and in that capacity breached their fiduciary duties by causing DLJ's designees on the Insilco to engage in the same alleged misconduct.[80] Alternatively, Shandler alleges that DLJ and the DLJ Advisors are liable for aiding and abetting the fiduciary wrongdoing of the Insilco director defendants.[81]

As to the DLJ Advisors, the complaint alleges, without any fact pleading, that these advisors to Insilco engaged in professional malpractice.[82]

With much more specificity, the complaint alleges that KeyBanc aided and abetted the breaches of fiduciary duty that occurred in connection with the ThermaSys Transaction by knowingly placing too low of a value on ThermaSys and thereby painting the patina of fairness on an allegedly unfair transaction.[83] Alternatively, the complaint

[79] *Id*. ¶¶ 120-26 (Count I).
[80] *Id*. ¶¶ 127-130 (Count II), 131-33 (Count III), 134-139 (Count IV).
[81] *Id*. ¶¶ 149-160, 162 (Count VII). Not content with these fiduciary duty-based counts, Shandler also throws in a count for unjust enrichment against the DLJ Funds, seeking the disgorgement of any benefits they received in any form from Insilco at any time. *Id*. ¶¶ 145-48 (Count VI). I dismissed Shandler's unjust enrichment claim at the oral argument on these motions to dismiss. *See Shandler v. DLJ Merchant Banking, Inc. et al.*, C.A. No. 4797-VCS, at 73-74 (Del. Ch. Apr. 27, 2010) (TRANSCRIPT).
[82] Compl. ¶¶ 140-144 (Count V).
[83] *Id*. ¶¶ 149-156, 161-62 (Count VII).

alleges that KeyBanc at the least committed professional malpractice by giving Ashton, the oxymoronic single man special committee, deficient advice.[84]

KeyBanc, DLJ, the DLJ Advisors, and directors Dawson, Dean, Peinado, and Palumbo filed motions to dismiss the complaint on October 30, 2009. Defendant directors Ashton and Fort joined in the DLJ defendants' motion to dismiss, but filed a separate reply brief (hereafter, Dawson, Dean, Peinado, Palumbo, Ashton, Fort are referred to as the "Moving Directors" and, with DLJ and the DLJ Advisors, as the "Moving Defendants").[85]

The Moving Defendants argue that the complaint should be dismissed because: (1) the claims based on events before December 16, 1999 are time-barred; (2) the breach of fiduciary duty claims are barred by res judicata; (3) a § 102(b)(7) provision in Insilco's charter bars any due care claims against the Insilco directors; and (4) the complaint otherwise fails to state a claim under Court of Chancery Rule 12(b)(6).

KeyBanc argues that Count VII for aiding and abetting the Insilco directors' breaches of fiduciary duty must be dismissed against KeyBanc because: (1) the claim is time-barred; and (2) Ohio substantive law applies to the aiding and abetting claim and Ohio does not recognize such a claim.

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[84] *Id.* ¶¶ 163-67 (Count VIII).

[85] I use the terms "Moving Defendants" and "Moving Directors" to differentiate these defendants from directors Curran and Howe, who have not moved to dismiss or otherwise entered an appearance. I note that Shandler filed default judgment motions against Curran and Howe on December 12, 2009, but has failed to press those motions.

III. Legal Analysis

Motions to dismiss for failure to state a claim are governed by Court of Chancery Rule 12(b)(6). In considering a motion to dismiss, I must accept as true all well-pled allegations, drawing all reasonable inferences in favor of the plaintiffs.[86] Dismissal will be granted where a plaintiff fails to "plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks."[87]

A. Portions Of Shandler's Claims Are Outside The Statute Of Limitations

The Moving Defendants point out that Shandler's claims rely, in part, on events that occurred beyond the statute of limitations. The parties agree that each of Shandler's claims is subject to a three-year statute of limitations, plus a two-year extension for those claims that remained timely when Insilco filed for bankruptcy.[88] That is, the parties agree Shandler can only bring claims that were timely on December 16, 2002 — when Insilco filed for Chapter 11 reorganization. Shandler does not dispute the Moving Defendants' reading of the statute of limitations, nor their argument that conduct occurring on or before December 16, 1999 cannot form the basis for a claim. Instead, in his answering brief, Shandler states that "facts alleged prior to December 16, 1999 are relevant to

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[86] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (quoting *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 227 (Del. 1982)).

[87] *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).

[88] Under Delaware law, claims for breach of fiduciary duty, professional malpractice, and unjust enrichment are covered by a three year statute of limitations. *See* 10 *Del. C.* § 8106; *see also*, *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *5 (Del. Ch. Dec. 1, 2009) (explaining that "Delaware law sets a three year statute of limitations for claims for unjust enrichment . . . and breach of fiduciary duty"). The Bankruptcy Code "extends the time period for filing [timely] claims by two years . . . ." *In re Fruehauf Trailer Corp*, 250 B.R. 168, 185 (Bankr. D. Del. 2000); *see also* 11 U.S.C. § 108(a).

describe the foundation for the wrongful conduct that occurred *after* December 16, 1999, none of which is time-barred."[89]

Due to the statute of limitations, Shandler now admits that he cannot base a claim for relief on events that occurred on or before December 16, 1999. This constraint includes Shandler's allegations that:

- The Insilco board failed to disclose that Fort was a DLJ insider;[90]
- The DLJ Advisors were hired to serve as the arranger and underwriter for $300 million in amended credit facilities on October 31, 1998;[91]
- The DLJ Advisors were hired and received fees for serving as the financial advisor on seven transactions occurring from January 1999 to October 1999;[92]
- DLJ caused Insilco to engage in a number of M & A transactions, including the sale of its Publishing Business, called Taylor Publishing Company.[93]

Thus, to the extent that the complaint as written seeks relief for this conduct, the claims are time-barred and dismissed. With that limitation in mind, I now proceed to address whether the allegations of the complaint relating to conduct occurring after December 16, 1999 are sufficient to withstand the dismissal motion.

