UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	:	02 Civ. 5776 (PKC)
-against-	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
ADELPHIA COMMUNICATIONS CORPORATION, et al., Defendants.	:	

P. KEVIN CASTEL, District Judge:

These are the court's findings of fact and conclusions of law issued after a bench trial of the claims asserted by the Securities and Exchange Commission ("S.E.C.") against defendant Michael C. Mulcahey, a former Vice President and Assistant Treasurer of Adelphia Communications Corporation ("Adelphia"). Adelphia is a public company located in Coudersport, Pennsylvania, and was once the sixth largest cable television enterprise in the country.

By way of background, the action was initially commenced by the S.E.C. against Adelphia, John J. Rigas, Timothy J. Rigas, James P. Rigas, Michael J. Rigas, James R. Brown and Mulcahey, who were officers and, in some cases, also directors of Adelphia. Adelphia, the four Rigas family members and Brown agreed with the S.E.C. on the entry of consent judgments, leaving Mulcahey as the only remaining defendant in the action before me. Mulcahey moved under Rules 12(b)(6) and 9(b), Fed. R. Civ. P., to dismiss the Second Amended Complaint for failure to state a claim and failure to allege fraud with the requisite particularity. On January 12, 2006, I denied the

motion and set the matter down for trial to commence on July 10, 2006. Trial commenced on the scheduled date. The parties presented the direct testimony of their witnesses in written form, subject to live cross-examination and redirect. Five witnesses testified at trial, including defendant Mulcahey.

Having heard the witnesses and considered the documentary evidence, I conclude that this is not a case that turns on a subtle assessment of scienter. Mulcahey used his considerable knowledge and experience to implement a massive fraud. Mulcahey signed “cross receipts” which made it appear that there had been a “wire transfer” or “bank transfer” of over $423 million when no wire transfer or bank transfer of funds had taken place. When the heat was on and questions were being asked, he caused the creation of a phony “borrowing notice” which he then signed making it appear that a request had been made to the Bank of Montreal to draw funds on a line of credit when no such borrowing or request for borrowing had ever occurred. He also signed a phony “paydown notice” making it appear that the proceeds of the borrowing from the Bank of Montreal had been used to paydown debt. Twenty-two times, he certified in writing that he had examined a specific calculation required by an indenture governing a public issue of debt and that Adelphia was in compliance with the leverage ratio permitted by the indenture. In truth and in fact, he examined no such calculation. Mulcahey also signed eight false management representation letters.

I fully accept that Mulcahey was not the architect of the fraud. He was, however, a critical participant who enabled the fraud. He was not duped. He is knowledgeable, experienced and reasonably savvy. Beyond the continued maintenance of employment at a comfortable but not exorbitant salary, there is no evidence that he financially benefited from the fraud.

For the reasons explained herein, I conclude that the S.E.C. has proven its case against Mulcahey. As relief, the S.E.C. seeks the equitable remedies of a permanent injunction and

disgorgement of ill-gained profits. I agree that this man should never serve as an officer or director of a public company. I also agree that the imposition of a permanent injunction against future securities law violations is necessary and appropriate. But I also conclude that disgorgement does not fit the facts. Instead, I will fashion a remedy which acknowledges that Mulcahey has not yet received a big payday for the fraud and ensures that he never does so in the future. Absent an injunction, the danger of his enrichment from the fraud would remain substantial because Mulcahey continues to be employed by a Rigas-controlled company. As more particularly described below, I will prohibit Mulcahey from the future receipt of anything of value from Rigas family members, except in defined circumstances. His employment by Rigas family members will come to an end.

It is important to note that an enforcement action brought by the S.E.C. is only one of the several vehicles to hold an officer or director of a public company to account. Indictment by a grand jury and prosecution by the Office of the United States Attorney is potentially available to punish wrongdoers. Indeed, there was a criminal prosecution of five individual defendants in this action. United States v. John J. Rigas, et al., 02 Cr. 1236 (LBS). Defendant Brown pled guilty to three counts of the indictment prior to trial. On July 8, 2004, a jury returned a verdict of guilty on multiple counts against John Rigas and Timothy Rigas, who, respectively, were sentenced to terms of 15 and 20 years imprisonment. The jury acquitted Michael Rigas on certain counts and was unable to reach verdict as to other counts against him. He subsequently pled guilty to one count of the indictment. Mulchaey was acquitted by the jury on all counts.

