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 United States District Court, D. Oregon.
 Michael L.E. KING, et al., Plaintiffs,
 v.
 DEUTSCHE BANK AG, et al., Defendants.
No. CV 04-1029-HU.

March 8, 2005.

[John S. Stone](#), Preston Bunnell & Stone, Portland,
[David R. Deary](#), [W. Ralph Canada](#), [Stewart Clancy](#),
[Jeven R. Sloan](#), Deary Montgomery Defeo & Can-
 ada, Dallas, TX, for plaintiffs.

[Keith Dubanevich](#), Garvey Schubert Barer, Portland,
[Seth C. Farber](#), Dewey Ballantine, New York, NY,
 for defendants Deutsche Bank AG; Deutsche Bank
 Securities, Inc., d/b/a Deutsche Bank Alex Brown, a
 division of Deutsche Bank Securities, Inc.; Craig
 Brubaker; David Parse.

[Kerry J. Shepherd](#), Markowitz, Herbold, Glade &
 Mehlhaf, Portland, for defendants BDO Seidman
 LLP, Michael Kerekes, and Robert Greisman.

[Peter C. Richter](#), [Sarah Lowinger](#), Miller Nash, Port-
 land, for defendants Lincoln National Corporation,
 d/b/a Lincoln Financial Group; Lincoln Financial
 Advisors Corporation; [Michael Nelson](#); James Sieg-
 fried.

FINDINGS AND RECOMMENDATION

[HUBEL](#), Magistrate J.

*1 This is an action by three groups of plaintiffs (the “King plaintiffs,” the “Mulholland plaintiffs,” and the “Allen plaintiffs”) against four groups of defendants, investment advisors and accountants (the “Deutsche Bank defendants,” the “Lincoln defendants,” the “BDO defendants,” and the “Brown defendants”). Plaintiffs assert claims under the Racketeering Influenced and Corrupt Organization Act (RICO), [18 U.S.C. § 1965](#), breach of fiduciary duty, fraud, breach of contract or breach of the duty of good faith and fair dealing, negligent misrepresentation, professional malpractice, declaratory judgment, unjust enrichment, and civil conspiracy.

The matters before the court are the Deutsche defen-
 dants' motion to arbitrate or stay claims (doc. # 37),

the BDO defendants' motion to arbitrate or stay claims (doc. # 43), the Lincoln defendants' motion to dismiss (doc. # 53), and the BDO defendants' motion to strike and to seal certain portions of plaintiffs' briefs and supporting evidence (doc. # 63). The court heard oral argument on the motions January 7, 2005.

Factual Allegations

The Amended Complaint alleges that plaintiffs were induced by the defendants to enter into a tax shelter scheme involving foreign exchange digital options contracts. The scheme is variously referred to under its marketing name of COBRA, which stands for Currency Options Bring Reward Alternatives, and as “tax-advantaged digital-option transactions.”

Plaintiffs allege that the COBRA scheme, and a plan to market it to wealthy investors, was initially developed by defendants Deutsche Bank AG, Deutsche Bank Securities d/b/a Deutsche Bank Alex Brown (DB Alex Brown), Craig Brubaker, an employee of Deutsche Bank, David Parse, also an employee of Deutsche Bank and/or DB Alex Brown, Richard Judd, an employee of Deutsche Bank and/or DB Alex Brown (collectively the “Deutsche Bank defendants”) and [Jenkins & Gilchrist](#) (“Jenkins,”), a 600-lawyer law firm with offices in nine major cities throughout the United States.^{[FN1](#)} Plaintiffs allege on information and belief that Paul Daugerdas, a partner at [Jenkins](#), Dan Brooks, defendant David Parse, and certain other unknown individuals associated with the Deutsche defendants participated in the development of COBRA.

[FN1](#). [Jenkins](#) is not a named defendant because of the pendency of a proposed class action settlement in the Southern District of New York. The class action case is called *Denney et al. v. Jenkins & Gilchrist, et al.*, No. 03-CV-5460 (S.D.N.Y.) and was filed August 28, 2003. The class action was filed by the same lawyers that appear in this case, on behalf of other individuals with purportedly similar claims. The pendency of this case is one of the grounds for the defendants' motion to stay, which is discussed below.

COBRA was marketed as a tax shelter, with the following steps. First, each investor formed a single-member limited liability company (LLC) to enter into foreign currency digital option transactions with Deutsche Bank. The option transactions were governed by an agreement called the FX contract, pursuant to which the investor entered into two opposing transactions. The investor sold a short option and purchased a long option in almost identical amounts on a foreign currency with different (but only different by a very small amount) strike prices, each to expire in 30 days. The cost of the long option was partly offset by the premium earned on the sale of the short option.

On all of the FX contracts the “trigger” (i.e., the event which causes a payoff) occurred when the spot rate on the underlying currency pair (Euro/American dollar, for example) was at or above a specific spot rate on a certain date at a certain time. Under the terms of the FX contracts, Deutsche Bank was authorized to use discretion in selecting the spot rate on expiration and to determine when and if the event was triggered. The range of spot rates available to Deutsche Bank was larger than, and included, the range of “winning” spot rates defined in the FX contract. Thus, because Deutsche Bank, as the “calculation agent,” could choose to accept or disregard any spot rate, Deutsche Bank is alleged to always have had the ability to decide whether the FX contract paid out. Plaintiffs allege that the result-unknown to the investors-was that the investors had virtually no chance of a payout.

*2 Through the LLC, the investor contributed the options to a general partnership. After 30 days, the long and short options expired in or out of the money, resulting in a modest gain or loss, depending on the exchange rate between the U.S. dollar and the relevant foreign currency at that time.

The investor then made a capital contribution, consisting of cash, stock, or other capital assets, to the partnership. If cash was contributed, it was used to purchase either stock or foreign currencies, depending on whether the investor ultimately wished to create a capital or an ordinary loss.

The investor then contributed the partnership interest to an S Corporation, causing the partnership to be

terminated as a matter of law. The S Corporation then sold the assets over a period of time. The partnership assets had a basis that was artificially increased by the amount paid for the long option. (The short option was considered a contingent liability, whose value was unknown at the time of its contribution to the partnership, and ignored.) As a result, the sale of the assets created a substantial unrealized short-term capital loss and/or ordinary loss.

The Deutsche defendants allegedly recruited the other defendants to assist them in locating wealthy clients and marketing the COBRA strategy to them. BDO Seidman developed a written strategy, called the BDO Wolfpack Manual, on how to sell the COBRA strategy. The investors were told that a major law firm (Jenkins) would prepare an independent opinion letter confirming that the COBRA transaction was legal and providing the investors with “insurance” in the event of an IRS audit.

The Amended Complaint alleges that the defendants, and others not named as defendants such as Jenkins, structured the FX transactions so that the investors would pay commissions and fees in amounts between 5.5% and 9.5% of the tax savings the investor wished to achieve. The defendants shared these fees among themselves, so that between 1% and 5% went to the Deutsche defendants as the “spread” between the two positions in the FX contract (i.e., the difference between what was paid for buying one position and what was received for selling the other), 3% went to Jenkins for having developed the FX transactions and producing for each investor an opinion letter on the legality of the transactions, and 1.5% went to others (the “Marketing Participants”) who presented and recommended the FX contracts as a tax strategy to their clients.

On December 27, 1999, the Internal Revenue Service (IRS) issued Notice 1999-59, entitled, “Tax Avoidance Using Distribution of Encumbered Property.” In this Notice, the IRS gave notice that “certain types of transactions” were being “marketed to taxpayers for the purpose of generating tax losses” that involved the taxpayers claiming tax losses for capital outlays that they had in fact recovered. The IRS gave notice that it would not recognize such artificial losses. The Amended Complaint alleges that the defendants told plaintiffs who had entered into the COBRA strategy in 1999 that this IRS Notice did not affect their par-

participation in the strategy. However, plaintiffs allege that as a result of Notice 1999-59, defendants knew or should have known that the IRS would not recognize the purported losses arising from the COBRA strategy.

*3 In 2000, the IRS issued another notice, [Notice 2000-44](#), entitled “Tax Avoidance Using Artificially High Basis.” This notice referred to Notice 1999-59 and described the transactions marketed to the plaintiffs by the defendants. The IRS stated that the “purported losses from these transactions (and from any similar arrangements designed to produce non-economic tax losses by artificially overstating basis in partnership interest) are not allowable as deductions for Federal income tax purposes.”

Defendant Michael Kerekes, a lawyer who worked for BDO Seidman and who promoted the COBRA scheme out of BDO Seidman's offices, analyzed [Notice 2000-44](#) and concluded that 1) the COBRA scheme failed to meet the IRS's definition of “economic substance” as described in [Notice 2000-44](#); and 2) the contracts between BDO Seidman and its clients had not been written to specify the services being rendered in connection with COBRA and, thus, certain of [Notice 2000-44](#)'s requirements might apply. Although these conclusions were shared with Jenkens, the plaintiffs and other clients were given only a “watered down” version that did not highlight the concerns articulated by Kerekes. Defendants did not retract, modify or qualify their tax and other advice to plaintiffs, or the opinions expressed in the Jenkens opinion letters. The defendants continued to represent that the COBRA strategy was a legal tax shelter, and that plaintiffs were not required to disclose or register the COBRA transactions on their federal tax returns. The defendants continued to promote the COBRA strategy after [Notice 2000-44](#) was issued, even though at least the BDO defendants had internally concluded that the Notice raised serious concerns.

In early 2000 and 2001, Jenkens sent the plaintiffs virtually identical opinion letters about the propriety of the COBRA strategy. The opinion letters reassured the plaintiffs that entering into the options would not create problems with the IRS. The opinion letters issued in 2000 stated that IRS Notice 1999-59 had no effect on its earlier opinions; the opinion letters issued in 2001 did not mention Notice 1999-59.

The Brown defendants prepared the 2000 tax returns for the King plaintiffs. The BDO defendants prepared the 1999 tax returns for some of the Allen plaintiff entities. The Amended Complaint alleges that the “Vjon Harten Defendants” prepared the 2000 tax returns for the Mulholland plaintiffs, but there is no reference to any Vjon Harten defendants in the caption of the case or in the part of the Amended Complaint which identifies the various parties.

The Amended Complaint alleges that the accountant defendants represented to the plaintiffs that the COBRA strategy was a legal tax shelter. Relying on this, the plaintiffs included the premiums they paid for the long option, but not the premiums they received for the short option, in their tax bases for computing their respective capital losses and ordinary income in their 1999 and 2000 tax returns.

*4 In late 2001, the IRS offered a “Tax Amnesty Program” (“Amnesty Program”), a voluntary disclosure program for taxpayers. Under the Amnesty Program, taxpayers who disclosed their involvement in strategies like COBRA would avoid liability for penalties for underpayment of taxes without conceding liability for back taxes or interest. The Amended Complaint alleges that although each defendant knew of the Amnesty Program and its applicability to the plaintiffs, they either failed to inform plaintiffs of the program, thereby depriving the plaintiffs of the opportunity to join the Amnesty Program and avoid the assessment of penalties, or advised them not to take advantage of it. None of the plaintiffs participated in the Amnesty Program.

In June 2003, the IRS issued new regulations, retroactive to October 18, 1999. The Regulations invalidate the COBRA strategy. Because the regulations were retroactive, they invalidated the COBRA strategy that the plaintiffs had used.

Plaintiffs were all audited by the IRS for the tax returns on which they claimed losses resulting from the COBRA strategy. On May 5, 2004, in [Notice 2004-46](#), the IRS offered to settle with plaintiffs ^{FN2} and other taxpayers involved in similar schemes as follows: the taxpayers would pay to the IRS all the taxes avoided, all interest due, and a 10% penalty for each tax shelter; they would be allowed to deduct 50% of the fees and other “out of pocket” costs. Taxpayers

who did not accept this offer were to be assessed all taxes and interest, the maximum penalty of 40%, and lose all deductions. The Amended Complaint alleges that because of the “extremely harsh result that would occur if these plaintiffs did not settle with the IRS,” all of the plaintiffs have “reluctantly accepted” the IRS settlement offer and now owe the IRS back taxes, interest and penalties.

[FN2](#). All the plaintiffs in this case were included in the settlement offer except for the Allen plaintiffs.

Plaintiffs allege that in addition to the back taxes, interest and penalties, they are out substantial amounts of money paid in fees to the defendants and to retain new tax and legal advisors. They allege that the defendants also caused plaintiffs to “forgo other legitimate tax saving opportunities.”

Legal Contentions

Plaintiffs allege that the FX contracts and the COBRA scheme constituted a scheme to defraud them, in that the defendants failed to disclose 1) the true unlikelihood that the FX contracts would pay out; 2) that the Deutsche defendants had virtually unlimited discretion to determine whether the FX contracts would pay out and therefore could ensure that they did not; 3) that the FX contracts had no reasonable possibility of a profit, at least not in excess of the fees paid and that, in reality, the net effect of the options they were purchasing and selling was no more than a wager on where the price of the underlying currency would be at a certain time on a given date; and 4) that COBRA, on which Jenkens provided “independent” legal advice, was in fact a strategy devised by Jenkens. Plaintiffs assert that the defendants breached their fiduciary duties to plaintiffs, intentionally deceiving them by aggressively marketing the COBRA strategy, giving the plaintiffs little time to consider the transactions, charging the plaintiffs exorbitant fees, and failing to disclose that the transactions would fail to achieve their intended purpose of avoiding the payment of taxes.