[89] Pl. Ans. Br. to the DLJ Def.'s Mot. to Dismiss at 18-19.
[90] Compl. ¶ 58.
[91] *Id.* ¶ 63.
[92] *Id.* ¶ 64.
[93] *Id.* ¶ 64.

B. The Breach Of Fiduciary Claim Can Proceed, In Part, Against All But Two Of The Moving Directors

The Moving Defendants argue that Shandler's breach of fiduciary duty claim against the Moving Directors should be dismissed because: (1) it is barred by res judicata as to certain of Insilco's directors; and (2) the complaint fails to state a claim for breach of fiduciary duty at all, or at best states only a due care claim that is barred by an exculpatory provision in Insilco's charter.

1. Res Judicata Does Not Bar Shandler's Fiduciary Duty Claim Against The DLJ Directors

First, certain of the Moving Defendants argue that Shandler's breach of fiduciary duty claim against Moving Directors Dawson, Dean, Palumbo, and Peinado (for purposes of this section, the "DLJ Directors") is barred by res judicata. The DLJ Directors were parties to an indemnification stipulation, which was entered in the bankruptcy proceeding (the "Indemnification Stipulation").[94] The DLJ Directors now argue that Shandler cannot sue them for breach of fiduciary duty because he is "bound by the Indemnification [Stipulation], which provides that the DLJ Directors are entitled to indemnification regarding any claim for liability . . . ."[95] That is, the DLJ Directors claim that Shandler cannot bring breach of fiduciary duty claims against them because he agreed that they were entitled to indemnification, and that therefore he agreed that they had acted in good faith and were entitled to be indemnified by Insilco for any judgment against them.

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[94] Brauerman Aff. Ex. 7 (Stipulation Regarding Withdrawal of Creditor Trustee's Seventh Substantive Omnibus Objection to Former Insilco Directors' Claims) at 1.
[95] DLJ Def.'s Op. Br. at 13.

During the proceedings in Bankruptcy Court, the DLJ Directors sought to have Insilco and its insurers pay for their costs in defending claims which included the same breach of fiduciary duty claims that Shandler now brings in this court. In a negotiated settlement, Shandler entered into the Indemnification Stipulation, stipulating to the fact that the DLJ Directors were entitled to so-called indemnification, so long as those claims were limited to the amount of Insilco's insurance coverage. By agreeing to the Indemnification Stipulation, the DLJ Directors argue, Shandler was acknowledging that the DLJ Directors had acted in good faith, because § 145(b) of the Delaware General Corporation Law extends indemnification only to those directors who have acted "in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation."[96] Thus, the Moving Defendants claim, by agreeing to indemnify the DLJ Directors, Shandler effectively agreed that the DLJ Directors had not acted in bad faith or contrary to the best interests of Insilco.

This creative idea is silly. Sometimes creative ideas that are silly can have social merit. This is certainly true in comedy — think of Monty Python. But not so much in law.

Here, this argument is not only silly, it is frivolous. When the Indemnification Stipulation was entered — on April 13, 2006 — the Bankruptcy Court had not yet dismissed the non-core breach of fiduciary duty claims that are now at issue in this

[96] 8 *Del. C.* § 145(b). Insilco's certificate provides that Insilco will indemnify its directors to the fullest extent permitted by Delaware law. *See* Brauerman Aff. Ex. 6 (Restated Certificate of Incorporation of Insilco Corporation) at Art. V.

court.[97] Instead, by entering the Stipulation, the Bankruptcy Court recognized that the directors could receive such indemnification "as may be available to them under applicable Insilco insurance policies . . . ."[98] As counsel for the Moving Defendants who negotiated the Indemnification Stipulation admitted, the DLJ Directors were seeking so-called indemnification largely in order to cover the costs of defending themselves against Shandler's fiduciary duty claims.[99] The settlement with Shandler was designed to allow them to do that, so long as they limited their claims to using the company's existing D & O policies.[100] As counsel for the Moving Defendants also admitted, she never told Shandler that by using the variegated word indemnification in a loose way in the Stipulation, he was agreeing to release the DLJ Directors from liability for the very claims for which they were seeking defense costs.[101] Apparently, though, counsel believes she can now do an end zone dance because she snuck past Shandler into the end zone by silently obtaining an order barring any consideration of Shandler's fiduciary duty claims.

This argument lacks any merit and any equity. The Indemnification Stipulation was not based on any determination of whether the defendants had acted in bad faith or were liable for the conduct in the underlying litigation, and no such determination had been made at the time that the Stipulation was agreed to. All the Stipulation did was

[97] According to the Complaint, the Bankruptcy Court dismissed the claims against the DLJ Defendants for lack of subject matter jurisdiction on September 27, 2005.
[98] Brauerman Aff. Ex. 7 (Stipulation Regarding Withdrawal of Creditor Trustee's Seventh Substantive Omnibus Objection to Former Insilco Directors' Claims) ("Indemnification Stipulation").
[99] *See Shandler*, C.A. No. 4797-VCS, at 13-14 (Del. Ch. Apr. 27, 2010) (TRANSCRIPT).
[100] *Id*. at 15-16.
[101] *Id*. at 19-20.

ensure that the DLJ Directors could have their legal fees for defending Shandler's claims covered by Insilco's D & O insurance coverage, and seek ultimate indemnification if that was consistent with the policy and so long as the policy had sufficient funds for that purpose.[102]

Thus, the Indemnification Stipulation does not bar Shandler's breach of fiduciary duty claim because an element of res judicata — a *final* prior adjudication — is not present.[103] The Bankruptcy Court never intended to and never did make a final ruling on whether the DLJ Directors had acted in bad faith or breached their fiduciary duties. Rather, the Bankruptcy Court dismissed the claims against the DLJ Directors for lack of subject matter jurisdiction and allowed them to be pursued in a court with jurisdiction. Indeed, in an earlier decision in the bankruptcy proceeding, the U.S. Court of Appeals for the Third Circuit expressly recognized that the claims for breach of fiduciary duty could be pursued in state court.[104] All that the Bankruptcy Court intended when it approved the Indemnification Stipulation was to approve the parties' agreement that the DLJ Directors