Adelphia has agreed to restitution in the amount of $715 million to be made available to security-holders who were victims of the fraud. In part, the restitution was funded through asset forfeitures made by members of the Rigas family.

FINDINGS OF FACT

1. John J. Rigas was the founder of Adelphia and together with his wife, daughter and three sons, Timothy, Michael and James, held a majority voting interest in Adelphia stock.

2. Mulcahey graduated from State University of New York at Buffalo in 1977. As of 1982, he worked as an internal auditor for Ellis National Bank, later acquired by Nations Bank. By reason of his wife's military assignments, he moved near Spokane, Washington, and began his pursuit of a Masters in Business Administration which was awarded in 1985 by Eastern Washington University. He later took additional accounting courses and was hired by Coopers & Lybrand in Syracuse, New York. He did some auditing work for Coopers & Lybrand, but not a great deal. After four years at Coopers & Lybrand, he passed the CPA exam.

3. Mulcahey was hired as Director of Investor Relations for Adelphia in 1991. By 1992 or 1993, he began involvement with the administration of the bank lending agreements. By 1993, he was helping to prepare the financial statements for the entities engaged in borrowing. By 1994, he undertook some responsibilities in Adelphia's treasury function, also known as the cash management system. In 1994 or 1995, he became Director of Accounting and Assistant Treasurer of Adelphia. The responsibilities of the position included generating the financial statements for S.E.C. filings, reviewing them with other members of management and conducting discussions with outside auditors and counsel. By 1996, Mulcahey's responsibilities shifted away from preparing the financial statements and he became more deeply involved in "bank compliance" meaning compliance with debt covenants and loan or credit agreements.

4. Timothy J. Rigas was Executive Vice President, Chief Financial Officer and Treasurer of Adelphia. Mulcahey reported directly to Tim Rigas. James R. Brown, Vice President of Finance, also reported directly to Tim Rigas.

5. The Rigas family also owned several private entities, many of which were in the cable television industry. Adelphia managed certain of these entities. When Mulcahey joined the company, there were approximately 800,000 subscribers between Adelphia and the Adelphia-managed Rigas companies. By the beginning of 2002, there were approximately 6 million subscribers.

6. Mulcahey worked for Tim Rigas for over ten years at Adelphia. When Mulcahey began at Adelphia his salary was $50,000 and when he left it was $140,000.

7. According to Mulcahey, the Rigas entities and Adelphia were treated as one for the purposes of his employment.

8. At trial, Mulcahey was asked whether he held any positions with the Rigas cable companies while he was employed by Adelphia. He testified that he did not really know, but believed he was allowed to sign on behalf of the Rigas companies on bank documents.

9. Mulcahey left the employ of Adelphia on July 25, 2002, the day after he was arrested on federal criminal charges. He worked for the Rigas family members as a consultant from May 1, 2003 to June 2004.

10. As of the date of trial, Mulcahey had become employed by Zito Media, a cable company controlled by members of the Rigas family. The co-presidents of Zito Media are Michael Rigas and James Rigas. Tim Rigas is also employed by Zito Media.

11. Mulcahey's salary at Zito Media is $135,000 per year.

12. Mulcahey asked the Rigases to cover his legal bills in the criminal trial and they did so through indemnification by Rigas-owned companies.