*5 Plaintiffs allege that the defendants, along with Jenkens, conspired to defraud the plaintiffs for the purpose of receiving and splitting millions of dollars in fees. These fees were not tied to, or reflective of, time or effort expended, but rather to the tax losses

each investor intended to claim. In pursuance of this conspiracy, they marketed the COBRA strategy to their clients, provided them with opinion letters from Jenkens that confirmed the legal propriety of the COBRA strategy, and concealed the illegality of the scheme.

For their RICO claim, plaintiffs assert that the defendants constitute a “Solicitation Enterprise” and an “FX Enterprise.” The solicitation enterprise consists of the Deutsche defendants, Jenkens, the BDO defendants, the Lincoln defendants, and all other marketing participants who solicited participants in the FX contracts offered by the Deutsche defendants for the alleged purpose of tax liability reduction. The FX enterprise consists of all defendants and all other persons or entities who participated in the implementation, sale and/or development of FX contracts.

Plaintiffs assert further that the defendants acted with malice, with knowledge that their conduct was unlawful, and that their conduct obstructed, delayed or affected interstate commerce. The predicate acts include mail and wire fraud. Plaintiffs further allege a pattern of racketeering activity as defined by RICO, by committing and/or conspiring to or aiding and assisting in transactions involving at least two acts of racketeering activity for the past ten years.

Additionally, plaintiffs assert claims for declaratory judgment and unjust enrichment against all defendants, breach of contract or, alternatively, breach of the duty of good faith and fair dealing (against the Deutsche defendants and the BDO defendants), breach of fiduciary duty (against all defendants), fraud (against all defendants), negligent misrepresentation and professional malpractice (against all defendants), breach of contract/professional malpractice (against all defendants except the Deutsche defendants), declaratory judgment that any written BDO Seidman Consulting agreement is inapplicable to all the claims asserted, and civil conspiracy.

Motions

I. Deutsche defendants' motion to stay the proceedings

When plaintiffs opened their brokerage accounts with Deutsche Bank, they signed Account Agreements which contained a mandatory arbitration clause:

I agree to arbitrate with you any controversies which may arise, whether or not based on events occurring prior to the date of this agreement, including any controversy arising out of or relating to any account with you, to the construction, performance or breach of any agreement with you, or to transactions with or through you, only before the New York Stock Exchange or the National Association of Securities Dealers Regulation, Inc., at my election.

See, e.g., Declaration of Keith S. Dubanevich, Exhibit 1, ¶ 19 (Account Agreement for MK Investing, LLC). However, the defendants concede that under another provision of the Account Agreements, they cannot compel plaintiffs to arbitrate *at this time*:

*6 No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until 1) the class certification is denied; or 2) the class is decertified; or 3) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

This provision is based on National Association of Securities Dealers (NASD) Rule 10301(d)(3).

The plaintiffs in this case are members of a putative class in an action pending in the Southern District of New York, *Denney et al. v. Jenkins & Gilchrist et al.*, No. 03-CV-5460, filed August 28, 2003). In that case, the court has preliminarily certified a settlement class with respect to the claims against Jenkins, and plaintiffs are members of that class.

The Deutsche defendants concede that so long as the plaintiffs are members of a putative class in *Denney*, they cannot be compelled to arbitrate. But, they argue, the choices open to plaintiffs are 1) becoming part of one or more classes in *Denney* and litigating their claims there; or 2) going to arbitration. Regardless of which event occurs, the Deutsche defendants assert, plaintiffs are not entitled to commence and maintain a separate action in this court and hold arbitration at bay. Consequently, they argue, this action should be stayed until one of the two events occurs.

Plaintiffs respond that the Deutsche defendants are essentially asking this court for an advisory opinion as to whether the Deutsche defendants may, at some later time, be entitled to compel arbitration *if* the plaintiffs' claims are not resolved as part of the *Denney* class. They contend that because the defendants are not *presently* allowed to enforce their arbitration rights, they should not be allowed to “obtain indirectly and under the guise of fairness what they are prohibited from obtaining directly” under the arbitration agreements.

Plaintiffs argue further that some of them do not fall within the *Denney* case for a variety of reasons, among them that the Mulholland plaintiffs were not clients of Class Counsel at the time the most recent complaint in *Denney* was filed, and some of the claims asserted in this case were not brought as class claims in *Denney*.

Under the terms of the Account Agreements, the pending litigation in *Denney* precludes the Deutsche defendants from enforcing their right to compel arbitration. Nothing in the language of the Account Agreements gives the defendants the right to a stay of litigation during periods when the defendants are shut out of arbitration. The defendants argue that such a right can be inferred from the provision that “Neither you nor I waive any right to seek equitable relief pending arbitration.” However, I disagree that this language can be interpreted to mean that the parties agreed to confer upon the Deutsche defendants the right to obtain a stay of all other litigation while class litigation was pending.

*7 The conditions for a discretionary stay are also not established. The power to stay proceedings is “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort,” and within the sound discretion of the district court. [Landis v. North American Co.](#), 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936). In the exercise of that discretion, the court weighs the competing interests of the parties. *Id.* at 254-55. However, that discretion is abused by a stay of indefinite duration in the absence of a pressing need. *Id.* at 255.

Deutsche seeks a stay of indefinite duration, but has made no showing of hardship or inequity in being

required to go forward. *Id.* The possibility that, at some point in the indefinite future, the plaintiffs' claims will either be resolved as part of the class action in *Denney* or subject to arbitration is not sufficient to justify a stay, particularly when the *Denney* court has not yet certified a litigation class.^{FN3} See [Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 864 \(9th Cir.1979\)](#) (stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time).

^{FN3}. On June 14, 2004, the *Denney* court stayed the action during the pendency of defendants' appeal. Canada Declaration, Exhibit C, p. 1-14.

I recommend that the motion for stay be denied.

II. Motion to strike

The BDO defendants move to strike and to seal plaintiffs' response to the BDO defendants' motion to compel arbitration and the Canada Declaration filed in support of that motion. The basis for the motion is that these documents refer to a memorandum written by Michael Kerekes and dated August 11, 2000, which is subject to attorney-client privilege. The issue of whether the Kerekes Memorandum is privileged has been adjudicated in other courts; see, e.g., [United States v. BDO Seidman, 2004 WL 1470034 \(N.D.Ill. June 29, 2004\)](#) (holding that the Kerekes Memorandum was privileged); *Miron v. BDO Seidman*, No. 04-968 (E.D.Pa. October 2004) (holding that the Kerekes Memorandum was privileged, but for purposes of that case only ^{FN4}) and *Denney v. Jenkins & Gilchrist*, No. 03-5460(SAS) (S.D.N.Y. November 2004) (holding that even if the Kerekes Memorandum was privileged, the privilege had been waived). The BDO defendants assert that the Superior Court of California, County of San Francisco, has also determined that the Kerekes Memorandum is privileged, in *Anna Ng v. BDO Seidman et al.*, CGC-04-434497.

^{FN4}. Judge Joyner, the judge in *Miron*, was aware that the Kerekes Memorandum had been produced to the plaintiffs by Jenkins and could simply be produced to them again for purposes of other cases.

The *Denney* court held an evidentiary hearing on the

issue. In a similar case also filed in the Southern District of New York, *Blythe et al. v. Deutsche Bank et al.*, No. 04 Civ. 5867(SAS), the judge presiding over the *Denney* case again held that the attorney-client privilege had been waived.

The elements of attorney-client privilege are 1) when legal advice of any kind is sought 2) from a professional legal adviser in his or her capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client 6) are, at the client's instance, permanently protected 7) from disclosure by the client or by the legal adviser, 8) unless the protection is waived. [United States v. Martin, 278 F.3d 988, 999 \(9th Cir.2002\)](#). Issues concerning application of the attorney client privilege in the adjudication of federal law are governed by federal common law. [Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 \(9th Cir.1992\)](#). The party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication. [Ralls v. United States, 52 F.3d 223, 225 \(9th Cir.1995\)](#). Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed. [Weil v. Investment Indicators, Research and Management, Inc., 647 F.2d 18, 24 \(9th Cir.1981\)](#).

*8 Attorney-client privilege may be waived by inadvertent disclosure of privileged matters. [Gomez v. Vernon, 255 F.3d 1118, 1131 \(9th Cir.2001\)](#). But when there has been an involuntary disclosure, the privilege will be preserved if the privilege holder has made efforts reasonably designed to protect the privilege. Conversely, the privilege will be deemed waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter. *Id.* at 1131-32.

A. Is the Kerekes Memorandum privileged?

Michael Kerekes, the author of the Kerekes Memorandum, is a partner at BDO Seidman and, at the time the Memorandum was written, was a member of BDO Seidman's Tax Solutions Opinions Committee. The Memorandum is addressed to David Dreier, a lawyer at White & Case, LLP, BDO Seidman's outside counsel, and to the BDO Seidman Tax Solutions Opinion Committee, the members of which are unnamed in the Memorandum. Copies were sent to Denis Field and Mike Lichner, both of BDO Seid-

man. The Memorandum was produced to the plaintiffs by Jenkens.

The Memorandum discusses the effective date of [IRS Notice 2000-44](#) with respect to the requirement that BDO Seidman maintain lists of taxpayers participating in certain types of tax shelter transactions. However, although the Memorandum is addressed to Mr. Dreier, among others, it does not on its face seek legal advice from him. The first paragraph of the Memorandum disclaims any discussion of whether the Notice should be viewed as having any effect on the substantive law relating to the tax shelter transactions or any discussion of whether there are arguments that the list-keeping requirement is either invalid or inapplicable to the transactions.

The Memorandum's third paragraph is titled "Provisional Conclusion" and states that it "seems fairly clear" that the list-keeping requirement should not apply to transactions in which the clients signed their engagement letters before August 11, 2000, but probably does apply to transactions in which the engagement letters were signed after that date, and to transactions first offered to clients on or after August 11, 2000.

The Memorandum contains an extensive analysis of the basic list-keeping requirement, the amendments to the regulation, the effective date provision of the amendment, and the relationship of the effective date provision to various transactions. At the end of this discussion, the Memorandum says:

It seems that we will need to form our own conclusions on this issue, at least temporarily, as White & Case will probably not have a definitive view on the subject until Larry Hill returns a week from Monday. I don't think BDO can be without a policy during the coming week.

Exhibit E, p. 5. The Memorandum ends with the following sentence: "I would very much welcome comments or alternative readings," presumably from all of the other recipients.

Mr. Kerekes says in the second paragraph of the Memorandum that parts of the Memorandum "reflect discussions with David Dreier, Bob Greisman and Paul Shanbrom;" Mr. Dreier is also included within the request for "comments or alternative readings."

These statements suggest that Mr. Dreier is being solicited for legal advice.

*9 I conclude that BDO Seidman has met its burden of proving that the Kerekes Memorandum is privileged. However, I find that the privilege has been waived by disclosure, either deliberate or inadvertent.

B. Involuntary waiver of the privilege

Inadvertence of disclosure does not, as a matter of law, prevent the occurrence of waiver. [Weil, 647 F.2d at 24](#). But when attorney-client privilege has been inadvertently waived, the privilege can be preserved if the holder of the privilege can show efforts reasonably designed to protect the privilege. [Gomez, 255 F.3d 1131-32](#).

There is no evidence in this case from which it can be inferred that BDO Seidman guarded the confidentiality of the Kerekes Memo with sufficient care to justify application of this exception; indeed, BDO Seidman failed to take even such an elementary precaution as labeling the Kerekes Memorandum privileged or confidential.

C. Deliberate waiver of the privilege

Waiver of attorney-client privilege may be effected by implication, and the subjective intent of the party asserting the privilege is only one factor to be considered in determining whether waiver should be implied. [Weil, 647 F.2d at 24](#). BDO Seidman denies that the Memorandum was intentionally sent to Jenkens by anyone at BDO Seidman. According to a declaration from Michael Kerekes, he has no recollection or record of sending a copy of the Memorandum to Jenkens or to anyone other than those listed on the Memorandum. The recipients of the Memorandum, including Robert Greisman, David Dreier, Charles Bee, Lawrence Cohen, Lorin Luchs, Paul Shanbrom, and Adrian Dicker, also deny any recollection of sending a copy to Jenkens.

However, according to an affidavit submitted by Donna Guerin, a Jenkens shareholder, dated August 24, 2004, she was faxed a copy of the Memorandum, along with a copy of a BDO Seidman Consulting Agreement, by Mr. Greisman on January 19, 2001. See Canada Affidavit, Exhibit 4. Ms. Guerin says she

specifically recalls receiving these materials from Mr. Greisman by fax, and having conversations with Mr. Greisman and others at BDO Seidman about the contents of the Memorandum. *Id.* According to Ms. Guerin, Mr. Greisman on other occasions sent her e-mails and writings he had received from others at BDO Seidman. *Id.* She offers the example of a fax she received from Mr. Greisman on Monday, January 22, 2001, also relating to the list-keeping requirements (the January 22 fax). She has submitted a copy of the January 22 fax, which shows that it was sent from BDO Seidman's Chicago office. *Id.* at Exhibit 1-B. The January 22 fax is a memorandum dated September 7, 2000, written by Mr. Greisman, titled "New IRS List-Keeping Rules for Various Transactions." *Id.*

In an affidavit dated September 12, 2004, Mr. Greisman states that he was in Los Angeles at a meeting, and then on a plane back to Chicago, on January 19, 2001. Mr. Greisman states that his file from that meeting does not contain the Memorandum, he does not recall taking the Memorandum with him to Los Angeles. He states further that the Los Angeles hotel where he attended the meeting did not charge anyone from BDO Seidman for a facsimile, and he has no record copy of the fax or copy of the cover letter. Declaration of Kerry Shepherd, Exhibit C. Mr. Greisman states in his affidavit that he also has no record or recollection of having sent the January 22 fax to Ms. Guerin. *Id.* at p. 3. ^{FN5}

^{FN5} Mr. Greisman has since admitted sending the January 22 fax to Ms. Guerin.