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[102] Indemnification Stipulation § 2; *see Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 592 (Del. Ch. 2006) (discussing some of the historical complexities associated with the word indemnification); *see also* LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND DIVISIONS § 1.05[5] at 1-39 (2001) (discussing the use of so-called "indemnification" provisions that address the right of a contractual party to seek relief for certain contractual breaches of the occurrence of certain events).
[103] Res judicata bars a party from re-litigating claims where a final judgment has been reached in an earlier suit, and where five elements are present: (1) the prior court had jurisdiction; (2) the parties in both actions are the same, or are in privity with one another; (3) the cause of action in both cases is the same; (4) the issues in the prior case must have been decided adversely to the contentions in the present case; and (5) the prior adjudication was final. *See Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1184-85 (Del. Ch. 2009) (quoting *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001)).
[104] *In re Insilco Techs., Inc.*, 280 F.3d 212, 219 n.13 (3d Cir. 2007) (observing that claims for breach of fiduciary duty relating to the management of Insilco could be pursued under Delaware law and outside of Bankruptcy Court).

could receive attorneys' fees under Insilco's D & O insurance policy to defend against Shandler's claims. Therefore, Shandler's claims against the DLJ Directors are not barred by res judicata.

2. The Complaint States A Non-Exculpated Claim For Breach Of Fiduciary Duty Against Four Of The Moving Directors As To The ThermaSys Transaction, But Otherwise Fails To Do So

The Moving Defendants also argue that the complaint fails to state a non-exculpated claim for relief against all of the Moving Directors. Their argument has two components. The Moving Defendants argue that: (1) the complaint fails to state a claim at all under Rule 12(b)(6); and that (2) if it does state a claim, it is at best one for a breach of the duty of care which is exculpated by Insilco's Restated Certificate of Incorporation.[105]

The most efficient way to address these related arguments is to do so in tandem, addressing the three categories on which Shandler bases his claims. I start with the easiest one, the allegation that the ThermaSys Transaction was unfair and the product of fiduciary misconduct. As the Moving Directors must admit, they are not protected by the exculpatory provision if the complaint states a claim against them for breach of the duty of loyalty.[106]

The complaint contains well-pled allegations that the ThermaSys Transaction was substantively unfair and implemented through an unfair process. With one exception, the complaint also contains well-pled allegations that the DLJ Directors — defendants

[105] Brauerman Aff. Ex. 6 (Insilco Restated Certificate of Incorporation) at Art. VI.
[106] *See, e.g.*, *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000).

Dawson, Dean, Palumbo, and Peinado — derived their primary source of income from working for DLJ.[107] The complaint pleads facts that support a rational inference that these defendants supported the ThermaSys Transaction to benefit DLJ at the unfair expense of Insilco.[108] Palumbo, however, was not on the board when the ThermaSys Transaction was firmed up and consummated.[109] Thus, the ThermaSys Transaction cannot form the basis for keeping Palumbo in the case.

As to defendant Ashton, the circumstances of his behavior and interests are sufficiently unusual as to raise an inference that his willingness to jump in as a new board member and to ratify an interested transaction within *five days* of being seated was influenced by his relationships with DLJ.[110] That oddly rapid action may turn out to be evidence merely of an incisive and decisive mind, quick to grasp all material facts and come to a wise decision. But, it may also be evidence of a mindset well captured by Chancellor Allen in his 1990 article in *The Business Lawyer* about the need for special negotiating committees to act with genuine vigor and independence if they are to fulfill

[107] Compl. ¶¶ 31, 32, 34, 35.

[108] In their papers, the Moving Defendants present a number of arguments about why the ThermaSys Transaction was fair and provided a benefit to Insilco. The Moving Defendants may be right, but they cannot try the issue of fairness on a dismissal motion. *See In re New Valley Corp.*, 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001) (declining to conduct an entire fairness review at the motion to dismiss stage). In contrast to other issues, the fact pleading addressing the ThermaSys Transaction is relatively clear and suffices to state a duty of loyalty claim.

[109] The parties agree that Palumbo was on the board from January 26, 1999 to March 14, 2000. *See* Brauerman Ex. 10 (Insilco Form 14A (May 14, 2000)) at 1. Thus, the July 14, 2000 ThermaSys Transaction occurred *after* Palumbo was no longer a board member. The Moving Defendants also argue that Peinado had nothing to do with the ThermaSys Transaction, and cannot be held liable for it. But the complaint avers that Peinado was placed on the board on July 14, 2000 — the very day that the ThermaSys Transaction was approved by the Special Committee. Compl. ¶ 59. Thus, for purposes of this motion, Shandler has sufficiently pled this allegation against Peinado.

[110] *Id.* ¶¶ 72-75.

their intended purpose.[111] In that regard, I note that the complaint alleges that Ashton allowed himself to be named by a resolution that simply indicated he had no material relationship with DLJ, while failing to state that he had previously served as the CEO of a private equity portfolio company that a DLJ-related company controlled.[112] The fact that Ashton later was named by DLJ to be ThermaSys's CEO is also something that I cannot ignore at a pleading stage.[113] Thus, the complaint states a claim for breach of the duty of loyalty against Ashton.

I conclude differently as to director Fort. In the complaint, all that is pled is that Fort was on a DLJ Merchant Advisory Board.[114] There is no allegation that Fort received any remuneration for participating on that board or that service on that board was material in any other way to Fort. The complaint is largely silent as to the role of Fort in any of the events and simply lumps him in with the other directors. Given that there are no pled facts that suggest any material reason for Fort to favor DLJ's interests over the interests of Insilco in the ThermaSys Transaction, and the absence of any pled facts otherwise supporting an inference that Fort breached his duty of loyalty by acting in bad faith to injure Insilco, the complaint at best states a due care claim against Fort. That claim is barred by the exculpatory charter provision and therefore the complaint is dismissed against Fort.

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[111] William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy*, 45 BUS. LAW. 2055, 2061 (1990) (describing situations where the independent directors on a special committees "appear no more than, in T.S. Eliot's phrase, 'an easy tool, deferential, glad to be of use'" (quoting T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in Collected Poems 1909-1962 (Harcourt, Brace & World 1970))).
[112] Compl. ¶ 60.
[113] *Id.* ¶¶ 7, 80.
[114] *Id.* ¶ 58.