The 22 False Compliance Certificates

13. In 1992, Adelphia began offering debt to the public. Relevant to this action are eleven public note offerings of Adelphia: 9 1/2% Notes due 2004, Indenture dated February 22,

1994; 9 7/8% Notes due 2005, Indenture dated March 11, 1993; 10 1/4% Notes due 2000, Indenture dated July 28, 1993; 9 7/8% Notes due 2007, Indenture dated February 26, 1997; 9 1/4% Notes due 2002, Indenture dated September 25, 1997; 10 1/2% Notes due 2004, Indenture dated July 7, 1997; 8 3/8% Notes due 2008, First Supplemental Indenture, dated 11/12/98, to the Indenture dated January 21, 1998; 8 1/8% Notes due 2003, Indenture dated July 2, 1998; 7 1/2% Notes due 2004 and 7 3/4 % Notes due 2009, Indenture dated January 13, 1999; 7 7/8% Notes due 2009, First Supplemental Indenture dated April 28, 1999; and 9 3/8% Notes due 2009, Second Supplemental Indenture dated November 16, 1999 to Base Indenture dated April 28, 1999 (the "Notes").

14. Each Note was governed by a contractual undertaking between Adelphia and an indenture trustee (the "Indenture Trustee"), which undertaking is known as an indenture (the "Indentures"). The Indentures were identical with respect to their material covenants, including Adelphia's obligation to certify compliance with the covenants at specified times.

15. The Indentures limited the amount of debt that Adelphia may incur in relation to its EBITDA, <u>i.e.</u> earnings before interest taxes, depreciation and amortization. Specifically, the Indentures required Adelphia to maintain a numerical ratio of "Indebtedness" (a defined term) to "Annualized Pro Forma EBITDA" (also a defined term) of 8.75 to 1. Compliance with this ratio was to be measured as of the date of each incurrence of new debt by Adelphia, or by a Rigas entity if Adelphia would be jointly and severally liable for such debt.

16. A plain reading of the language of the Indentures confirms that an "incurrence" test is imposed. Article 4, Section 4.05, of the Indentures provided that "[t]he Company shall not, and shall not permit any Restricted Subsidiary to, directly or indirectly create, <u>incur</u>, issue, assume or become liable for, contingently or otherwise (collectively an '<u>incurrence</u>'), any indebtedness (other than the $350,000,000 of Notes originally issued under the Indenture) unless, after giving effect to such <u>in-</u>

currence on a pro forma basis, shall not be more than the products of the Annualized Pro Forma EBITDA for the latest quarter preceding such incurrence for which financial statements are available, multiplied by 8.75." (emphasis added).

17. Brown credibly testified that "[t]he incurrence test is in the indenture, which states that you're supposed to use the most recently available financial statements, use the 8.75 times, and that would allow you to calculate the most that you can borrow, and presuming that you know how much you can borrow, that would tell you how much you had left that you could borrow without defaulting."

18. Mulcahey participated in the negotiation of Adelphia's first Indenture. He read the provisions of the Indentures at various times. He understood that the ratio was to be determined on an incurrence basis.

19. The Indentures required that Adelphia issue a certificate to the Indenture Trustee 105 days after the end of each fiscal year, and again 50 days after the end of the second quarter of each fiscal year (the "Compliance Certificates").

20. The Indentures required the Compliance Certificate to include the following:

> "(1) a statement that the [signer of] such certificate or opinion has read such covenant or condition;
>
> (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;
>
> (3) a statement that, in the opinion of such [signer], it or he has made such examination or investigation as is necessary to enable it or him to express an informed opinion as to whether or not such covenant or condition has been complied with; and
>
> (4) a statement as to whether or not, in the opinion of such [signer], such covenant or condition has been complied with."

21. When the Board of Directors of Adelphia appointed Mulcahey an officer of the corporation and its Assistant Treasurer and Director of Accounting at its meeting on March 9, 2000, it gave him the authority to execute and deliver "compliance certificates, schedules and other documents, certificates or instruments related to the ongoing compliance with the indentures, bank credit facilities, term notes, and other credit and financing facilities of [Adelphia] and its Subsidiaries . . . ."

22. As Assistant Treasurer, Mulcahey executed 11 Compliance Certificates, as of April 14, 2000, for each of the Indentures (the "April Certificates"). He also executed 11 Compliance Certificates as of August 16, 2000 for the same Indentures (the "August Certificates").