*10 Ms. Guerin has filed a Supplemental Affidavit in which she says that the conversation she had with Mr. Greisman at the time he sent the fax of the Kerekes Memorandum to her was that he

wanted Jenkens to reconsider the text of opinion letters that it planned to send to those clients that Jenkens had advised who were also clients of BDO, to harmonize such text to comport with the text of BDO memos to their clients. As part of the back-up for his argument, Greisman sent me the [Kerekes] Memorandum.

Exhibit 9, p. 2.

A memorandum to the Tax Opinion Committee dated

January 25, 2001, written by Mr. Greisman, and titled, "Summary from January 19, 2001 Meeting," contains a paragraph which says, "We still need to resolve "list issue" with J & G. (Greisman, Kerekes and Shanbrom)." The memorandum goes on to say, "Pam and Lorin will follow-up on issues related to list-keeping requirements." Government Exhibit A-32, filed in *United States of America v. BDO Seidman*, No. 02 C 4822 (N.D.Ill.).

This document casts doubt on Mr. Greisman's credibility in several ways. First, it shows that the meeting in Los Angeles on January 19, 2001 was a meeting of the Tax Opinion Committee, the same committee designated, along with Mr. Dreier, as recipients of the Kerekes Memorandum. Second, Mr. Greisman's minutes of the January 19, 2001 meeting show that coordinating list keeping requirements with Jenkens was a topic of discussion-the same topic explored in the Kerekes Memorandum. This evidence supports Ms. Guerin's testimony and casts doubt on that of Mr. Greisman. It also answers BDO Seidman's rhetorical question about why Mr. Greisman should have taken the four-month-old Kerekes Memorandum with him to the Los Angeles meeting.

BDO Seidman makes much of a number of odd circumstances surrounding the fax itself, suggesting that the fax was not sent from BDO Seidman. The fax shows a date of January 19, 2001, and page two of the fax (page five of the Kerekes Memorandum) shows a time of 3:21 p.m. Page three of the fax (page six of the Memorandum) shows a time of 3:22. Page four of the fax (page seven of the Memorandum) shows a time of 3:23. The next page of the fax bears a time of 3:55 (more than 30 minutes after the preceding page), and is page one of a Consulting Agreement. The next page of the fax is page two of the Consulting Agreement, and also shows a time of 3:55. Then comes page three of the Consulting Agreement, showing a time of 3:56. The remaining three pages of the Consulting Agreement are missing; instead, at 3:58, page one of the Kerekes Memorandum is faxed. Then at 3:59, pages two and three of the Kerekes Memorandum appear. The next faxed page is page four of the Kerekes Memorandum, showing a time of 4:00.

The fax line on the Kerekes Memorandum, which shows the date as 1-19-2001, the time, the word "from" and a page number preceded by the letter "P."

It looks completely different from the standard BDO Seidman fax line, which shows the date with slashes and the year as a two-digit number (1/19/01), gives the time on a 24-hour clock (e.g., 17:36), displays the BDO Seidman telephone number preceded by an icon of a telephone, the name "BDO Seidman LLP," and an icon and three-digit number for the page designation (for example, 002).

*11 I do not find this evidence persuasive, since it merely tends to show that the January 19, 2001 fax of the Kerekes Memorandum was not sent to Ms. Guerin from BDO Seidman. Since there is no dispute that Mr. Greisman was not at BDO Seidman on January 19, the absence of identifying BDO Seidman marks on the fax does not tend to disprove that Mr. Greisman could have sent it or had it sent to Ms. Guerin. The evidence that the Kerekes Memorandum's pages were faxed out of order and mixed in with pages from a Consulting Agreement is perplexing, but it does not tend to disprove that Mr. Greisman sent the fax or caused it to be sent to Ms. Guerin, particularly in view of Ms. Guerin's testimony that the *contents* of the Kerekes Memorandum were discussed between herself and Mr. Greisman. Regardless of the circumstances under which the Kerekes Memorandum was faxed to Ms. Guerin—faxed by Mr. Greisman or someone else, intentionally or inadvertently—Mr. Greisman's discussion with Ms. Guerin of the *contents* of Kerekes Memorandum on January 19, 2001 shows not only that Mr. Greisman knew Ms. Guerin had the Kerekes Memorandum, but also that Mr. Greisman had apprised her of its contents. The conversation and the provision of the Kerekes Memorandum both waived the privilege.

I find Ms. Guerin's testimony more credible than Mr. Greisman's, because she has a specific recollection that Mr. Greisman sent her the Kerekes Memorandum and of what they discussed that day, while Mr. Greisman relies merely on his failure to recall sending or discussing the Kerekes Memorandum. Further, the evidence shows that the topic under discussion in Los Angeles by the Tax Opinion Committee on January 19, 2001, the list-keeping requirements, was the same topic discussed in the Kerekes Memorandum, and the minutes of the January 19, 2001 meeting specifically mention the coordination of list-keeping requirements with Jenkens. This makes it logical that Mr. Greisman would have faxed a copy of the Kerekes Memorandum to a lawyer at Jenkens that day.

That conclusion is reinforced by Mr. Greisman's acknowledgment that he and Ms. Guerin discussed list-keeping requirements on January 22, 2001, three days later, and that Mr. Greisman sent her another BDO Seidman analysis of list-keeping, written by himself, on that date. It is worth noting that initially, Mr. Greisman denied sending the January 22 fax as well.

BDO Seidman points to Ms. Guerin's failure to produce time records or other evidence that she received the fax or discussed it with Mr. Greisman on January 19, 2001. However, Ms. Guerin is not a party to this litigation and has no obligation to come forward with any evidence at all. The BDO defendants have the burden of proof on the privilege issue.

I find that Mr. Greisman either faxed the Kerekes Memorandum to Ms. Guerin himself or caused to be faxed to her on January 19, 2001, and that Mr. Greisman and Ms. Guerin discussed its contents at that time.

D. Authority to waive the privilege

*12 The BDO defendants assert that even if Mr. Greisman did send the fax to Mr. Guerin on January 19, 2001, he did not have authority to waive the attorney-client privilege on behalf of BDO Seidman.

The power to waive the corporate attorney-client privilege rests with the corporation's management, and is normally executed by its officers and directors. [*United States v. Chen*, 99 F.3d 1495, 1502 \(9th Cir.1996\)](#). BDO Seidman argues that although Mr. Greisman is a partner at BDO Seidman, he is one of 200 such partners, and is not an officer or director of the firm, or a member of the firm's management. However, this argument does not persuade me that Mr. Greisman did not have authority. The evidence shows that, even if Mr. Greisman did not have inherent authority to waive the privilege, BDO Seidman conferred that authority upon him.

The Kerekes Memorandum was sent to Mr. Greisman as a member of BDO Seidman's Tax Opinion Committee, not as an individual. The Tax Opinion Committee represented BDO Seidman's interests with respect to the tax shelter transactions being conducted by BDO Seidman with its clients. As a member of the Tax Opinion Committee, Mr. Greisman had authority from BDO Seidman to possess the Kerekes Memo-

randum, and to discuss its contents with other persons in BDO Seidman and with BDO Seidman's legal counsel.

In view of the allegedly close working relationship between the Jenkens firm and BDO Seidman in the tax shelter transactions, which BDO Seidman does not deny, I find improbable BDO Seidman's contention that Mr. Greisman did not have authority to share with Jenkens the thoughts and analysis contained in the Kerekes Memorandum. Jenkens clearly shared BDO Seidman's interests in the tax shelter transactions and participated closely with BDO Seidman in the planning and execution of those transactions. Ms. Guerin's example-initially denied, but now admitted by Mr. Greisman-of the January 22 fax, received just three days after the Kerekes Memorandum was faxed, and on the same subject as the Kerekes Memorandum, is telling.

E. Common interest rule

Alternatively, the BDO defendants assert that the Kerekes Memorandum is protected from disclosure under the common interest rule. The "common interest" rule protects communications made when a non-party sharing the client's interests is present at a confidential communication between attorney and client. [United States v. Zolin](#), 809 F.2d 1411, 1417 (9th Cir.1987), *affirmed in part, reversed in part on other grounds*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). The BDO defendants argue that the common interest doctrine extends to situations "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel," citing [Bank Brussels Lambert v. Credit Lyonnais \(Suisse\) S.A.](#), 160 F.R.D. 437, 447 (S.D.N.Y.1995) and an unpublished decision from the Ninth Circuit, [United States v. Montgomery](#), 1993 WL 74314 (9th Cir.1993). I do not find this argument persuasive for several reasons.

*13 First, at the time the Kerekes Memorandum was sent to Jenkens, there is no evidence of ongoing litigation involving Jenkens and BDO Seidman as joint defendants, nor is there any evidence that they would have pursued a common legal strategy in the event of such litigation. Ms. Guerin's supplemental affidavit indicates that the discussion she had with Mr. Greisman about the Kerekes Memorandum was unrelated to litigation strategy-it concerned the language of the

opinion letters Jenkens was sending to BDO Seidman's clients.

Second, the theory of the common interest doctrine is inconsistent with the inadvertent waiver theory pro-pounded by the BDO defendants. And third, as Judge Scheindlin observed in *Denney*, the fact that Jenkens has produced the Kerekes Memorandum during discovery in numerous actions, without invoking the joint defense privilege, is persuasive evidence that Jenkens was unaware of any joint defense strategy.

I recommend that the court's oral order sealing the transcript be vacated, and that the BDO defendants' motion to strike and seal the Kerekes Memorandum and references to the Kerekes Memorandum in the briefing papers be denied.

III. BDO defendants' motion to compel arbitration and stay action

Only the Allen plaintiffs (Brian Allen, Kathleen Allen, BGA Montgomery Investments, Parts Voice Investments, and Compu-Time, Inc .) have claims against BDO Seidman. The BDO defendants move to compel arbitration of the Allen plaintiffs' claims, pursuant to a Consulting Agreement entered into by Brian Allen. The BDO defendants also move to stay the claims of the other plaintiffs, who do not assert claims against BDO Seidman, arguing that doing so would serve the interests of judicial economy.

The Consulting Agreement provides that it is to be governed in accordance with the laws of the State of New York. Kerekes Declaration, Exhibit A, ¶ 3.

An agreement to arbitrate is like any other contract. [Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University](#), 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). When ruling on a motion to compel arbitration, the court first determines whether a valid agreement to arbitrate exists. [Prima Paint Corp. v. Flood & Conklin Mfg. Co.](#), 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). If a valid agreement exists, the court then determines whether the dispute falls within the scope of the agreement. [Hartford Accident and Indemnity Co. v. Swiss Reinsurance America Corp.](#), 246 F.3d 219, 226 (2d Cir.2001).

The Federal Arbitration Act (FAA) creates a body of federal substantive law governing arbitrability, applicable to any arbitration agreement that is within the coverage of the FAA. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

A. Validity of the Consulting Agreement

Plaintiffs urge me to adopt the reasoning of the *Denney* court, which found the Consulting Agreement void on the basis of mutual fraud, because the language of the Consulting Agreement did not describe the services BDO Seidman actually provided.

***14** Under the language of the Consulting Agreement, BDO Seidman agrees to

provide the following consulting services to you and your company: consulting services in conjunction with ongoing planing for your corporation, including planing for future operations and/or orderly termination and liquidation of the corporation, assisting you and your company in evaluating the various options [for the corporation] and their consequences, providing numerical computations (based on information provided by you) to illustrate those consequences, coordinating with your legal counsel, estate planners and financial advisors to coordinate the resolution of matters relating to your corporation with other business, legal and financial matters, and such other services as you may request that relate to the above-listed services.

Declaration of Brian Allen, Exhibit B, p. 1.

In *Denney*, the court found that although plaintiffs' Consulting Agreements with BDO Seidman provided for assistance in "business expansions" and the "transfer, sale or lease" of their businesses, the plaintiffs had already sold their businesses at the time they entered into the Consulting Agreements, and BDO Seidman never provided services to them in connection with their business activities. The court concluded, based upon this evidence and the "extraordinarily vague language contained in the consulting agreements" that BDO Seidman and plaintiffs engaged in mutual fraud when they executed the consulting agreements," because neither party to the transaction wanted third parties to "know the nature of the contracts into which they entered, or that BDO

had contracted with plaintiffs to provide tax shelter advice."Canada Declaration, Exhibit C, p. 17.

Plaintiffs argue that the court's analysis in *Denney* applies to this case as well. According to the Declaration of Brian Allen, he owned 100% of the capital stock in Compu-Time, Inc., (CTI) an Oregon corporation. In March 1999, CTI sold substantially all of its assets to Parts Voice, LLC (PV), thereby acquiring a 20% interest in PV. Mr. Allen states that at his first meeting with Michael Nelson of Lincoln Financial and Michael Kerekes of BDO Seidman, they "talked only about the tax transaction; no advice was given with respect to the already completed sale of the CTI assets."Allen Declaration, p. 2. Mr. Allen states that although CTI was used in the last step of the COBRA strategy, BDO Seidman did not provide any of the services listed in the Consulting Agreement because CTI's business operations and activities had ended upon the sale.*Id.* at p. 3.

The Opinion Letter prepared by Jenkens, attached to the Allen Declaration as Exhibit A, tells a somewhat different story. According to that document, on November 17, 1999, Mr. Allen contributed the digital currency options to PV, which was treated as a partnership for federal income tax purposes, as a contribution to capital. Allen Declaration, Exhibit A, p. 2. PV had been formed for the purpose of making income and gains from investment transactions, and was engaged in investment activities. *Id.* On December 17, 1999, Mr. Allen contributed shares in other companies to PV as a contribution to capital.*Id.* On December 21, 1999, Mr. Allen contributed his interest in PV to CTI as a contribution to capital. According to the Opinion Letter, CTI had been formed for the purpose of making investments.