As to the complaint's allegation involving for fees paid to the DLJ Advisors, I cannot conclude that the complaint even states a claim. I have already addressed the reality that Shandler may not base claims on conduct occurring before December 16, 1999.[115] After that date, the complaint alleges that the DLJ Advisors received advisory and other fees that were "excessive" and highlights that certain DLJ Advisors received fees of a total of $6.7 million in 2000 in connection with the refinancing of Insilco's Credit Agreement, and that those Advisors received a total of $15 million in fees from 1998 to 2002.[116]

The problem is that the complaint only alleges that the fees were excessive, and does not plead any factual basis to support that mere conclusion. The complaint itself notes that Insilco engaged in a large number of M & A transactions in 1999 and 2000.[117] Although the complaint challenges the wisdom of these transactions, it makes no attempt to indicate that the DLJ Advisors received a premium for their advisory services over market for assisting with those transactions. Likewise, the complaint makes no attempt to plead that the amounts received by the DLJ Advisors for helping to arrange a very large Credit Agreement were in excess of market rates, and makes no attempt to show that the credit procured under that Agreement was less favorable than market. Even though our law stringently reviews interested transactions,[118] a plaintiff must still plead facts that plausibly support an inference that fees received by a controlling stockholder's

[115] *See supra* pages 20-22.
[116] Compl. ¶¶ 62, 87.
[117] *Id.* ¶ 64.
[118] *E.g.*, *Kahn v. Lynch Commc'ns Syst., Inc.*, 638 A.2d 1110, 1116 (Del. 1994).

affiliate were in fact excessive, in the sense that they were more than would have been paid to a comparable firm providing the same services.[119] All Shandler has done is point to an amount of fees that the DLJ Advisors received in various capacities and call those fees excessive, while simultaneously identifying a wide array of complicated transactions to which those services relate. It may be that as part of any damages award that might result if Shandler succeeds on his challenge relating to the ThermaSys Transaction, Insilco can recover any fees it paid to DLJ Advisors for advice on that deal. But his more general conclusory charge that the board breached their fiduciary duties by causing Insilco to pay "excessive" fees is not supported by any non-conclusory facts and cannot buttress a claim for breach of fiduciary duty.

Likewise, I dismiss Shandler's third and final category, his so-called "deepening insolvency"-based fiduciary duty claim. That theory is pled in a way that makes no coherent sense. To the extent that the theory is based on an argument that the Moving Directors caused Insilco to take a reckless and value-destroying gamble so as to provide a chance for DLJ to recoup value for its 74% share of Insilco's equity, that argument finds no basis in the complaint as there are no facts indicating that the board took any such gamble. Instead, the complaint argues that the board kept Insilco out of bankruptcy for

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[119] *See Nelson v. Emerson*, 2008 WL 1961150, at *10 (Del. Ch. May 6, 2008) (dismissing an excessive compensation claim where no information was provided about "the amount or specific instances of the alleged excessive compensation"); *Canal Capital Corp. By Klein v. French*, 1992 WL 159008, at *4 (Del. Ch. July 2, 1992) (dismissing a duty of care claim alleging that management fees paid to a company controlled by the majority shareholder were excessive because the "complaint contain[ed] no factual support for the conclusory allegation that the fee[s] [were] excessive"); *see also Metcap Secs. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *7 (Del. Ch. Feb. 27, 2009) (declining to find, at the summary judgment stage, that a $20 million advisors fee was unreasonable because no facts were pled "that could lead the court to conclude . . . that a $20 million fee [was] unreasonable").

too long and that as a result the firm somehow lost even more value than it would have had if it had entered bankruptcy earlier.[120] The bad faith motivation for this is supposedly that the additional time enabled the DLJ Advisors to obtain more in advisory fees and for DLJ to sell out of its senior debt positions while the getting was good. In large measure, the complaint also relies on the $15 million Term-C Loan that DLJ provided as stop-gap financing, financing that subordinate to the senior lenders' position but senior to certain company notes.[121] As will be discussed, to the extent that this claim turns on DLJ's interests in providing the Term-C financing, it has been released by a prior agreement that was entered as a stipulation in the Bankruptcy Court proceeding.[122]

What is left is the contention that the board knew that Insilco had no chance to survive as a going concern, and in bad faith delayed a bankruptcy filing so as to enable DLJ to siphon off benefits that would salve its wounds at the expense of Insilco's entity value and therefore at the expense of Insilco's junior creditors. But I cannot find any rational support for this theory in the pled facts. During the period when Shandler says that bankruptcy proceedings should have been filed — June 2001 forward[123] — Shandler fails to specify any fees that the DLJ Advisors received, much less that they were material in relationship to the 74% equity interest the DLJ held or, even more important, to the senior debt positions DLJ held. Even if one considers the Term-C Loan, the complaint pleads no rational inference why DLJ or the board would want DLJ to put

[120] Compl. ¶¶ 134-139.
[121] *Id.* ¶ 136.
[122] *See infra* pages 36-38.
[123] Compl. ¶ 95.

another $15 million at risk on top of what it already had at risk if it knew that Insilco's performance and value would deteriorate if Insilco did not file for bankruptcy. Admittedly, the complaint says that the time that was bought allowed DLJ to reduce its *senior debt* positions by an unspecified amount.[124] But what the complaint does not allege is that DLJ was engaged in a pattern of large transactions in senior debt that plausibly supports the inference that DLJ put in $15 million more and kept Insilco alive with the bad faith knowledge that Insilco's situation could not improve and the company's value would deteriorate, and for the purpose of enabling DLJ to reap benefits of materially more than that $15 million and the risk to its remaining senior debt position from that value deterioration by getting rid of Insilco debt and equity well in excess of that amount.