23. Mulcahey transmitted the April Certificates and the August Certificates to the Indenture Trustee.

24. The April Certificates and the August Certificates were two paragraphs in length—fifteen lines of text—about a one-third of a page of typed single-spaced text.

25. Mulcahey believed it was important for a corporate officer to carefully read such a certificate. While his testimony was not at all time consistent on the point, I find that he understood the Indenture provisions and understood the Compliance Certificates.

26. In signing each of the April Certificates and the August Certificates, Mulcahey attested that:

(1) he had "read the relevant provisions of the Indenture relating to any Default or Event of Default (as such terms are defined in the Indenture)";

(2) he had "examined the financial condition and results of operations of Adelphia . . . for the [relevant] period . . ., and . . . examined calculations regarding the covenants outlined under Article 4 and
. . . held such discussions with executive officers, other officers and management of [Adelphia] necessary in [my] opinion to make the statement made herein";

(3) it was his opinion "that these examinations and discussions have enabled [me] to express an informed opinion as to whether or not such covenants and provi-

sions have been complied with"; and

(4) "[b]ased upon and subject to the foregoing, [I] do not know of any Default or Event of Default under the Indenture at the date of this Officers' Certificate."

27. Tim Rigas also signed the April Certificates and the August Certificates. Tim Rigas did not tell Mulcahey that he had reviewed calculations necessary to attest to Adelphia's compliance with the Indentures' debt covenants.

28. Prior to executing the April Certificates and the August Certificates, Mulcahey had not "examined the financial condition and results of operations of Adelphia . . . for the [relevant] period . . ., and . . . examined calculations regarding the covenants outlined under Article 4 . . . ." At trial, Mulcahey conceded that he had not examined the calculations regarding the covenants outlined in Article 4 at the time of signing the certificates; he may have done so "much after" the signing.

29. The April Certificates and the August Certificates were false because, prior to executing them, Mulcahey neither reviewed nor performed any calculations necessary to attest to Adelphia's compliance with the Indentures' debt covenants as of April 2000 or August 2000.

30. Mulcahey testified that when he certified that he had "examined calculations regarding the covenants outlined under Article 4" he did not intend to state that he had examined such calculations. The testimony is not credible nor is it credible that he thought that the certification meant nothing more than that "he didn't think there was a default under the indenture . . . ."

31. The April Certificates and August Certificates were materially false because, from at least July 3, 2000 through and including August 16, 2000, Adelphia's incurrence of new debt caused it to default on its Indenture debt ratio covenants. Adelphia was in default of its Indentures' debt ratio covenants continuously from July 3, 2000 through December 31, 2000.

32. The April Certificates and August Certificates were books and records of Adelphia.

33. The April Certificates and August Certificates were material false statements in connection with the purchase or sale of Adelphia securities, i.e. the Notes to which they related.

The False Cross Receipts

34. From time to time, Adelphia offered shares of its common stock to the public. The Rigas family often bought stock in tandem with these public offerings. The Rigas family's purchases avoided the dilution of their voting and ownership interest in Adelphia. They also bought notes of Adelphia. The purchases of stock and debt by the Rigas family was a signal to the market that the family maintained confidence in Adelphia.

35. In January 2001, Adelphia closed on public offerings of $750 million of 6% Convertible Subordinated Notes due 2006 and 17,000,000 shares of Class A Common Stock.

36. On January 17, 2001, the Rigas family, through an entity the family controlled known as "Highland 2000", agreed to purchase two classes of Adelphia securities through direct placements which were to close on or before October 22, 2001: $167,376,000 aggregate face amount of 6% Adelphia Convertible Subordinated Notes, and 5,819,367 shares of Adelphia stock, for a total purchase price of over $400 million (the "October 2001 Direct Placements").