***15** On the basis of this evidence, I am not persuaded that the Consulting Agreement describes consulting work that was never done for the Allen plaintiffs. The evidence shows that CTI and PV were the entities used to implement the tax shelter transactions, and such phrases in the Consulting Agreement as "planing for ... orderly termination and liquidation of the corporation,"^{FN6}"evaluating the various options and their consequences,""providing numerical computations ... to illustrate those consequences," and "coordinating with your legal counsel, estate planners and financial advisors to coordinate the resolution of matters relating to your corporation with other business,

legal and financial matters,” can reasonably be interpreted to encompass tax advice, including assistance in the identification and implementation of a tax shelter strategy.

[FN6](#). The “corporation” referred to in the Consulting Agreement is never identified by name.

Although plaintiffs argue, on the basis of the Kerekes Memorandum, that BDO Seidman made an effort to draft Consulting Agreements so as to conceal the true nature of the services being provided to clients engaging in the COBRA transactions,^{[FN7](#)} there is no evidence to show that BDO Seidman's clients were deceived by the language of the Consulting Agreements, or that Mr. Allen entered into the Consulting Agreements with the intention of deceiving third parties. I therefore find no evidence indicative either of fraud in the inducement or of mutual fraud, and no grounds for invalidating the Consulting Agreements.

[FN7](#). Mr. Kerekes says in his Memorandum:

Our engagement letters have been structured not to make clear exactly what services we were providing in return for our fee. In order to fall clearly within the protection of the date the engagement letters were signed, we might wish to send letters to our clients clarifying that one of the services is consulting with respect to their current hedge fund transaction, or some such innocuous but clear language.

B. Scope of the arbitration agreement

The scope of an arbitration agreement is a matter of federal substantive law. [Simula, Inc. v. Autoliv, Inc.](#), 175 F.3d 716, 719 (9th Cir.1999); [Clausen v. Watlow Elec. Mfg. Co.](#), 242 F.Supp.2d 877, 882 (D.Or.2002). The standard for demonstrating arbitrability is not high. [Simula](#), 175 F.3d at 719. A court interpreting an arbitration agreement must give due regard to the federal policy favoring arbitration; ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration. [Mastrobuono v. Shearson Lehman Hutton, Inc.](#), 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); [AT & T Techs. Inc. v. Comm. Workers of America](#), 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)(“in the absence of any

express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”)

The arbitration provision of the Consulting Agreement states:

If any dispute, controversy or claim arises in connection with the performance or breach of this agreement, and cannot be resolved by facilitated negotiations (or the parties agree to waive that process) then such dispute, controversy or claim shall be settled by arbitration in accordance with the laws of the State of New York and the then current Commercial Arbitration Rules of the American Arbitration Association, except that no prehearing discovery shall be permitted unless specifically authorized by the arbitration panel, and shall take place in the city in which the BDO Seidman, LLP office providing the relevant services exists, unless the parties agree to a different location. Such arbitration shall be conducted before a panel of three persons.... The arbitration panel shall have no authority to award nonmonetary or equitable relief, and any monetary award shall not include punitive damages.

*16 *Id.*, ¶ 5.

Contractual language such as “all disputes arising in connection with” an agreement is interpreted broadly to reach “every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract,” including statutory claims. [Simula Inc. v. Autoliv, Inc.](#), 175 F.3d at 721.

The plaintiffs assert that this broad phrase is narrowed by the limitation to “performance or breach of this agreement,” arguing that the Allen plaintiffs are explicitly *not* claiming that BDO Seidman failed to perform under or breached the Consulting Agreement.^{[FN8](#)} The plaintiffs argue that the dispute between them relates to the COBRA strategy marketed by BDO Seidman, not the services enumerated in the Consulting Agreement.

[FN8](#). However, the Allen plaintiffs have asserted a breach of contract claim against BDO. See Amended Complaint ¶¶ 216-220. They allege that the BDO and Deutsche De-

defendants “breached their agreements with Plaintiffs (including but not limited to, the FX Contracts) and their duty of good faith and fair dealing.”*Id.* at ¶ 218.

For the reasons already discussed, I am not persuaded that the services enumerated in the Consulting Agreement exclude BDO Seidman's activities in presenting the COBRA tax shelter strategy to the plaintiffs and assisting them in its implementation. I therefore disagree with plaintiffs' contention that the claims asserted in the Amended Complaint have “nothing to do with” the Consulting Agreement. Further, the Consulting Agreement is the *only* agreement between BDO Seidman and the plaintiffs, the only instrument which could conceivably provide the basis for the services rendered by BDO Seidman and the fees paid for those services by the Allen plaintiffs, and the only agreement upon which a breach of contract claim could be based.

Because 1) there is no express provision excluding claims arising from the COBRA strategy from arbitration, or 2) any evidence of a purpose on the part of the Allen plaintiffs and BDO Seidman to exclude claims arising from the COBRA strategy from arbitration; 3) the arbitration clause is broad; and 4) any doubts are to be resolved in favor of arbitrability, I recommend that the motion to compel arbitration be granted. However, I recommend that BDO's motion to stay be applied only to the claims asserted against BDO by the Allen plaintiffs. BDO has made no showing that would justify staying this action as to any other parties.

IV. Lincoln Defendants' Motion to Dismiss

The only claims asserted against the Lincoln defendants are by the Allen plaintiffs. The allegations in the Amended Complaint which concern the Allen plaintiffs are that the Lincoln defendants introduced the Allen plaintiffs to the COBRA strategy through an initial presentation in Portland. The Allens then met with Mr. Kerekes and decided to engage in the strategy in October 1999.

The Lincoln defendants move to dismiss all the claims asserted against them for failure to state a claim. The Lincoln defendants move to dismiss claims one, two and three, asserted under RICO, [18 U.S.C. § 1961](#) *et seq.*, because 1) they are preempted

by the Private Securities Litigation Reform Act of 1995 (PSLRA), which amended [18 U.S.C. § 1964\(c\)](#) to eliminate as a predicate for civil claims under RICO any conduct actionable as securities fraud; 2) plaintiffs have failed to allege some of the requisite elements of a RICO claim, such as “operation or management” of an enterprise, “particularity,” and conspiracy; and 3) there is no RICO claim for “aiding and abetting.”

*17 The Lincoln defendants move to dismiss claim four (declaratory judgment and unjust enrichment claims) for failure to allege the invalid contracts to which the Lincoln defendants were parties or to allege who paid whom for what. They move to dismiss claims six, seven and eight (breach of fiduciary duty, fraud, and negligent misrepresentation/professional malpractice, respectively) for failure to plead the elements of those claims with particularity and failure to allege a special relationship.^{FN9}

[FN9.](#) The common law claims for breach of contract and of the duty of good faith and fair dealing is not asserted against the Lincoln defendants.

The Lincoln defendants move to dismiss claim nine (breach of contract/professional malpractice) for failure to allege the existence of any contract between the Allen plaintiffs and the Lincoln defendants with respect to the COBRA strategy. They move to dismiss claim 10, requesting declaratory judgment as to plaintiffs' damages, because it seeks a declaration that plaintiffs are entitled to damages based on their other claims and plaintiffs have failed to plead sufficient facts in support of those underlying claims. They move to dismiss claim 11, for civil conspiracy, because plaintiffs fail to allege with particularity a “meeting of the minds” between the Lincoln defendants and the other alleged co-conspirators and fail to allege in what manner and with whom the Lincoln defendants conspired.

The Lincoln defendants also move to dismiss the Allen plaintiffs' claim for punitive damages under [Or.Rev.Stat. § 31.725](#), and their claims for compensatory damages based on improperly taken deductions, interest and penalties payable to the IRS, for failure to state a claim.

Dismissal for failure to state a claim is proper only

when “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations” of the complaint. [Hishon v. King & Spalding](#), 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

A. RICO claims

Claim One is for violation of [18 U.S.C. § 1962\(c\)](#), which provides that it

shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

Claim Two is for violation of [18 U.S.C. § 1962\(d\)](#) by conspiring to violate [18 U.S.C. § 1962\(c\)](#). [Section 1962\(d\)](#) provides that it “shall be unlawful for any person to conspire to violate any of the provisions of subsection (a) or (c) of this section.”

Claim Three is a claim for violation of [18 U.S.C. § 2](#) by “seeking to and aiding and abetting a scheme to violate [18 U.S.C. § 1962\(c\)](#).”

1. Preemption by the PSLRA

Section 10(b) of the Securities Exchange Act makes it “unlawful for any person ... to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.” [15 U.S.C. § 78j](#).

*18 SEC Rule 10b-5 provides that

[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading or (c) To engage in any act, practice or course of

business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The phrase “in connection with” in § 10(b) is to be “construed not technically and restrictively, but flexibly to effectuate [the statute's] remedial purposes.” [SEC v. Zandford](#), 535 U.S. 813, 819, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002)(internal quotation and citation omitted).

In 1995, RICO was amended by the PSLRA, to provide, “Any person injured in his business or property by reason of a violation of [RICO] may sue * * * except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO].” [18 U.S.C. § 1964\(c\)](#). The purpose of this amendment was to “address a significant number of frivolous actions based on alleged securities law violations” so as to “deprive plaintiffs of the right to bring securities fraud-based RICO claims.” [Scott v. Boos](#), 215 F.3d 940, 945 (9th Cir.2000).

The Lincoln defendants argue that claims one, two and three should be dismissed because the Allen plaintiffs' claims are based on alleged conduct that would be actionable as securities fraud. The defendants make three arguments. First, they argue that the COBRA strategy involved the purchase and sale of currency options, interests in S Corporations, and publicly-traded stock, all three of which are included in the definition of “security,” see 15 U.S.C. § 71b(a)(1)(definition of security includes notes, stock, investment contracts, and “any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency;” [Landreth Timber Co. v. Landreth](#), 471 U.S. 681, (sale of all outstanding stock in closely-held corporation was sale of securities).^{FN10}

[FN10](#). The Lincoln defendants further contend that the Allen plaintiffs' interests in BGA Monterey Investments LLC and Parts Voice Investments LLC, which were transferred and used to effectuate the COBRA transactions, are arguably securities as well, citing [Robinson v. Glynn](#), 349 F.3d 166, 174 (4th Cir.2003)(interests in manager-managed LLCs may often be securities); [SEC v. Parkersburg Wireless LLC](#), 991

[F.Supp. 6, 7-8 \(D.D.C.1997\)](#)(sale of interest in LLC was sale of securities); [Nutek Information Systems v. Arizona Corp. Comm., 194 Ariz. 104, 977 P.2d 826, 836 \(Ariz.Ct.App.1998\)](#)(under Arizona blue sky law's definition of security, which is "substantially similar" to the federal definition, membership interests in LLC were securities).

Second, they argue that plaintiffs' allegations that the Lincoln defendants induced the plaintiffs to enter the COBRA transactions by means of false and misleading statements, although alleged as mail and wire fraud, could and should have been alleged as securities fraud, see SEC Rule 10b-5 and [Zandford, 535 U.S. at 822](#) (for purposes of securities fraud, "[i]t is enough that the scheme to defraud and the sale of securities coincide.")

Third, the Lincoln defendants argue that other courts have dismissed RICO claims based on tax strategies the same as, or similar to, the COBRA strategy in this case, as preempted by the PSLRA. These cases include [Seippel v. Jenkins & Gilchrist, 2004 WL 1907315 at *5 \(S.D.N.Y. August 25, 2004\)](#) (dismissing RICO claims involving same tax strategy at issue in this case); [Jacobini v. KPMG, 314 F.Supp.2d 1172 \(M.D.Fla.2004\)](#); and [Loftin v. KPMG LLP, 2003 WL 22225621 \(S.D.Fla. Nov.12, 2003\)](#)(both involving a similar tax strategy).

*19 In *Seippel*, the complaint alleged that plaintiff William Seippel, a senior executive of a company, was planning to change his employment, exercise his stock options, and sell the stock. Ernst & Young was Seippel's employer's auditor and provided tax advice and other financial services to Seippel and other senior executives. Through this relationship, Ernst & Young knew of Seippel's plans and the substantial gains that he would recognize when he engaged in the stock options transaction. Acting on this knowledge, Charles Paul of Ernst & Young approached the Seippels and advised them about the COBRA scheme. The Seippels agreed to engage in the scheme to reduce their tax liability for the gains that would be realized from exercising the stock option.

Seippel formed various entities, including an S corporation, an LLC, and a partnership. The LLC entered into the currency options transactions, purchas-

ing long options and selling short options on foreign currency exchanges through Deutsche Bank. The options had an expiration date of December 23, 1999. On December 2, 1999, Seippel, through the LLC, contributed his currency options to a partnership. On December 12, 1999, the partnership purchased Canadian dollars. On December 27, 1999, Seippel contributed his partnership interest to an S Corporation. The partnership was liquidated and the Canadian dollars were distributed to the S Corporation. On December 29, the S Corporation sold all of its investments. The Seippels claimed a \$12 million loss on their tax returns. The Seippels were subsequently audited by the IRS, and required to make tax payments of over \$5 million and interest and penalty payments of over \$1 million. They brought an action against Jenkens and Deutsche Bank, among others, asserting claims for RICO, fraud, breach of fiduciary duty, negligent misrepresentation, breach of contract, professional malpractice, and unjust enrichment. The defendants moved against the RICO claims on the ground that the Seippels' allegations were actionable as securities fraud, and therefore barred by the PSLRA.