No doubt the complaint pleads that DLJ had all kinds of financial interests at stake in Insilco, including most notably as a senior lender and majority equity owner.[125] But the complaint never articulates a rational basis for inferring that DLJ, which the complaint alleges held large amounts of senior debt and was acting for the senior lenders,[126] intentionally kept Insilco out of bankruptcy knowing that would result in a diminishment of Insilco's value for the purpose of allowing DLJ to reap illicit gains for itself.[127] Indeed, the complaint suggests that the company's senior lenders agreed to defer

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[124] *Id.* ¶ 101.
[125] *Id.* ¶ 111.
[126] *Id.* ¶¶ 101, 113.
[127] In a situation like this one, to sustain this theory would require the pleading of a scenario whereby it was plausible that: i) DLJ knew that failing to file for bankruptcy would lower the value of Insilco; and ii) irrespective of DLJ's substantial equity and senior debt position, DLJ

declaring a default largely in the hope that the Term-C Loan infusion would enable the company to weather the downturn and be put it in a better position to pay off the senior debt than would be the case if an immediate bankruptcy filing occurred upon a declaration of default.[128]

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could reap enough gains through fees and debt sales to make it worthwhile to take action reducing Insilco's value and therefore its ability to satisfy debt claims, including its ability to pay back the additional $15 million DLJ put at risk in 2001 to keep Insilco operating. After the point in time when Shandler alleges that DLJ should have caused Insilco to file for bankruptcy, Shandler does not allege that DLJ received any material amount of fees from Insilco, much less enough to approach the level of the additional $15 million it was putting at risk. Nor does Shandler allege facts suggesting that DLJ had a rational incentive to keep Insilco out of bankruptcy knowing that would lower its value because DLJ could reap more from its senior debt positions that way through market sales of that debt than if Insilco had actually declared bankruptcy.

Although Shandler alleges that DLJ was attempting to unwind its position, he pleads no facts about the magnitude or timing of any sales of senior debt by DLJ and his theory seems entirely undercut by the fact that the senior lenders as a group were willing to defer their default rights in order to take a chance that Insilco would pull through. That forbearance suggests that the senior debtors were worried about whether they could recover in full in bankruptcy and felt that they were better off deferring the bankruptcy that would have come if they had exercised their rights precisely because they perceived that they would do better as creditors if Insilco could escape bankruptcy. Of course, the mere fact that the company was not able to avoid ultimate insolvency does not, in itself, mean that there was not a good faith basis to take a chance on survival if the board viewed that as the best option to maximize Insilco's value. *See Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 205 (Del. Ch. 2006) (rejecting "deepening insolvency" as a cause of action under Delaware law, and stating that "[i]f a board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, but that also involves the incurrence of additional debt, it does not become a guarantor of that strategy's success"), *aff'd*, 931 A.2d 438 (Del. 2007); *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 787 (Del. Ch. 1992) ("Even where the law recognizes that the duties of directors encompass the interests of creditors, there is room for application of the business judgment rule."). Indeed, given the incentives for creditors to break rank and seek to recover as much of their loans as possible before their claims become administered through a bankruptcy proceeding, the fact that the creditors jointly agreed on a course of action suggests a good faith basis for the deferral. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 122-23 (1986) (discussing the problem that creditors of a company on the brink of insolvency have an incentive to call their loans in order to beat the other creditors in hopes of recovering their loans before a bankruptcy proceeding requires them to split the insolvent company's assets more equally).

[128] Compl. ¶¶ 113-14.

In this regard, it is critical to note that Shandler cannot base his fiduciary duty claim on the premise that the board did not do what was best for a particular class of Insilco creditors.[129] Even when Insilco was insolvent, the board was entitled to exercise a good faith business judgment to continue to operate the business if it believed that was what would maximize Insilco's value.[130] Although the rambling complaint makes the cursory allegation that the board did not consider strategic alternatives, it then immediately says that the board retained Bain & Company and consulted with a DLJ-affiliated workout specialist for just that purpose.[131] The complaint indicates later that efforts to find buyers took place but did not succeed.[132]

In the absence of any pled facts that plausibly support an inference that DLJ could rationally benefit from knowingly diminishing Insilco's enterprise value by purposely delaying bankruptcy when DLJ knew that filing was the value maximizing option, I cannot conclude that the complaint pleads a claim for the breach of the duty of loyalty against the Moving Directors. And, although Insilco was ultimately unable to stay out of bankruptcy, the complaint does not even indicate why a bankruptcy filing early in 2001 or earlier in 2002 would have preserved more value for Insilco, or that it was gross negligence not to file. Although I am doubtful that the complaint even states a due care

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[129] *N. Am. Catholic Edu. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007) (holding that "individual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors").
[130] *See Trenwick*, 906 A.2d at 174 ("[D]irectors may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out, result in the firm being painted in a deeper hue of red.").
[131] Compl. ¶ 96.
[132] *Id.* ¶ 112.

claim given this absence, I need not make that determination because the exculpatory charter provision bars any such claim.

For all of these reasons, I conclude that Shandler has pled a non-exculpated claim for breach of the duty of loyalty against Moving Directors Dawson, Dean, Peinado, and Ashton as to the ThermaSys Transaction, including as to any fees paid to DLJ Advisors in connection with that transaction. I otherwise dismiss the fiduciary duty claims.

C. Shandler Has Stated A Breach Of Fiduciary Duty Claim Against DLJ Only As To The ThermaSys Transaction

1. DLJ, Inc., DLJMB And The DLJ Funds Are Alter-Egos For Purposes Of This Motion

Shandler has brought the same fiduciary duty claims against DLJ that he has brought against the Insilco directors. DLJ contends that DLJ, Inc., DLJMB and the DLJ Funds are all separate entities and cannot be considered, even at the pleading stage, as part of a group that acted as Insilco's controlling stockholders. I disagree.

This court has allowed claims of alter-ego liability to survive where plaintiffs alleged that the boards of a parent company and its subsidiary were identical and one company appeared to operate as an instrumentality of the other,[133] as well as where the officers and directors of two companies were the same, and the two companies shared a common address.[134] According to the complaint, DLJ, Inc. and DLJMB had control over

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[133] *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990) (finding, on a motion for summary judgment, that genuine issues of material fact existed on a veil-piercing theory where two entities had substantially the same boards, and the subsidiary seemed to operate as an instrumentality of the parent).