37. The October 2001 Direct Placements were governed by two written agreements between Adelphia and Highland 2000, dated January 17, 2001 (the "January 17 Agreements"). Michael Rigas signed the January 17 Agreements on behalf of both Adelphia and Highland 2000. The January 17 Agreements provide that Highland 2000 was to "deliver to [Adelphia] the purchase price for the [stock and notes] in immediately available funds." The January 17 Agreements were publicly reported by Adelphia.

38. On January 18, 2001, Adelphia issued a press release announcing its public offerings of Adelphia stock, and stating that they would "generate gross proceeds totaling approximately $1.5 billion" (the "January 2001 Press Release").

39. In addition to announcing the Adelphia public offerings, the January 2001 Press Release announced the October 2001 Direct Placements, stating that the "closings on these Rigas family purchases will raise total proceeds of approximately $417 million and are to occur within 270 days after the closings of the . . . public offerings."

40. In prior direct placements of Adelphia securities, the Rigas family paid for the stock and notes by borrowing the funds under an Adelphia/Rigas Entity co-borrowing facility.

41. As Mulcahey described it, "[a]s the closing of the purchase of stock that was to occur on October 22, 2001, approached, I reviewed our borrowing ability and determined that there wasn't enough borrowing ability to do one borrowing for the full amount of the purchase." Mulcahey brought the lack of borrowing capacity to the attention of Tim Rigas and he "suggested we could close the transaction by assuming the debt under the coborrowing agreement and not actually have the borrowing and pay-down activity happen." Tim Rigas and Brown determined, with the concurrence of Mulcahey, that the Rigas family would pay for the October 2001 Direct Placements through an assumption of Adelphia debt by a Rigas entity on Adelphia's general ledger, i.e., a reclassification of the debt. The debt reclassification was to be accomplished through general ledger journal entries, which would report a transfer of "OCH Facility" debt from Adelphia to Highland Video in the amount of the October 2001 Direct Placements purchase price. However, under the terms of the "OCH Facility", Adelphia would remain jointly and severally liable for any such reclassified debt.

42. On October 22, 2001, Adelphia issued to Highland 2000 the notes and stock in furtherance of the October 2001 Direct Placements. The same day, Highland 2000 and Adelphia executed two cross receipts concerning the stock and notes sales (the "Cross Receipts").

43. The Cross Receipts were brief, easily understandable documents. They were two paragraphs in length –twelve lines of text—about one-third of a page of typed single-spaced text.

44. In the Cross Receipts, Highland 2000 acknowledged its receipt of the Adelphia stock and notes, and Adelphia acknowledged receipt from Highland 2000 of "wire transfer[s] and/or bank transfer[s] of immediately available funds" totaling $423 million.

45. Tim Rigas signed the Cross Receipts on behalf of Highland 2000, and Mulcahey signed them on behalf of Adelphia.

46. Mulcahey flat-out lied when he said in the simple two-sentence Cross-Receipts that Adelphia had received from Highland 2000 "wire transfer[s] and/or bank transfer[s] of immediately available funds" totaling $423 million. These were knowing and intentional falsehoods on his part regarding a material fact which he knew others would rely upon to their detriment.

47. Mulcahey signed the false Cross Receipts to create the appearance that the October 2001 Direct Placements were consistent with Adelphia's public statements regarding them.

48. On October 23, 2001, Adelphia issued a press release announcing that "it has closed on" the "previously announced" October 2001 Direct Placements (the "October 2001 Press Release"). The October 2001 Press Release was false and misleading because it referenced, without correction, the January 2001 Press Release, which falsely stated that the October 2001 Direct Placements would "raise total proceeds of approximately $417 million." In fact, Adelphia received no proceeds from the October 2001 Direct Placements, either at the purported closing of the transaction or thereafter.

49. The October 23 Press Release was further misleading because the "previously announced" October 2001 Direct Placements were governed by the January 17 Agreements, which required Highland 2000 to pay Adelphia in "immediately available funds," and neither Highland 2000 nor any other entity had made any such payment, and none of the parties to the October 2001 Direct Placements had any intention of doing so.

50. The false statements contained in the January 2001 and October 2001 Press Releases were material. They would have been important to a reasonable shareholder or debt holder in his, her or its decision to purchase or sell the securities of Adelphia.