The court noted that the predicate acts alleged were, as in this case, "transmitting fraudulent information and materials through the interstate mails and wires, as well as otherwise using the interstate mails and wires in furtherance of a common plan to commit racketeering activity."341 F.Supp. at 372. The court then considered whether the conduct alleged by the Seippels would have been actionable as securities fraud.

The court rejected the Seippels' argument that the PSLRA exception did not apply because they had not alleged that any defendant misrepresented the value of Mr. Seippel's stock options. The court relied on [Zandford, 535 U.S. at 819](#), in which the Supreme Court made it clear that the scheme to defraud and the sale of securities need only "coincide" to be actionable as securities fraud.

The court held that the Seippels' complaint described a "single fraudulent scheme 'in connection with' the sale of Mr. Seippel's stock."341 F.Supp. at 373. The sale of the stock was an "integral part" of the scheme, since without it "there would have been no gain for the COBRA transaction to offset," and under the Seippels' allegations, the reason the defendants ap-

proached the Seippels was that they knew of the planned sale of the stock. *Id.* The court concluded, “Having alleged in their Amended Complaint that defendants' acts were part of a single fraudulent scheme, the Seippels cannot now divide the scheme into its various component acts.”*Id.* The court dismissed the RICO claims.

*20 The *Loftin* and *Jacobini* cases involved tax shelter strategies different from the COBRA strategy at issue here. However both, like *Seippel*, involved representations and opinion letters-later proved to be wrong-that tax shelters involving transactions designed to effect a “basis shift” enabling the investor to recognize a capital loss, would pass muster with the IRS. The predicate acts alleged in *Loftin* and *Jacobini* were mail and wire fraud, but in each case, the purchase and sale of securities was part of the tax shelter strategy.

Plaintiffs argue that the facts of this case are distinguishable from those of *Seippel*, *Loftin* and *Jacobini*, because this case involves *digital* options, which places them somehow outside the definition of securities. They rely on language from the *Seippel* case, in which the court noted that digital options were “significantly different” from the strategies used in the *Loftin* and *Jacobini* cases. However, I find plaintiffs' reliance on this observation from *Seippel* to be misplaced. The *Seippel* case involved exactly the same digital option transactions that were used in this case, and the court concluded that plaintiffs' RICO claims were precluded by the PSLRA. The *Loftin* and *Jacobini* cases did not involve options of any kind, but rather shares of stock.

Plaintiffs also attempt to distinguish *Seippel* on the ground that in *Seippel*, the plaintiffs were approached about the COBRA scheme because of a large *future* stock sale, while in this case, the Allen plaintiffs were approached *after* they had realized a gain from the sale of Allen's interest in Parts Voice LLC. I find this a distinction without a difference. In this case and in *Seippel*, the objective was to avoid paying taxes on gains realized from the sale of stock. The date on which the gains accrued is immaterial. Moreover, there is another stock transaction in this case which was absent from *Seippel*: here, the Allen plaintiffs contributed stock to the partnership, while in *Seippel*, the plaintiffs contributed Canadian dollars. The Allen plaintiffs' partnership subsequently sold all of its

stock. The Allen plaintiffs' contribution of stock to the partnership, and the subsequent liquidation of the partnership assets, were integral to the COBRA strategy.

Plaintiffs also argue that the use of stock was merely incidental to the COBRA scheme, because COBRA merely required the contribution of something with value to the partnership. While I agree that implementation of the COBRA strategy did not necessarily require the Allens to contribute securities to the partnership, the fact remains that the Allen plaintiffs' contribution was in the form of stock, and the artificially inflated basis created by the series of options transactions was meant to, and did, attach to that stock.

Plaintiffs argue that the COBRA scheme involved transactions “more akin to wagers or lotteries on the movements of foreign currency prices” rather than the physical exchange of securities. They quote from [*Lehman Brothers Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 159 \(S.D.N.Y.2001\)](#), where the court held that digital transactions did not fall within either the foreign currency definition or the “investment contract” definition of “security” under New York's Martin Act, despite Martin Act's broader definition of security than the federal act.

*21 This argument is flawed for two reasons. First, the COBRA scheme, as implemented by the Allen plaintiffs, involved more than the digital options. As discussed, it also involved the contribution of stock to the partnership and the subsequent sale of that stock. Further, the issue of the PSLRA's bar on RICO claims was not before the court in the *Lehman Brothers* case.

Plaintiffs' final argument is that the proper focus for the analysis is not on whether the conduct pleaded as predicate offenses is “actionable” as securities fraud, and not on whether the conduct at issue was “intrinsically connected to, and dependent upon” conduct actionable as securities fraud. Plaintiffs rely on [*Bald Eagle Area Sch. Dist. v. Keystone Financial, Inc.*, 189 F.3d 321, 330 \(3d Cir.1999\)](#). In *Bald Eagle*, the plaintiffs, school districts, brought a class action under RICO against a bank acting as the custodian of the districts' assets seeking to recover funds lost as the result of an alleged Ponzi scheme. The court held

that the action relied on conduct actionable as fraud, and was thus barred by the PSLRA.

The district court held that the conduct underlying the RICO claims was “intrinsicly connected to, and dependent upon conduct which would be actionable under Federal securities law.” [189 F.3d at 330](#). The Court of Appeals held that the “proper focus” of the analysis was on whether the conduct was “actionable” as securities fraud, *id.*, but held that the district court's opinion made it clear that the district court had properly “found the conduct alleged as predicate acts was so closely connected to and dependent upon conduct undertaken in connection with the purchase or sale of securities that it was actionable as securities fraud.” *Id.*

To the extent that the *Bald Eagle* court applied a stricter standard than the *Zandford* court's requirement that the scheme to defraud and the sale of securities “coincide,” the *Bald Eagle* standard has been overruled by the later Supreme Court opinion in *Zandford*.

I recommend that the motion to dismiss the RICO claims as barred under the PSLRA be granted.

2. Is Claim One deficient for failure to allege that the Lincoln defendants had a part in directing the operation or management of the enterprises' affairs?

Defendants assert that the plaintiffs have failed to state a claim for violation of [18 U.S.C. § 1962\(c\)](#) because they have failed to allege that the Lincoln defendants had a part in directing the operation or management of the enterprises' affairs, as required by RICO. The Lincoln defendants rely on *Reves v. Ernst & Young*, 507 U.S. 179 (1993), where the Supreme Court interpreted the RICO requirement that a defendant “conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs, [18 U.S.C. § 1962\(c\)](#), to mean that the defendant must be involved in the “operation or management” of the enterprise. The Court held:

In order to “participate, directly or indirectly, in the conduct of such enterprise's affairs,” one must have some part in directing those affairs. Of course, the word “participate” makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase “directly or

indirectly” makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.

*22 507 U.S. at 179.

The only facts alleged specifically against the Lincoln defendants are that Nelson “made the initial presentation,” in July 1999 and that Kerekes, Nelson and Siegfried “pitched” the FX strategy to the Allen plaintiffs in August 1999. Amended Complaint ¶¶ 72, 73. The Amended Complaint contains allegations about what Kerekes said at the August 1999 meeting, but no indication of what Nelson said in July 1999 and what, if anything, Nelson and Siegfried said in August 1999.

The Amended Complaint also alleges that Deutsche Bank negotiated the fees, see ¶ 58, that the fees were based on the plaintiffs' anticipated tax savings, ¶ 40, and that some percentage of the fees went to “the Marketing Participants” who “introduc[ed] and recommend[ed] the FX Contracts, as part of various tax strategies, to long-time clients who trusted them.” Amended Complaint ¶ 40.

The Lincoln defendants assert that none of the allegations against them amounts to anything more than the introduction of the Allen plaintiffs to Kerekes; there is no allegation that the Lincoln defendants played any role in the events that followed. The Lincoln defendants contend that the Amended Complaint does not allege that the Lincoln defendants played any role in designing the strategy, making or implementing decisions about the strategy, explaining the strategy and the tax consequences to the plaintiffs, or implementing the FX transactions. Rather, they argue, the allegations show that the series of transactions which comprised the COBRA strategy were the product of others, specifically Jenkens and Deutsche Bank.

The Lincoln defendants argue that courts in this jurisdiction have held that limited involvement in the purported enterprise is not sufficient to satisfy the “direction” requirement, citing [Baumer v. Pachtl](#), 8 F.3d 1341, 1344 (9th Cir.1993).

In *Baumer*, the complaint alleged that plaintiffs were investors in a California limited partnership known as “Golden Hills Estates,” formed by non-defendants

Erdy and EPA.

The complaint alleged that in 1976, Erdy and EPA commenced public sales of fractional partnership interests in “Klamath Country Reserve.” Approximately five years later, Erdy and EPA began public sales of limited partnership interests in Golden Hills, allegedly in an effort to make payment to the Klamath plaintiffs and others. However, the California Department of Corporations concluded that the Golden Hills transactions constituted illegal sales of unregistered securities, and demanded that no further sales be undertaken.

Erdy and EPA subsequently enlisted the aid of defendant Pchl, an attorney, who undertook by use of United States mail numerous efforts to perpetuate the alleged fraud, including the preparation of letters to the Department of Corporations and others, allegedly designed to forestall and cover up the fraud by minimizing or mischaracterizing the allegedly improper activities of Erdy and EPA. Plaintiffs alleged further that Pchl knowingly filed a false partnership agreement in which he inflated the number of limited partners, and mailed copies of the false agreement to create the impression that Golden Hills was formed and operated legally. Pchl subsequently assisted Erdy in bankruptcy proceedings and sent two letters to the limited partners in this regard. In one letter, Pchl allegedly made misrepresentations to limited partners about Golden Hills' assets.

*23 Erdy and EPA also enlisted the help of defendant Yow, a licensed real estate appraiser. Yow misrepresented the appraised value of the property, and this appraisal was used to enhance the perceived attractiveness of the Golden Hills property by means of communicating this information by mail to present and future investors.

Defendants moved to dismiss the RICO claims against Pchl and Yow. The district court granted the motion, and the Court of Appeals affirmed. The Court of Appeals relied on *Reves* to hold that Pchl's involvement, consisting of the preparation of two letters, a partnership agreement, and assistance in the bankruptcy proceeding in which he again sent two letters, was insufficient to impute liability. The court noted that the allegedly fraudulent scheme began five years before Pchl became involved, “his role thereafter was at best sporadic,” and he “at no time held

any formal position in the limited partnership,” playing no part in directing the affairs of the enterprise. 8 F.3d at 1344. The court cited with approval a Third Circuit case, *Univ. of Md. at Baltimore et al. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir.1993), in which the court held that the mere provision of goods or services that ultimately benefit the enterprise “does not mean that one becomes liable under RICO as a result.”

Plaintiffs counter that although there may have been other players more involved in the affairs of the enterprise than the Lincoln defendants, the Lincoln defendants were nonetheless “at the very core of this scheme” because it was the trust reposed in the Lincoln defendants by the Allen plaintiffs which made the scheme possible. Plaintiffs characterize the Lincoln defendants as “front-line” solicitors, and therefore “critical players” in the enterprises.

The question of whether these allegations are sufficient to state a claim that the Lincoln defendants at least indirectly participated in the conduct of the enterprise's affairs is a difficult one. Nothing in these allegations about the July and August 1999 meetings suggests that the Lincoln defendants directed the operation or management of the affairs of the “solicitation enterprise.” The allegation that the Lincoln defendants received a fee based on the Allen plaintiffs' anticipated tax savings might be sufficient if it were coupled with an allegation that the Lincoln defendants knew or should have known of the relationship between the fees paid and the outcome of the tax shelter strategy. But in the absence of any alleged fact indicating such knowledge or awareness of the COBRA scheme, plaintiffs have not stated a claim that the Lincoln defendants participated in the conduct or management of a RICO scheme's affairs.

A comparison of the allegations in this case with the facts of the *Baumer* case also demonstrates that plaintiffs' allegations are insufficient. The court in *Baumer* noted that Pchl had allegedly made numerous efforts to perpetuate the fraud, including the preparation of letter designed to cover up the fraud; knowingly filed a false partnership agreement and mailed copies of it to further the impression that Golden Hills operated legally; and made misrepresentations to limited partners about Golden Hills' assets. These actions are far more extensive, and suggest considerably more knowledge about and control over the fraud than the

actions alleged against the Lincoln defendants here. I conclude, therefore, that under *Baumer* the plaintiffs' allegations are insufficient to generate liability. I recommend that Claim One be dismissed with leave to replead if my recommendation to dismiss Claim One as barred under PSLRA is not adopted.

3. Is Claim One deficient for failure to allege with particularity 1) the predicate acts, 2) the "pattern" requirement, and 3) each element of the predicate acts for a RICO claim?

*24 Claim One is asserted under [18 U.S.C. § 1962\(c\)](#), which states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

A "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property."[18 U.S.C. § 1961\(c\)](#). An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[18 U.S.C. § 1961\(4\)](#). "Racketeering activity" comprises a series of named criminal acts or violations of enumerated statutes. [18 U.S.C. § 1961\(1\)](#). A "pattern of racketeering activity" requires proof of at least two predicate acts of racketeering activity within a 10-year period. [18 U.S.C. § 1961\(5\)](#). The predicate acts must be related and must amount to or pose a threat of continued criminal activity. [H.J., Inc. v. Northwestern Bell](#), 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); see also [Cooper Industries, Inc. v. Lagrand Tire Chains](#), 205 F.Supp.2d 1157, 1165 (D.Or.2002)("[C]ourts have determined that a pattern must be based on at least two acts of racketeering, must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.")

a. Pleading of predicate acts

The Lincoln defendants assert that RICO claims based upon predicate acts involving fraud must be pleaded with the particularity required by Rule 9(b),

which means that the complaint must allege the time, place, speaker, and content of the alleged misrepresentations. [Moore v. Kayport Package Express, Inc.](#), 885 F.2d 531, 541 (9th Cir.1989). When fraud claims involve multiple defendants, the complaint must satisfy Rule 9(b) particularity requirements for each defendant. See [In re Worlds of Wonder Securities Litigation](#), 694 F.Supp. 1427, 1432 (N.D.Cal.1988).