[134] *Haisfield v. Cruver*, 1994 WL 497868, at *3-4 (Del. Ch. 1994) (holding that a plaintiff had succeeded in alleging alter ego status where, on a motion to dismiss, facts were pled to show common financial interests, board members and officers, and a common address).

the DLJ Funds through various entities that they owned and controlled.[135] Additionally, DLJ, Inc., DLJMB, and the DLJ Funds share the same address on Madison Avenue in New York City.[136] And, the complaint alleges that "the same individuals were the officers or principals of" DLJMB and DLJ Merchant Banking II, Inc. — the DLJ Funds' managing partner.[137] Fairly read, the complaint alleges that DLJ, Inc. presided over a family of entities that it dominated and controlled, including the entities that together owned 74% of Insilco's equity. Using their unified power in a concerted way, DLJ controlled Insilco and directed its business strategy, including causing it to employ the DLJ Advisors. For purposes of a dismissal motion, I believe that Shandler has pled sufficient facts from which it can be inferred that the DLJ Funds were instrumentalities operated for the benefit of DLJ, Inc. and DLJMB.[138] Without conflating their existence for all purposes, there is a pleading stage inference that these entities acted jointly together as if they were a single controlling stockholder and on that basis owed fiduciary duties to Insilco.

Because, however, the premise of controlling stockholder fiduciary responsibility is to hold the controller liable for actions its causes using its control of the company's board,[139] liability under this theory is largely coextensive with the liability faced by the

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[135] *See supra* note 7.
[136] *See* Compl. ¶¶ 16-30.
[137] *Id.* ¶ 45.
[138] *Cf. Mabon*, 1990 WL 44267, at *5 ("A court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner.").
[139] *E.g.*, *ATR-KIM Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *16 (Del. Ch. Dec. 21, 2006) (noting that a majority stockholder "was prohibited from using his position of control to extract value from the corporation to the exclusion of, and detriment to, the minority stockholders").

corporation's directors. That is, a controlling stockholder cannot be held liable for a breach of the duty of care when the directors are exculpated.[140] The purpose of controlling stockholder liability is to make sure that controlling stockholders do not use their control to reap improper gains through unfair self dealing or other disloyal acts. Thus, Shandler's claim for breach of fiduciary duty stands against DLJ only as to the ThermaSys Transaction and is otherwise dismissed for the reasons previously given.

2. To The Extent That The Fiduciary Duty Claims In The Complaint Rely On The Term-C Loan, Those Claims Are Barred By Res Judicata

The Moving Defendants argue that res judicata bars Shandler's claim that it was a breach of fiduciary duty not to file for bankruptcy earlier to the extent that the claim is premised on the notion that the delay was inspired by DLJ's desire to enter into the Term-C Loan so as to benefit the Term-C Lenders[141] at the expense of Insilco and its other creditors.[142] The Moving Defendants point out that the Term-C Lenders filed proofs of claims in Bankruptcy Court in May 2004, and the claims against the Term-C Lenders

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[140] *See Trenwick*, 906 A.2d at 194 ("A judicial acknowledgement that, as a matter of the common equity, directors of a public company protected by an exculpatory charter provision may be exposed to negligence-based liability claims made by the public company's wholly-owned subsidiaries would undercut the important public policy reflected in 8 *Del. C.* § 102(b)(7)."); *Abraham v. Emerson Radio Corp*., 901 A.2d 751, 759 (Del. Ch. 2006) (questioning the logic of holding a controlling shareholder liable when care claims against directors were exculpated, and noting that "the unthinking acceptance that a greater class of claims ought to be open against persons who are ordinarily not subject to claims for breach of fiduciary duty at all — stockholders — than against corporate directors is inadequate to justify recognizing care-based claims against sellers of control positions"); *see also Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Investcorp S.A.*, 137 F. Supp. 2d 502, 515 (S.D.N.Y. 2001) (applying Delaware law, stating that "[e]nabling plaintiff to sue the [controlling] shareholder defendants for acts of [the director] for which [the directors] personally cannot be held liable would provide an illogical end-run around the protections of § 102(b)(7)").

[141] Again, the Term-C Lenders include DLJ Capital, DLJ Securities, and eight of the DLJ Funds. *See supra* page 17.

[142] Compl. ¶¶ 102, 108, 111, 113-14.

were dismissed due to a Settlement Agreement that released all claims and defenses against them.[143] The Settlement Agreement provided that the Term-C Lenders were released from Shandler's claims "only in respect of the Term-C Loans under the Credit Agreement."[144] The United States Court of Appeals for the Third Circuit recognized in *In re Insilco Technologies, Inc.* that the Settlement Agreement provided that "the secured creditors agreed to contribute money to [a] [t]rust for payment of the unsecured creditors' claims in return for a full release from the unsecured creditors' challenges to their claims."[145] But, the Court of Appeals explained that the Settlement Agreement applied *only* to claims "related to the Term C Loans," and that claims *not* related to the Term-C Loan would be permitted because "the Term C Lenders' primary relationship to Insilco was as equity holders and controlling shareholders, not as lenders."[146] That is, the Settlement Agreement disposed of claims against the Term-C Lenders only insofar as the claims related to the Term-C Loan.

The complaint raises allegations that directly relate to the Term-C Loan, including that it violated the 12% Note.[147] The complaint also suggests that the Term-C Loan was given in order to help delay a bankruptcy filing. Although the complaint is extremely unclear, to the extent that the complaint implies that DLJ sought to benefit from the Term-C Loan and therefore improperly delayed a bankruptcy filing, that implication cannot form the basis for a claim. Likewise, to the extent the complaint suggests that it

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[143] *See* Settlement Agreement.
[144] *Id*.
[145] *Insilco*, 280 F.3d at 215.
[146] *Id*. at 219.
[147] *See supra* pages 11-12.

was in any way a breach of duty for Insilco's board to enter into the Term C-Loan, that suggestion cannot form the basis for a claim. The Settlement Agreement clearly encompasses any claim that is based on the notion that it was wrongful for the Insilco board to agree to the Term-C Loan. Therefore, Counts II, III, and IV are dismissed, in addition to the reasons already given, to the extent that they are so premised.