51. The false Cross Receipts purported to support and, thus, enabled the false statements in the October 23 Press Release.

52. The Cross Receipts are part of the books and records of Adelphia. The false and misleading statements in the Cross Receipts were material because without them the true nature of the transactions would have been known to the auditors and, in turn, the public shareholders and debt holders. Such information would have been important to the decision of a public shareholder or debt holder to purchase or sell the securities.

53. Adelphia made the false statements contained in the January 2001 and October 2001 Press Releases in connection with the purchase or sale of Adelphia securities in the aftermarket, and in the offer and sale of new Adelphia securities. Mulcahey's false and misleading statements in the Cross Receipts which provided facial support for the statements in the Press Releases were made in connection with the purchase and sale of Adelphia securities and the offer and sale of Adelphia securities.

54. On November 9, 2001, Adelphia filed with the Commission its third quarter 2001 Form 10-Q (the "Third Quarter 2001 10-Q").

55. Tim Rigas signed the Third Quarter 2001 10-Q on behalf of Adelphia.

56. The Third Quarter 2001 10-Q states that Adelphia "closed" the October 2001 Direct Placements on October 22, 2001 and that "Adelphia used the proceeds of approximately [$423 million] to repay subsidiary bank debt, which may be reborrowed and used for general corporate purposes."

57. The Third Quarter 2001 10-Q statements regarding the October 2001 Direct Placements were false and misleading because (1) Adelphia received no "proceeds" as a result of the direct placements; (2) Adelphia had not paid down any debt, had created no new borrowing ability or liquidity, and had no ability to "reborrow" any funds; and (3) in any event, Adelphia could not "reborrow" $423 million under the OCH Facility because not enough credit existed under that facility at the time of the October 2001 Direct Placements closing to permit Adelphia to borrow $423 million.

58. The false statements contained in the Third Quarter 2001 10-Q concerning the October 2001 Direct Placements were material.

59. Adelphia made the false statements contained in the Third Quarter 2001 10-Q concerning the October 2001 Direct Placements in connection with the purchase or sale of Adelphia securities.

60. From all the surrounding facts and circumstances, including Mulcahey's former position as Director of Investor Relations for Adelphia and his then present position as Assistant Treasurer of Adelphia with responsibility for bank compliance, it is fair to infer that he kept himself informed of so much of the public statements and filings of Adelphia as related to bank borrowing. I conclude that Mulcahey knew the manner in which the October 2001 Direct Placements were disclosed in the January and October 2001 Press Releases and in the Third Quarter 2001 10-Q.

61. At the time Adelphia filed its Third Quarter 2001 10-Q, the only Adelphia books or records reflecting the October 2001 Direct Placements were the January 2001 Agreements, the January 2001 and October 2001 Press Releases, and the false Cross Receipts. At that time, Adelphia had not recorded the October 2001 Direct Placements on its general ledger.

62. At the time Adelphia issued the October 2001 Press Release and filed its Third Quarter 2001 10-Q, Mulcahey knew, from his position within the company and his access to documents and information, that the only Adelphia records concerning the October 2001 Direct Placements were the Cross Receipts, and that the Cross Receipts falsely documented the transaction.

63. Mulcahey also knew that Deloitte & Touche LLP ("Deloitte") reviewed Adelphia's public filings, including its Third Quarter 2001 10-Q, and that Deloitte relied upon Adelphia's books and records in reviewing Adelphia's public filings.

64. Mulcahey knew that the October 2001 Direct Placements has not been recorded on Adelphia's general ledger until late January 2002.

65. James Helms worked as treasury supervisor and treasury manager at Adelphia and was concerned with the daily operations of the cash and debt management systems. Helms reported directly to Mulcahey. On January 25, 2002, Helms, at Mulcahey's direction and with information supplied by Mulcahey, completed two Adelphia journal entry input forms to record the October 2001 Direct Placements onto the General Ledger (the "Journal Entry Forms").