The defendants argue that even though plaintiffs are required to plead with particularity each of the elements of mail and wire fraud, their allegations do not include even one specific example of mail and wire fraud that was committed by the Lincoln defendants. While plaintiffs have alleged that "defendants" in general violated mail and wire fraud statutes, and have pleaded six specific communications between the plaintiffs and the defendants, none of these specific communications involves any of the Lincoln defendants. The only two alleged communications involving the Allen plaintiffs are 1) a fax from Mr. Kerekes to Mr. Allen, attaching the form used to transfer funds to Deutsche Bank; and 2) a fax from Mr. Allen to defendant David Parse, an employee of Deutsche Bank, attaching letters authorizing the wire transfer of funds.

*25 The plaintiffs have not responded to this contention, offering only legal generalizations to the effect that the pleading requirements of fraud are not onerous. Moreover, plaintiffs themselves cite to the language from [Vess v. Ciba-Geigy Corp., USA](#), 317 F.3d 1097, 1106 (9th Cir.2003) ("Averments of fraud must be accompanied by the who, what, when, where and how of the misconduct charged") and to [Riley v. Brazeau](#), 612 F.Supp. 674, 677 (D.Or.1985) (complaint must allege the time, place and nature of the allegedly fraudulent activities). Plaintiffs have not directed the court to any specific allegations involving the Lincoln defendants that would meet these who, what, where, when and how requirements. Instead, they rely on the general allegations in the complaint about "defendants" and various "failures to disclose."

The plaintiffs argue that it is not necessary that they allege a predicate act of mail and wire fraud by each member of the RICO conspiracy. They rely on cases holding that all conspirators are liable for the acts of their co-conspirators. See, e.g., [Oki Semiconductor Co. v. Wells Fargo Bank Nat. Ass'n](#), 298 F.3d 768,

[774-75 \(9th Cir.2002\)](#) and *Sec. Investor Prot. Corp. v. Vigman*, 908 F.2d 1461, 1468 (9th Cir.1990), *rev'd on other grounds sub nom. Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (“All conspirators are liable for the acts of their co-conspirators.”) However, the Lincoln defendants counter that these conspiracy cases were analyzed under [18 U.S.C. § 1962\(d\)](#), the RICO conspiracy statute, (i.e., Claim Two) not [§ 1962\(c\)](#), which is the statute relevant to Claim One.

[Section 1962\(c\)](#) provides for the liability of “any person employed by or associated with” the enterprise who conducts or participates in the enterprise's affairs through a pattern of racketeering activity. Plaintiffs' allegations against “defendants” in general do not satisfy the requirement that the elements of the offense be pleaded against “any person.” Because the plaintiffs have not pleaded the who, what, when and where of the predicate acts of fraud against the Lincoln defendants, their allegations do not satisfy the specificity requirements of Rule 9(b).

b. Pleading the pattern requirement

The Lincoln defendants assert that RICO's pattern requirement requires proof of “at least two acts of racketeering activity” within a 10-year period. [18 U.S.C. § 1961\(5\)](#). A pattern of racketeering is demonstrated by showing that the racketeering predicate acts are related and that they amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Cooper Industries, Inc. v. Lagrand Tire Chains*, 205 F.Supp.2d 1157, 1165 (D.Or.2002). The Lincoln defendants argue that plaintiffs have failed to satisfy this requirement because they have not alleged that the Lincoln defendants themselves committed at least two predicate acts or caused others to do so. The plaintiffs have not responded to this contention.

*26 I recommend that Claim One be dismissed for failure to plead the fraudulent predicate acts with particularity and for failure to plead the pattern requirement of [18 U.S.C. § 1962\(c\)](#), with leave to replead, if my recommendation that Claim One be dismissed as barred under PSLRA is not adopted.

4. Should Claim Two be dismissed for failure to allege the existence of a RICO conspiracy?

The Lincoln defendants assert that Claim Two must be dismissed because plaintiffs have failed to allege the existence of a RICO conspiracy. “To establish a violation of [section 1962\(d\)](#), plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses.” *Howard v. America Online*, 208 F.3d 741, 751 (9th Cir.2000). Further,

A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). A defendant must also have been aware of the essential nature and scope of the enterprise and intended to participate in it. *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir.1993).

Howard, 208 F.3d at 751. The Lincoln defendants argue that the plaintiffs have not alleged that they 1) made an agreement that was a substantive violation of [section 1962\(c\)](#) or 2) agreed to commit, or participated in the commission of, any predicate offenses; or 3) were aware of the “essential nature and scope of the enterprise and intended to participate in it.” They argue that plaintiffs' statement that the alleged misrepresentations and omissions “give rise to an inference” (Amended Complaint, ¶ 199) that the defendants agreed to conspire to commit mail and wire fraud is conclusory and insufficient to establish liability. They also argue that the plaintiffs' allegations that the Lincoln defendants engaged in a RICO conspiracy do not state a violation of [18 U.S.C. § 1962\(d\)](#). (Amended Complaint, ¶¶ 195-202).

The plaintiffs respond that a RICO conspiracy defendant need not himself commit or agree to commit predicate acts, and that a violation of [§ 1962\(c\)](#) is not a prerequisite to a violation of [§ 1962\(d\)](#). *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *Dooley v. Crab Boat Owners Assoc.*, 2004 WL 902361 at *8 (N.D.Cal.2004). The plaintiffs assert that the *Salinas* Court found that for purposes of conspiracy it “suffices that [defendant] adopt the goal of furthering or facilitating the criminal endeavor.” [522 U.S. at 65](#). They also rely on the *Howard* case's holding that the defendant “must have

been aware of the essential nature and scope of the criminal enterprise and intended to participate in it.” [208 F.3d at 751](#).

The Lincoln defendants reply that even under this standard, plaintiffs have failed to allege facts that would make out a conspiracy claim, since they have even failed to allege either that the Lincoln defendants adopted the goal of furthering or facilitating the criminal endeavor, or that they were aware of the essential nature and scope of the enterprise and intended to participate in it.

*27 I disagree with plaintiffs' contention that they are not required to plead predicate acts against the Lincoln defendants to make out a conspiracy claim against them. The *Howard* court held to the contrary, saying, “[T]he failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy.” [208 F.3d at 751](#). But even if I accepted plaintiffs' argument that they were only required to allege that the Lincoln defendants were aware of the nature and scope of the criminal enterprise and adopted the goal of furthering it, plaintiffs have failed to make even those allegations.

I recommend that Claim Two be dismissed with leave to replead if my recommendation that Claim Two be dismissed as barred under PSLRA is not adopted.

5. RICO claim for aiding and abetting

The Lincoln defendants assert that Claim Three must be dismissed because there is no cause of action for aiding and abetting a RICO violation. They rely on *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164,182 (1994), in which the Supreme Court held that liability for aiding and abetting would not be read into a statute: “Congress has not enacted a general civil aiding and abetting statute.... Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”

Central Bank was a § 10(b) securities fraud case, but courts in other jurisdictions have applied its holding to RICO claims. See, e.g., [Rolo v. City Investing Co. Liquidating Trust](#), 155 F.3d 644, 656, 657 (3d

[Cir.1998](#)) (“Because the text of the RICO statute does not encompass a private cause of action for aiding and abetting a RICO violation,” such an action “cannot survive the Supreme Court's decision in *Central Bank of Denver*.”).

The Lincoln defendants acknowledge that the question of whether the Ninth Circuit would allow claims for aiding and abetting a RICO violation after *Central Bank* “appears not to have been definitively answered yet,” but they note one district court case, [Westways World Travel v. AMR Corp.](#), 182 F.Supp.2d 952, 961 (N.D.Cal.2001) stating, “The majority of courts which have addressed the issue since *Central Bank of Denver* have concluded that there is no basis to distinguish [Section 1962\(c\)](#) under RICO from Section 10(b), and thus there is no aiding and abetting liability under [Section 1962\(c\)](#).”^{FN11} The *Westways* court did not decide the issue, dismissing the RICO claim on other grounds.

FN11. These cases include [Rolo](#), 155 F.3d at 657, [Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison](#), 955 F.Supp. 248, 255-56 (S.D.N.Y.1997), [In re Lake States Commodities, Inc.](#), 936 F.Supp. 1461, 1475 (N.D.Ill.1996), and [Department of Economic Dev. v. Arthur Andersen & Co.](#), 924 F.Supp. 449 (S.D.N.Y.1996).

The plaintiffs respond that the “prevalent view” is that civil liability for aiding and abetting can attach, and they cite cases to that effect.^{FN12} The Lincoln defendants distinguish these cases on the grounds that all but one, including the decisions of the Fifth, Eleventh, and District of Columbia Circuit Courts of Appeals cited as authority in *Cox*, were decided before the Supreme Court's decision in *Central Bank of Denver*, and the one case decided after *Central Bank of Denver*, [Park v. Jack's Food Systems, Inc.](#), 907 F.Supp. 914 (D.Md.1995), nonetheless relies on precedent that predates *Central Bank of Denver* and does not discuss the relevance of *Central Bank of Denver*.

FN12. [Cox v. Administrator U.S. Steel & Carnegie](#), 17 F.3d 1386 (11th Cir.1994), [Rodriguez v. Banco Cent.](#), 727 F.Supp. 759, 773 (D.P.R.1989), [Park v. Jack's Food Systems, Inc.](#), 907 F.Supp. 914 (D.Md.1995), [Independent Drug Wholesalers Group, Inc.](#)

[v. Denton, 833 F.Supp. 1507 \(D.Kan.1993\).](#)

*28 I conclude that aiding and abetting liability does not survive *Central Bank of Denver*.

6. Even if an aiding and abetting claim were permitted, have plaintiffs failed to allege the requisite participation in the “operation or management” of the enterprise?

The Lincoln defendants argue that the courts which either allow aiding and abetting liability under [§ 1962\(c\)](#) or have not yet decided the issue have still held that aiding and abetting claims must satisfy the “operation or management” requirement. They rely on [Westways, 182 F.Supp.2d at 961-62](#).

In *Westways*, the court found it unnecessary to determine the continued viability of aiding and abetting liability under [§ 1962\(c\)](#) because even if such liability survived *Central Bank of Denver*, plaintiffs failed to allege that the defendant participated in the operation or management of an enterprise, as required in *Reves*. The *Westways* court cited several cases holding that aiding and abetting claims must satisfy this requirement. [United States v. Antar, 53 F.3d 568, 581 \(3d Cir.1995\)](#); [United States v. Viola, 35 F.3d 37 \(2d Cir.1994\)](#); [Early v. K-Tel Int'l, Inc., 1999 WL 181994 \(N.D.Ill.1999\)](#); [Sundial Int'l Fund Ltd. v. Delta Consultants, Inc., 1998 WL 1962212 \(S.D.N.Y.1998\)](#); [Lippe v. Bairnco Corp., 218 B.R. 294 \(S.D.N.Y.1998\)](#); [In re American Honda Motor Co., Inc., Dealerships Relations Litigation, 965 F.Supp. 716 \(D.Md.1997\)](#).^{FN13}

^{FN13}. The court notes that some of these cases are from the same jurisdictions, and later than, the cases cited above holding that aiding and abetting liability does not survive *Central Bank of Denver*.

The Lincoln defendants note that, as discussed above, plaintiffs have failed to satisfy the “operation or management” requirement of *Rives*, so that even if plaintiffs can assert an aiding and abetting claim, they have failed to plead it properly. The plaintiffs have not responded to this argument.

7. Does [18 U.S.C. § 2](#) permit civil liability?

The Lincoln defendants assert that [18 U.S.C. § 2](#) governs criminal, not civil, liability. They rely on *Rolo* case, where the Court of Appeals for the Third Circuit held, “Criminal liability for aiding and abetting a violation of [§ 1962](#) is imposed by reference to the general aiding and abetting statute, [18 U.S.C. § 2](#). This provision has no application to private causes of action.” [155 F.3d at 657](#). The plaintiffs have not responded to this argument.

I recommend that Claim Three be dismissed with prejudice on the grounds that aiding and abetting liability is probably foreclosed by *Central Bank of Denver* and because RICO's aiding and abetting provision has no application to private causes of action, if my recommendation that Claim Three be dismissed as barred by PSLRA is not adopted. If my recommendation to dismiss Claim Three with prejudice is not adopted on any of these grounds, I recommend that Claim Three be dismissed with leave to replead.

B. Claim Four

The Lincoln defendants contend that Claim Four, which asserts a claim for declaratory judgment based on unjust enrichment with respect to the FX contracts, should be dismissed because plaintiffs have failed to allege that the Lincoln defendants' interests are adverse to those of the Allen plaintiffs.

*29 The plaintiffs have alleged that the FX contracts they executed with Deutsche Bank are unenforceable for lack of consideration, because Deutsche Bank retained unlimited discretion to determine whether they would pay out and because the tax strategy transactions were illusory. Plaintiffs therefore seek to recover “all fees paid” to defendants on an unjust enrichment theory.