D. The Professional Malpractice Claim Against The DLJ Advisors Is Dismissed

Shandler also brings a professional malpractice claim against the DLJ Advisors in Count V, alleging that they failed "to meet the industry standards applicable to financial advisory service providers."[148] The Moving Defendants argue that, under New York law,[149] professional malpractice claims cannot be brought against financial advisors. This is an undecided issue under New York law. In *Scientific Research, Inc. v. NIA Group, Inc.*, the New York Court of Appeals stated that, to sustain a claim for professional malpractice, the defendant must be a professional as a matter of law, and defined a professional as being "commonly understood to refer to the learned professions exemplified by law and medicine."[150] In *Leather v. U.S. Trust Co. of New York*, the New

[148] Compl. ¶ 143.
[149] Choice of law questions are governed by the most significant relationship test set forth in the Restatement (Second) of Conflicts of Laws. To determine which state has the most significant relationship, the following factors are considered: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1) (1971); *see also Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991). The balance of these factors points to New York. *See Am. Int'l Group, Inc. v. Greenberg*, 965 A.2d 763, 818-23 (Del. Ch. 2009) (applying New York law to a professional malpractice claim where no acts occurred in Delaware, and the majority of work at issue took place in New York).
[150] 96 N.Y.2d 20, 29 (N.Y. 2001).

York Appellate Division First Department found that financial advisors are not "professionals" who could be sued for professional malpractice under New York law.[151] By contrast, in *EBC I, Inc. v. Goldman, Sachs & Co.*, in a later decision addressing a similar question, the identical court, the New York Appellate Division First Department, reached the opposite conclusion, finding that "investment bankers are professionals" who are subject to malpractice suits.[152] But on appeal in that case, the New York Court of Appeals found that the lower court had properly dismissed the case on other grounds and therefore declined to affirm or address the finding below that a financial advisor was a "professional," choosing instead to "leave open the question of whether a financial advisor or underwriter may ever be treated as a professional for purposes of" malpractice liability.[153]

Without necessity, I am not going to base my decision on an unsettled issue of another state's law. Even assuming that the New York Court of Appeals would ultimately find that firms that hold themselves out as expert financial advisors on M & A and other important corporate transactions owe their clients an enforceable duty of care, Shandler has failed to state a claim. The complaint is entirely devoid of pled facts explaining *how* the DLJ Advisors committed malpractice. Instead, Shandler raises conclusory allegations that the DLJ Advisors failed to "properly . . . perform [their] services and . . . to render objective advice to Insilco," and "meet the industry standards

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[151] 279 A.D.2d 311, 312-13 (N.Y. App. Div. 2001).
[152] 7 A.D.3d 418, 420 (N.Y. App. Div. 2004).
[153] 832 N.E.2d 26, 33 (N.Y. 2005).

applicable to financial advisory service providers."[154] Shandler makes no claim about what the industry standards were, or what the DLJ Advisors did that was below those standards. Without any facts pled to support the professional malpractice claim, I grant the motion to dismiss Count V.

E. Shandler Has Pled An Aiding And Abetting Claim Against KeyBanc

Shandler also brings a claim against KeyBanc for aiding and abetting breach of fiduciary duty (Count VII), and an alternative claim against KeyBanc for professional malpractice (Count VIII). The aiding and abetting claim alleges that KeyBanc aided and abetted the DLJ Directors' breaches of fiduciary duty by "submit[ting] a fairness opinion as to the ThermaSys Sale originally prepared for DLJMB to Insilco as if it had been prepared for Insilco, changing the valuation in the opinion at the direction of DLJMB, and knowingly concluding a valuation of the ThermaSys Sale that was far lower than appropriate."[155] The professional malpractice claim alleges that KeyBanc "failed to meet the industry standards applicable to financial advisory service providers rendering fairness opinions."[156]

KeyBanc has moved for dismissal of the aiding and abetting claim, but not the professional malpractice claim. I therefore only consider whether the aiding and abetting claim requires dismissal. KeyBanc puts forth two different grounds for dismissal of the aiding and abetting claim: (1) the claim is barred by the statute of limitations; and (2)

[154] Compl. ¶¶ 141-42.
[155] *Id.* ¶ 161.
[156] *Id.* ¶ 166.

under Ohio law, which KeyBanc argues controls, no cause of action for aiding and abetting a breach of fiduciary duty exists. I deal with these in turn.

As to the first issue, KeyBanc argues that the aiding and abetting claim is untimely because that theory of recovery was not pled in Shandler's Bankruptcy Court proceeding and, thus, was not preserved under 10 *Del. C.* § 8118 (the "Savings Statute"). Section 8118(a) of the Savings Statute provides that:

> If in an action duly commenced within the time limited therefore in this chapter, . . . the action [is] otherwise avoided or defeated for any matter or form, . . . a new action may be commenced, *for the same cause of action*, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[157]

Shandler argues that his aiding and abetting claim is timely because it was brought within one year of the date that the Bankruptcy Order dismissing his professional malpractice claim against KeyBanc became final,[158] and asks that the "same cause of action" language in § 8118 be interpreted broadly such that the professional malpractice claim he brought against KeyBanc in Bankruptcy Court is considered the same cause of action as the aiding and abetting claim here, because those claims are based on the same factual scenario. In response, KeyBanc argues that the aiding and abetting claim and the malpractice claim are not the same cause of action because the aiding and abetting claim alleges intentional misconduct and collusion while the malpractice claim only alleges negligence.

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[157] 10 *Del. C.* § 8118(a) (emphasis added).
[158] Compl. ¶ 4.

Section 8118 and its predecessors have been on the books for a long time.[159] But the parties were unable to find any case law shedding light on what the General Assembly meant by the term "cause of action" in that statute. Does the term cause of action refer to each distinct legal theory that the plaintiff could assert arising out of an identical course of action? Or does the term cause of action simply refer more generally to a plaintiff's contention that it was injured and is due compensation as a result of a single course of action by the defendant and therefore encompass all theories of recovery that could justify such relief?