66. The Journal Entry Forms recorded the October 2001 Direct Placements as follows: On October 22, 2001, Adelphia issued to Highland 2000 $259,862,335.36 of Class B Shares and $163,512,741.28 of 6% convertible notes, and Adelphia recorded two receivables from Highland 2000 (i.e., due from Highland 2000 to Adelphia) in those same amounts (totaling $423,375,076.64). Adelphia also reclassified $423,375,076.64 of outstanding OCH Facility debt by simultaneously re-

ducing OCH's recorded OCH Facility debt, and increasing Highland Video's recorded OCH Facility debt by $423,375,076.64, and recording a $423,375,076.64 OCH payable to Highland Video. The Journal Entry Forms report no cash transfers.

The Phony Borrowing and Paydown Notices

67. In early February 2002, Deloitte, Adelphia's auditors, began to request information regarding the source of funding for the October 2001 Direct Placements. Deloitte considered the requested information important.

68. Mulcahey at first told Deloitte's Ivan T. Hofmann that Adelphia had received cash for the direct placements, and that the source of that cash had been the OCH Facility and/or Rigas family margin loans. Mulcahey left Hofmann with the understanding that he would get back to Hofmann with a full explanation of how the October 2001 Direct Placements were funded.

69. In response to Hofmann's inquires, Mulcahey had Helms create fake borrowing and paydown notices, which purported to show Highland Video borrowing $423 million under the OCH Facility and Adelphia simultaneously paying down $423 million in debt under the same facility (the "Borrowing Notice" and "Paydown Notice"). In fact, no such borrowing or pay-down had occurred, and Adelphia never sent or intended to send the Borrowing Notice or Paydown Notice to any bank.

70. The two-page Borrowing Notice had the look and feel of a real document. It was addressed to a "Sophia Mahaffey" at the "Bank of Montreal" and was backdated to October 22, 2001. The fake Borrowing Notice contained a request to borrow $423,375,076.64. Mulcahey signed the Borrowing Notice on behalf of Highland Video Associates, L.P.—a Rigas family entity. The document was never sent to Ms. Mahaffey or the Bank of Montreal and it was never Mulcahey's intent that it be sent. Rather, it was Mulcahey's intent that the Deloitte audit team would think it had been sent. It was a crude tool used by Mulcahey to continue the perpetration of a fraud.

71. The Paydown Notice was a one-page document also addressed to "Sophia Mahaffey" and backdated to October 22, 2001. It was signed on behalf of Olympus Cable Holdings, LLC by Mulcahey. It was never sent and Mulcahey never intended it to be sent; like the Borrowing Notice, it was an attempt by Mulcahey to continue the deception of Deloitte.

72. Mulcahey signed the phony Borrowing Notice and Paydown Notice and instructed Helms to provide them to Hofmann. Helms provided a copy of the Borrowing Notice and Paydown Notice to Hofmann by leaving them marked for his attention in a Deloitte in-box at Adelphia through which Deloitte routinely received information from Adelphia employees. There was no warning to Deloitte that the Borrowing Notice and Paydown Notice were fake, made-up documents. Helms filed the original Borrowing Notice and Paydown Notice in Adelphia's files containing Adelphia's real borrowing and paydown notices for other transactions.

73. Upon receiving the Borrowing Notice and Paydown Notice, Hofmann understood them to be actual proof that the Rigas family had paid for the October 2001 Direct Placements by borrowing $423 million under the OCH Facility. Hofmann had another Deloitte staff member request from Adelphia wire transfer documents evidencing the receipt and re-transfer of the borrowed funds between Adelphia and the banks as reflected in the Borrowing Notice and Paydown Notice. Hofmann learned at that point that no such wire transfers existed, and that he should direct any additional questions to Mulcahey.