The Lincoln defendants argue that this claim, regardless of whether it is brought under the Oregon Declaratory Judgments Act, [Or.Rev.Stat. § 28.010-28.160](#) or the federal Declaratory Judgment Act, [28 U.S.C. §§ 2201, 2202](#), must be dismissed because plaintiffs have failed to allege a justiciable controversy between persons whose interests are adverse. See [Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646, 658 \(9th Cir.2002\)](#)(under the federal Declaratory Judgment Act, plaintiff must establish standing by showing that there is a substantial controversy, between parties with adverse interests, of sufficient

immediacy and reality to warrant issuance of a declaratory judgment) and [Green v. Cox, 44 Or.App. 183, 186, 605 P.2d 1198 \(1980\)](#)(elements of a declaratory relief action under Oregon law are 1) justiciable controversy 2) between adverse parties, 3) where the party seeking relief has a legally protectible interest and 4) the claim is ripe).

The Lincoln defendants assert that the Amended Complaint contains no allegations that tie the Lincoln defendants to the development or implementation of the FX contracts, the negotiations by which the Allen plaintiffs entered into the FX contracts, or the performance of those contracts, and no allegations that identify any stake the Lincoln defendants may have had in the FX contracts that was adverse to the Allen plaintiffs' interests.

The plaintiffs have not squarely confronted this contention. They cite their general allegations against "defendants" and argue that the Lincoln defendants have been unjustly enriched by accepting and retaining fees "under circumstances demonstrating that it would be inequitable for Defendants, including the Lincoln Defendants, to retain the benefit."The plaintiffs assert, "Unless Lincoln concedes it owes to the Allen plaintiffs a refund of any consideration received under their arrangements with the other Defendants, the parties' interests are certainly adverse and in need of resolution."Plaintiffs' Memorandum, p. 34.

The mere assertion that the Lincoln defendants accepted fees is not sufficient to make their interests adverse to those of the plaintiffs. There is not a plain and concise statement that these fees were related to the FX Contracts, or an explanation of how they were allocated to the Lincoln defendants. The general references to conduct by the "defendants" similarly does not suffice to show adverse interests between the Allen plaintiffs and the Lincoln defendants.

I recommend that Claim Four be dismissed with leave for the Allen plaintiffs to replead, if they can, a concrete adverse interest between themselves and the Lincoln defendants with respect to the FX contracts they executed with Deutsche Bank.

C. Claim Seven

*30 The Lincoln defendants assert that the common-

law fraud claim should be dismissed for failure to plead each element of fraud with particularity. See, e.g., [Nisson v. Tillman, 213 Or. 133, 138, 323 P.2d 329 \(1958\)](#)(pleading must allege each element of fraud) and [Vess, 317 F.3d at 1103](#) (Rule 9(b)'s particularity requirement applies to state-law causes of action). The Lincoln defendants contend that the plaintiffs have failed to allege the time, place and nature of the allegedly fraudulent activities, see [Riley, 612 F.Supp. at 677](#), and have further failed to specify the role of each defendant in the fraud. *Id.*; see also [Newman v. Comprehensive Care Corp., 794 F.Supp. 1513, 1527 \(D.Or.1992\)](#)(generic references to "defendants" fail to reach the level of particularity required by Rule 9(b)). The Lincoln defendants argue that the plaintiffs have failed to identify the time, place and nature of the misrepresentations alleged to have been made by them, and have failed to identify the "specific examples of misfeasance for which the Lincoln defendants are allegedly responsible."Defendants' Memorandum, p. 18.

Plaintiffs' response to this argument is to reiterate their allegations about the conduct of "defendants." They also argue that *Newman* is distinguishable because "the role of the Lincoln Defendants, a trusted fiduciary who introduced Allen to the Strategy and to BDO Seidman is clear from the pleadings," and because unlike *Newman*, it is "clear from the Complaint what misrepresentations and omissions were made by the Lincoln Defendants (among others)-the Strategy is legitimate and you have an opinion letter..."

Plaintiffs have failed to plead their common-law fraud claim with the requisite particularity against the Lincoln defendants. I recommend that this claim be dismissed with leave to replead.

D. Should Claims Six (breach of fiduciary duty) and Eight(negligent misrepresentation/professional malpractice) be dismissed for failure to plead the fraudulent elements of these claims with particularity, and should Claims Six, Eight and Nine (breach of contract/professional malpractice) be dismissed for failure to plead the existence and breach of a special relationship?

The Lincoln defendants argue that the plaintiffs' failure to plead their underlying fraud claims with particularity is also fatal to Claims Six and Eight because Rule 9(b) requires pleading with particularity

for all “averments of fraud.” [Vess, 317 F.3d at 1103](#). In *Vess*, the court held:

In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be “grounded in fraud” or to “sound in fraud,” and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

*31 [317 F.3d at 1103-04](#). The Lincoln defendants argue that in *Vess*, the court held that allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements “regardless of the cause of action in which they appear,” because such allegations are damaging to a defendant's reputation. *Id.* at 1104. *Vess* involved the application of Rule 9(b) to averments of fraud in a California state statutory claim for unfair business practices. However, the defendants argue that the same standard has been applied to other types of claims “grounded in fraud,” including breach of fiduciary duty claims. See, e.g., [In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1404-05 \(9th Cir.1996\)](#) (claims under Section 11 of the Securities Act of 1933); [Krieger v. Gast, 2000 WL 288442 at *8 \(W.D.Mich.2000\)](#) (breach of fiduciary duty claims that involve fraud); [Torchetti v. Int'l Bus. Machs. Corp., 986 F.Supp. 49, 51 \(D.Mass.1997\)](#) (same); [Burt v. Danforth, 742 F.Supp. 1043, 1051 \(E.D.Mo.1990\)](#)(same). The Lincoln defendants contend that plaintiffs' allegations under these claims are insufficient because all three are grounded in fraud, but fail to plead the elements of the claims with the particularity required of fraud claims. The defendants point out that in these claims, as in the common-law fraud claims, plaintiffs have failed to identify which defendant is responsible for each example of misconduct. They point out that of the 69 suballegations, none refers to the Lincoln defendants by name. Accordingly, they argue, these claims should be dismissed.

The plaintiffs respond that the *Vess* case involved application of Rule 9(b) to California state claims of unfair business practices, but that there is no Ninth Circuit or Oregon case specifically applying Rule 9(b) to the state law claims involved in this case.

In the absence of such authority, they assert that they need only comply with the requirements of [Rule 8 of the Federal Rules of Civil Procedure](#), which is to provide a “short and plain statement” showing that they are entitled to relief. The plaintiffs argue that at most, “even if some allegations of these other claims are based on fraud,” other parts of the claims are not based on fraud, so that the heightened pleading requirements should apply only to the allegations that involve fraud. [Vess, 317 F.3d at 1104](#). I agree that the specificity requirement applies only to elements of claims that are based on fraud.

In the alternative, the Lincoln defendants argue that Claims Six, Eight and Nine all fail because the plaintiffs have not alleged facts showing the existence of a special relationship between the Allen plaintiffs and the Lincoln defendants, a prerequisite for all three claims.

For claims based on breach of fiduciary duty, no fiduciary duty will be implied unless a plaintiff properly pleads that the parties have a “special relationship.” [Bennett v. Farmers Ins. Co., 332 Or. 138, 159, 26 P.3d 785 \(2001\)](#). Oregon courts find the existence of a “special relationship” when

*32 the party who is owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interests. In doing so, the party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely on the latter to achieve a desired outcome or resolution.

[Conway v. Pacific University, 324 Or. 231, 240, 924 P.2d 818 \(1996\)](#).

To state a claim for professional negligence, or malpractice, the plaintiff must allege and prove 1) a duty that runs from the defendant to the plaintiff; 2) a breach of that duty; 3) resulting harm measurable in damages; and 4) causation. [Varner v. Eves, 164 Or.App. 66, 73, 990 P.2d 357 \(1999\)](#).

The tort of negligent misrepresentation requires that

one party in a relationship owe a duty “beyond the common law duty to exercise reasonable care to prevent foreseeable harm to the other party.” [Conway, 324 Or. at 236, 924 P.2d 818](#). However, the law does not imply a tort duty “simply because one party to a business relationship begins to dominate and to control the other party's financial future;” rather, a duty is imposed “only when that relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf.” [Bennett, 332 Or. at 161-62, 26 P.3d 785](#).

The Lincoln defendants contend that the plaintiffs have failed to state a claim for professional malpractice, negligent misrepresentation, or breach of fiduciary duty because they have not pleaded the existence of a special relationship between the Allen plaintiffs and the Lincoln defendants *with respect to the tax strategy*. In other words, plaintiffs have not pleaded, and could not plead, that the Lincoln defendants exercised independent judgment with respect to the tax strategy or that the Allen plaintiffs relinquished control over the tax strategy to the Lincoln defendants. The Lincoln defendants reiterate that the Amended Complaint alleges merely that they introduced the Allen plaintiffs to BDO Seidman, and argue that this is not sufficient to hold them responsible as fiduciaries or as professionals.

The plaintiffs respond that although the words “special relationship” were not used in the Amended Complaint, sufficient facts were pleaded to show such a relationship because the Amended Complaint alleges that the Lincoln defendants “agreed to be the Allens' financial advisor and trusted fiduciary.” See Amended Complaint ¶¶ 74-75. Therefore, they argue, it is “without question” that the Lincoln defendants owed a duty to Allen and that the Allen plaintiffs relied on the Lincoln defendants for advice to further his economic interest. The plaintiffs argue that the Lincoln defendants “exploited” this trusting relationship and their position as Allen's advisor, and breached their duty by introducing Allen to BDO Seidman “and then by making material misrepresentations and omissions which were relied on by Allen to his (and the other Allen Plaintiffs') detriment. (citing Amended Complaint, ¶¶ 74-77, 78, 227 and 240). The plaintiffs argue that the role of the Lincoln defendants was “critical” to the Allen plaintiffs' decision to enter the COBRA transactions, because without the expertise provided by the Lincoln defendants,

the Allen plaintiffs did not have the ability to understand them.

*33 In reply, the Lincoln defendants point out that the plaintiffs have not disputed that claims for negligent misrepresentation, professional malpractice and breach of fiduciary duty all require proof of a “special relationship,” and point out that the plaintiffs have not pleaded, and cannot plead, that the Lincoln defendants exercised independent judgment with respect to the COBRA strategy or that the Allen plaintiffs relinquished control over their participation in the strategy to the Lincoln defendants. The defendants point, again, to the only allegation specifically against them, which is that they introduced Mr. Allen to representatives of BDO Seidman and participated in the preliminary meetings. Thus, they argue, even if it could be argued that the Lincoln defendants had a special relationship with the Allen plaintiffs with respect to some unrelated previous financial services, the limited role alleged in the Amended Complaint undermines the plaintiffs' argument that they acted in a fiduciary capacity or with other heightened duties with respect to the COBRA transactions.

The Lincoln defendants further assert that plaintiffs have not only failed to plead the existence of a special relationship, they have failed to plead a *breach* of that special relationship. They argue that the plaintiffs allege that “defendants” breached their duties to the plaintiffs, but the majority of these allegations clearly do not apply to the Lincoln defendants because they relate to things that occurred either before or after their involvement. The Lincoln defendants point out that no facts are alleged from which it could be inferred that the Lincoln defendants knew or should have known of the problems with the COBRA strategy at the time they referred the Allen plaintiffs to BDO Seidman.

I recommend that Claims Six and Eight be dismissed with leave to replead the elements of these claims that sound in fraud with the requisite particularity, and that Claims Six, Eight and Nine be dismissed with leave for the Allen plaintiffs to conform their pleadings to the requirements that they allege facts showing the existence of a special relationship between themselves and the Lincoln defendants and the breach of that relationship.

E. Claim Nine (breach of contract/professional negli-

gence)

The Lincoln defendants assert that in plaintiffs' claim for breach of contract and professional negligence arising from contract, they 1) fail to allege that the Lincoln defendants are parties to any of the alleged contracts, and 2) fail to identify the parties, dates, or substance of any of the oral or written contracts that govern the COBRA tax strategy-contracts on the basis of which plaintiffs attempt to impose liability on the Lincoln defendants.

Plaintiffs respond that a breach of contract claim is subject to [Rule 8](#), not to the heightened requirements of Rule 9(b), and that the Amended Complaint does allege that the Allen plaintiffs entered into oral and written contracts with the Lincoln defendants. Amended Complaint ¶ 246. The plaintiffs argue that “in connection with” the contracts, the Lincoln defendants were required and expected to meet all applicable standards of care, including the fiduciary duties of loyalty and honesty, and to comply with all applicable rules of professional conduct. *Id.*

*34 In reply, the Lincoln defendants assert that the plaintiffs have failed to allege in the Amended Complaint that they were parties to *any* of the alleged contracts, including the FX Contracts. They point out that ¶ 246 of the Amended Complaint fails to refer specifically to the Lincoln defendants or to the nature of any contract they purportedly had with the Allen plaintiffs regarding the COBRA strategy. They argue that the plaintiffs' inability to allege the *existence* of a contract with the Lincoln defendants regarding the COBRA strategy necessitates the dismissal of the breach of contract claim.

Paragraph 246 of the Amended Complaint alleges:

Plaintiffs entered into oral and written contracts with these Defendants to provide Plaintiffs with professionally competent legal advice, accounting advice and services, tax advice and services, and tax return preparation services. In connection therewith, these Defendants were required and expected to meet all applicable standards of care, to meet the fiduciary duties of loyalty and honesty, and to comply with all applicable rules of professional conduct.

The existence of a written or oral contract between plaintiffs and the Lincoln defendants is not specifi-

cally alleged. Other allegations about the Lincoln defendants do not suggest that the Lincoln defendants provided the Allen plaintiffs with legal advice, accounting advice and services, tax advice and services, or tax return preparation services.