KeyBanc argues for the former reading, and says that Shandler now pleads an entirely new cause of action by asserting for the first time in his August 2009 complaint that KeyBanc's conduct in the ThermaSys Transaction not only supports a claim for malpractice, but also supports a claim for knowingly assisting in a breach of fiduciary duty. Shandler advocates the latter reading, and argues that all he has done is deepen his previously pled cause of action that KeyBanc caused compensable injury to Insilco by its actions in connection with the ThermaSys Transaction.

In support of their distinct positions, neither party has cited case law interpreting the words "cause of action" in the Savings Statute because they could find no such cases. Nor could I. To fill that void, both KeyBanc and Shandler analogized to Court of Chancery Rule 15(c)(2), which allows a party to amend the party's pleadings where the amendment "arose out of the conduct, transaction or occurrence" in the original

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[159] *See Frombach v. Gilbert Assoc., Inc.*, 236 A.2d 363, 365 (Del. 1967) ("The Savings Statute has been a part of Delaware law, with no change presently significant, since 1829.").

pleading[160] to interpret the term "cause of action" in the Savings Statute. Given that KeyBanc makes that concession and given the remedial purposes of the Savings Statute,[161] I find that its interpretation of § 8118 is less reasonable than the one advanced by Shandler.

The Savings Statute is designed to make sure that defendants have timely notice of the claims against them so that defendants are not burdened by stale claims from indolent plaintiffs.[162] When a party like Shandler files a timely complaint pleading a theory based on a course of action against a party like KeyBanc, the defendant has no basis for repose. Indeed, Court of Chancery Rule 15(c)(2) itself allows plaintiffs who do not plead all their theories within the limitations period to amend so long as "the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, or occurrence . . . in the original pleading."[163] Reading § 8118 of the Savings Statute consistent with Rule 15(c)(2) makes policy sense as it harmonizes our state's approach to these related issues.

Although KeyBanc may not have known as of the limitations date that it faced an aiding and abetting claim, it knew that Shandler sought to hold it responsible in damages

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[160] Ct. Ch. R. 15(c)(2).
[161] *See Marvel v. Prison Indus.*, 884 A.2d 1065, 1067 (Del. Super. 2005) (reasoning that the Savings Statute was intended to "alleviate the harsh consequences of the statute of limitations when an action, through no fault of the plaintiff, is technically barred by the statute of limitations," and that, as a remedial measure, the Savings Statute "should be liberally construed").
[162] *See Giles v. Rodolico*, 140 A.2d 263, 267-68 (Del. 1958) (holding that a defendant would not be prejudiced by allowing a suit to proceed against him under § 8117 of the Savings Statute because the defendant was "on notice that he was going to be sued"); *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 425-36 (Del. Super. 1971) (noting that the policy objective behind the Savings Statute is that, "by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts").
[163] Ct. Ch. R. 15(c)(2).

for harm its allegedly deficient performance in the ThermaSys Transaction caused to Insilco. KeyBanc faces no undue prejudice because Shandler has now alleged that KeyBanc's conduct in the same Transaction supports an additional legal theory as to why any harm suffered by Insilco in that Transaction should be remedied by KeyBanc. It is rational to interpret the term "cause of action" in § 8118 as embodying the Rule 15(c)(2) approach of deeming as one cause of action all theories that arise out of the same "conduct, transaction, or occurrence."[164] For these reasons, I hold that the aiding and abetting claim is not time barred.

Second, KeyBanc argues that Shandler's aiding and abetting claim must be dismissed because it is governed by Ohio law, which does not recognize such a claim. KeyBanc's only argument as to why Ohio law applies is that its contract with Insilco provided for Ohio law to apply. But the mere fact that any contractual or malpractice obligations KeyBanc owed to Insilco were governed by Ohio law does not give Ohio a stronger interest in Delaware as to an aiding and abetting claim.[165] When the claim against a third-party is that it was knowingly complicitous in a breach of fiduciary duty

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[164] *Id.*; *see Gosnell v. Whetsel*, 198 A.2d 924, 927 (Del. 1964) (stating that the Savings Statute has "a remedial purpose and should be liberally construed"); *Giles*, 140 A.2d at 267 (explaining that the Savings Statute was "designed to mitigate against the harshness of the defenses of the statute of limitations raised against a plaintiff who, through no fault of his own, finds his case technically barred by the lapse of time").

[165] *See In re Am. Intern. Group, Inc.*, 965 A.2d 763, 822 (Del. Ch. 2009) ("Although another state might have a policy interest in applying its own standards of professional accountability to auditors practicing within its borders, it is difficult to see how such a state could exculpate an auditor for knowing complicity in a breach of fiduciary duty against a Delaware corporation and trump Delaware's interest in holding the auditor accountable for its purposeful wrongdoing."); *cf. Sample v. Morgan*, 935 A.2d 1046, 1063-64 (Del. Ch. 2007) (holding that personal jurisdiction over lawyers who allegedly aided and abetted breaches of fiduciary duty to a Delaware corporation did not violate due process because, among other reasons, Delaware had an important interest in the internal affairs of its corporations).

against a Delaware entity, Delaware's interest is paramount.[166] Because Delaware has the strongest interest, because our law recognizes aiding and abetting claims, and because the complaint clearly states such a claim against KeyBanc in relation to the ThermaSys Transaction, its motion to dismiss is denied.

IV. Conclusion

For the foregoing reasons, I grant the motion to dismiss Counts I, II, III, and IV as to all Moving Defendants, except insofar as those counts challenge the ThermaSys Transaction and any fees paid in relation to that ThermaSys Transaction.[167] I grant the motion to dismiss all claims against defendants Palumbo and Fort. I dismiss Counts V and VII in their entirety against the DLJ Advisors. Finally, I deny KeyBanc's motion to dismiss Count VII as brought against it. IT IS SO ORDERED.

[166] *See Am. Intern. Group*, 965 A.2d at 822 (noting that, if a complaint had raised a claim for aiding and abetting breaches of fiduciary duty "injuring a Delaware corporation, Delaware's policy interest would . . . be paramount").
[167] In addition, I dismiss defendant DLJ Merchant Banking Partners, L.P. from this action, because Shandler has consented to the dismissal.