I conclude that the Allen plaintiffs have failed to plead any facts supporting the existence of a contract, oral or written, upon which to base their claim against the Lincoln defendants for breach of contract, or the provision of professional services upon which to ground a claim for professional negligence. I recommend that Claim Nine be dismissed, with leave to replead.

F. Claim 10 (declaratory judgment)

This claim seeks a declaration that plaintiffs are entitled to damages based on their other claims. See Amended Complaint ¶ 254. The Lincoln defendants assert that Claim 10 should be dismissed because it is premised on the other allegations asserted in the Amended Complaint, which fail to state claims against the Lincoln defendants as discussed above. They rely on [In re Joint E. and So. Dist. Asbestos Litigation](#), 14 F.3d 726, 731 (2d Cir.1993)(because operation of Declaratory Judgment Act is procedural and does not expand jurisdiction, a court can enter a declaratory judgment only in favor of a party who has a substantive right to such relief.)

In response, the plaintiffs state that the declaratory judgment claim was put in the Amended Complaint because at the time the Amended Complaint was filed, their IRS audits had not been fully resolved and therefore the plaintiffs could not ascertain the full extent of their damages. In light of this circumstance, the plaintiffs anticipated that the defendants might argue that because the full extent of the Allen plaintiffs' damages were not ascertainable, the plaintiffs' claims were premature and for that reason they put in a claim for declaratory judgment. The Allen plaintiffs concede that, as soon as their damages are fully ascertainable, “the need for and appropriateness of this declaratory judgment claim will likely cease to exist.”

*35 In reply, the Lincoln defendants point out that the plaintiffs fail to explain why, “given that this declaratory judgment claim is premised on the other allegations asserted in the complaint that fail to state

claims against the Lincoln defendants, the court should delay in dismissing the claims.”Reply Memorandum, p. 19. The Lincoln defendants argue that because plaintiffs have pleaded insufficient facts in support of these underlying claims, their request for declaratory relief is without foundation under *Asbestos Litigation* and should be dismissed.

I recommend that Claim 10 be dismissed with leave to replead.

G. Claim 11 (civil conspiracy)

The Lincoln defendants contend that Claim 11 should be dismissed because 1) the alleged conspiracy is linked to fraud, and plaintiffs have failed to plead fraud with the requisite particularity; and 2) plaintiffs' allegations are vague and conclusory. In the alternative, the Lincoln defendants assert that the Amended Complaint fails to plead facts showing a “meeting of the minds.”

For the first argument, the Lincoln defendants rely on *Krieger*, in which the district court in Michigan applied Rule 9(b) to a conspiracy claim because the claim was “grounded in fraud,” on *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir.1985) (Rule 9(b) applies where “fraud lies at the core of the action” and in actions alleging conspiracy to defraud or conceal) and on *Cohabaco Cigar Co. v. United States Tobacco Co.*, 1998 WL 773696 (N.D.Ill.1998) (to successfully allege a conspiracy claim pursuant to Rule 9(b), “a plaintiff must identify, with particularity, the nature of the conspiracy and each defendant's role in the conspiracy .”) The defendants argue that plaintiffs have alleged a conspiracy based on marketing and implementing the “fraudulent and illegal COBRA strategy,” that is, a conspiracy grounded in fraud, but they have failed to allege the nature of the alleged conspiracy or the role of each defendant in the fraud. The Lincoln defendants assert that the conspiracy allegations are too vague and conclusory to satisfy the requirements of Rule 9(b).

Plaintiffs' response is that the Lincoln defendants have failed to cite any Ninth Circuit authority to support their contention that the heightened pleading requirements of Rule 9(b) apply to this claim, but even if they did, that their pleadings are sufficient. But plaintiffs once again cite to their allegations against “defendants,” and not to any specific allega-

tions against the Lincoln defendants. Plaintiffs argue that these allegations, “when read in their proper context,” demonstrate that the Lincoln defendants, along with all the other defendants, conspired and committed overt acts.

Plaintiffs' argument is unpersuasive. A civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage. See, e.g., *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9th Cir.1990); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir.1999). General allegations from which the necessary element of intent cannot be inferred with respect to each defendant are insufficient.

*36 The Lincoln defendants also argue that the Amended Complaint fails to allege the required “meeting of minds” for a civil conspiracy. They rely on *Bonds v. Landers*, 279 Or. 169, 174, 566 P.2d 513 (1977), which held that a civil conspiracy is “a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means,” so that to plead a claim for civil conspiracy, the plaintiff must allege facts showing 1) two or more persons; 2) an object to be accomplished; 3) a meeting of minds on the object or course of action; 4) one or more unlawful overt acts; and 5) damages as the proximate result thereof.

The Lincoln defendants argue that the plaintiffs have failed to allege any specific facts showing that there was any meeting of the minds between themselves and the other defendants with respect to the COBRA strategy, a critical element of a civil conspiracy claim. They cite two cases, *Lawver v. Lawvor*, 86 Or.App. 721, 726, 740 P.2d 1220 (1987) (plaintiffs who “merely plead in a vague and conclusory manner that the named persons ‘have conspired with and among each other’ to achieve the allegedly fraudulent objectives” fail to plead a claim for civil conspiracy) and *Yanney v. Koehler*, 147 Or.App. 269, 935 P.2d 1235 (1997)(holding that plaintiffs failed to plead the “meeting of the minds” element because the allegations were vague and conclusory).

The plaintiffs have not responded to this argument.

I recommend that Claim 11 be dismissed with leave

to plaintiffs to replead the fraud elements of this claim with particularity and to identify the Lincoln defendants' role and conduct in the alleged conspiracy.

H. Punitive damages claim

The Lincoln defendants assert that plaintiffs' claim for punitive damages should be stricken on the basis of Oregon's statutory prohibition on pleading punitive damages in an initial pleading. [Or.Rev.Stat. § 31.725](#). Judges Aiken and Stewart of this court have held that [Or.Rev.Stat. 31.725](#) conflicts with the Federal Rules of Civil Procedure and therefore does not apply in diversity cases. See [Pruett v. Erickson Air-Crane Co., 183 F.R.D. 248, 252 \(D.Or.1998\)](#) and [Burkhart v. L.M. Becker & Co., 2004 WL 1920196 \(D.Or.2004\)](#). However, the Lincoln defendants argue that a Ninth Circuit case, [Kuntz v. Lamar Corp., 385 F.3d 1177, 2004 WL 2125950 \(9th Cir.2004\)](#), decided a month after [Burkhart](#), overrules these cases.

In [Kuntz](#), a diversity personal injury case brought in federal district court in Idaho, the district court denied plaintiffs leave to amend the complaint to add a claim for punitive damages. On appeal, the Ninth Circuit analyzed the relevant Idaho statute, which like the Oregon statute provides that a party may seek punitive damages only with leave of court and provides that the court must allow amendment to the pleadings to claim punitive damages if "the moving party [establishes] * * * a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages," and concluded that the district court had not abused its discretion in denying leave to amend because the plaintiffs had not made the requisite showing.

*37 The defendants also cite [United States ex rel. Newsham v. Lockheed Missiles, 190 F.3d 963, 973 \(9th Cir.1999\)](#)(special state procedures required by California's Anti-Strategic Lawsuits Against Public Participation did not conflict with the federal rules and would be applied in a federal diversity suit).

I have reviewed the [Kuntz](#) and [Newsham](#) cases and conclude that they do not directly overrule this court's decisions in [Burkhart](#) and [Pruett](#).I therefore recommend that this motion be denied.

I. Compensable damages

1. Tax deductions

The Lincoln defendants argue that a plaintiff cannot recover future tax write-offs or disallowed tax deductions as damages because these liabilities "resulted from the ineluctable requirements of the Internal Revenue Code, rather than from any wrongful conduct on the part of the defendants." [DCD Programs Ltd. v. Leighton, 90 F.3d 1442, 1449 \(9th Cir.1996\)](#). In [Leighton](#), a case brought under the federal securities laws, the court held that taxes paid to the IRS in settlement of liabilities from disallowance of tax deductions are not recoverable as tort damages. [90 F.3d at 1447-50](#). In that case, the defendants had marketed limited partnership interests as tax shelters. When the IRS disallowed the deductions, plaintiffs settled with the IRS and then sued the defendants for lost tax benefits. The court rejected the argument that the disallowed tax deductions were compensable "out of pocket" losses because "[i]f the partners had not purchased limited partnership interests in the first instance, they would still have had to pay the taxes in question, based on their overall income situation. [Id. at 1447, 1449-50](#).The Lincoln defendants also cite other out of jurisdiction cases.

The defendants argue that the plaintiffs seek in this case to recover for the loss of tax deductions they never would have taken had they known the truth about the COBRA transaction, and that they should not be entitled to do so.

The plaintiffs deny that they are seeking to recover any back taxes. Plaintiffs are bound by their representation of the limitation of this claim. I recommend, therefore, that this motion be denied as moot.

2. Interest

The defendants argue that plaintiffs have failed to plead an entitlement to recover the interest paid to the IRS because they are not entitled to the windfall of having "reaped the benefits of having the money for the requisite period" and then being reimbursed by the Lincoln defendants "for the interest charged by the IRS for having the money during that period."They rely on [Streber v. Hunter, 221 F.3d 701, 734 \(5th Cir.2000\)](#). The Fifth Circuit held in [Streber](#) that a plaintiff can recover only the "interest differential," that is, the difference between the interest

earned on the tax savings and the interest paid to the IRS for possessing the money unlawfully. *Id.* at 735. In *Streber*, the court held that to recover interest differential, the plaintiff must prove the amount of interest earned on the tax savings before being audited by, or accepting the amnesty offered by, the IRS.

*38 The plaintiffs respond that they should not be required to plead the "interest differential" because it is "not necessarily the law in this court." They point out that *Streber* is a Fifth Circuit case applying Texas law, and that other courts have differed on whether a plaintiff can recover interest paid to the IRS, regardless of whether he earned interest on or otherwise benefited from the money he was allowed to keep. They cite [Dail v. Dail, 212 Ill.App.3d 66, 156 Ill.Dec. 445, 570 N.E.2d 1167, 1169 \(Ill.App.1991\)](#) (applying Illinois law and holding that plaintiff can recover interest paid to IRS); [Ronson v. Talesnick CPA, 33 F.Supp.2d 347, 352-53 \(D.N.J.1999\)](#), *superseded on other grounds*, [Emilien v. Stull Tech. Corp., 2003 WL 21675343 \(3d Cir.2003\)](#) (applying New Jersey law and holding that plaintiff can recover interest paid to the IRS, minus any benefits the plaintiff received from having the back taxes in hand); [Ecker v. Cold Storage, Inc. v. Behl, 943 F.Supp. 1230, 1235 \(E.D.Cal.1996\)](#) (applying California law and holding that interest is not a proper element of damage).

I agree with the court's reasoning in *Streber*, and conclude that plaintiffs' recovery should be limited to the differential interest rate.

3. Penalties

The Lincoln defendants argue that the plaintiffs are not entitled to recover penalties paid to the IRS because they failed to take advantage of the 2002 amnesty program, and the plaintiffs have not alleged that their failure to take advantage of the program was in any manner attributable to advice given to them by the Lincoln defendants. They point out that the plaintiffs have admitted in the Amended Complaint that it was their failure to enter into the amnesty program which resulted in the penalties, because the penalties would have been waived had the plaintiffs participated in the amnesty program.

In response, plaintiffs cite to two cases, one a Cali-

fornia federal case and one an Illinois state case, allowing plaintiffs to recover penalties paid to the IRS. [Sarto v. United States, 563 F.Supp. 476, 478 \(N.D.Cal.1983\)](#) and [Dail v. Dail, 156 Ill.Dec. 445, 570 N.E.2d at 1169](#). However, the plaintiffs do not respond to the argument that, even if penalties are recoverable, they have failed to plead facts sufficient to show either that the Lincoln defendants prevented the plaintiffs from taking advantage of the amnesty program, or that despite the amnesty program, they were still required to pay penalties.

I recommend that this claim be dismissed with leave to plead facts showing either that the Lincoln defendants prevented the plaintiffs from taking advantage of the amnesty program, or that, despite the amnesty program, some action by the Lincoln defendants resulted in the Allen plaintiffs being required to pay penalties.

Conclusion

I recommend that the Deutsche defendants' motion to compel arbitration and stay (doc. # 37) be DENIED, that the BDO defendants' motion to compel arbitration and stay be GRANTED, with respect only to the claims between the Allen plaintiffs and BDO; that the BDO defendants' motion to strike and to seal the record (doc. # 63) be DENIED; and that the Lincoln defendants' motion to dismiss (doc. # 53) be GRANTED in part and DENIED in part, as follows: the motion to dismiss claims one, two and three as barred under the PSLRA be granted or, alternatively, that claim one be dismissed with leave to replead, claim two be dismissed with leave to replead, and claim three be dismissed with prejudice as barred by the PSLRA, or foreclosed by *Central Bank of Denver*, or, alternatively, that it be dismissed for failure to plead participation with leave to replead; that claims four, five, six, seven, eight, nine, ten and eleven be dismissed with leave to replead; that the motion to dismiss the claim for punitive damages be denied; that the motion to dismiss the claim for back taxes be denied as moot; that the motion to dismiss the claim for interest be denied; and that the motion to dismiss the claim for penalties be granted with leave to replead.

Scheduling Order

*39 The above Findings and Recommendation will

be referred to a United States District Judge for review. Objections, if any, are due March 23, 2005. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due April 6, 2005, and the review of the Findings and Recommendation will go under advisement on that date.

D.Or.,2005.
King v. Deutsche Bank Ag
Not Reported in F.Supp.2d, 2005 WL 611954 (D.Or.)

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