74. Hofmann subsequently spoke with Mulcahey again, and asked him to explain the Borrowing Notice and Paydown Notice in light of the fact that no funds had actually transferred. Mulcahey did not tell Hofmann the truth at that point -- i.e., that the notices were phony and that no such borrowing ability existed under the OCH Facility. Instead, he falsely explained to Hofmann that no such wire transfers existed because the borrowing and paydown of the $423 million occurred

simultaneously, and the bank did not actually need to transfer any money and had not done so. Mulcahey did not tell Hofmann that the Borrowing Notice and Paydown Notice had not been sent to the bank.

75. Mulcahey swears that he does “not believe that there can be any fair interpretation of these documents as an attempt to persuade anyone that there was an actual borrowing and pay down of debt.” “[A]nyone familiar with these type of documents would have understood immediately that they did not conform to the requirements for real notices of a borrowing or pay down.” Mulcahey asserts that the Borrowing Notice and Paydown Notice “were intended to illustrate” the underlying economics of the transaction. He does not adequately explain why he affixed his signature to mere illustrations. I do not believe Mulcahey’s testimony on this point. I find that the Borrowing Notice and Paydown Notice were part of a knowing deception on Mulcahey’s part.

76. Mulcahey’s false statements and omissions to Hofmann and Deloitte concerning the Borrowing Notice and Paydown Notice were material.

77. The Borrowing Notice and Paydown Notice are part of the books and records of Adelphia.

78. Mulcahey’s intentional delivery of the phony Borrowing Notice and Paydown Notice to Deloitte was part of an ongoing fraudulent scheme, participated in by Mulcahey and others to hide from both Deloitte and the public Adelphia’s false public reporting of the October 2001 Direct Placements in the January and October 2001 Press Releases and the Third Quarter 2001 10-Q.

79. On March 27, 2002, Adelphia publicly released its earnings for the fourth quarter and full 2001 year. In that release, Adelphia disclosed that Adelphia’s controlling shareholders, the Rigas family, had drawn down $2.3 billion under co-borrowing agreements which made each borrower, including Adelphia, liable for the full amount.

80. In late March or early April 2002, Hofmann began to question Mulcahey further regarding the Borrowing Notice and Paydown Notice. Mulcahey then informed Hofmann and Deloitte for the first time that the Borrowing Notice and Paydown Notice were not sent to the banks.

81. Upon learning of the phony Borrowing Notice and Paydown Notice and the contradictory Cross Receipts and Journal Entry Forms and other Mulcahey falsehoods, Deloitte concluded that it could not longer rely upon Mulcahey's representations.

82. Upon learning of the true nature of the October 2001 Direct Placements, Deloitte reviewed new draft Adelphia disclosure language for the October 2001 Direct Placements that differed significantly from the Third Quarter 2001 10-Q disclosure language. Unlike the Third Quarter 2001 10-Q disclosure, the new language (1) disclosed that the transactions were accomplished through the assumption of co-borrowed debt (rather than a drawdown and subsequent repayment of debt); (2) did not use the terms "proceeds" to describe the payment for the direct placements; and (3) did not claim any increased Adelphia borrowing ability.

83. On April 1, 2002, Adelphia filed a notice of late filing of its Form 10-K, citing a continuing review of accounting matters related to the credit facilities under which the Rigas family had borrowed the debt it disclosed. Later in April, Adelphia announced that Adelphia's Board of Directors appointed a Special Committee of Independent Directors to review dealings, relationships, transactions and other arrangements between Adelphia and the Rigas family and Rigas-owned Adelphia affiliates.

84. On May 14, Deloitte suspended its audit work on the 2001 Adelphia financial statements. Among the considerations that entered into that decision were Mulcahey's misrepresentations to the Deloitte audit team.

Management Representation Letters

85. In connection with its interim reviews of Adelphia's financial information and its year-end audits of Adelphia's financial statements, Deloitte sought written representations from members of the management team. Deloitte relies on the accuracy of those representations in forming an opinion concerning Adelphia's financial statements.

86. These management representation letters are addressed to Deloitte and are on Adelphia letterhead. Between November 1998 and November 2001, Mulcahey signed eight management representation letters which he understood were to be delivered to Deloitte; they are dated November 16, 1998, February 15, 1999, May 14, 1999, May 17, 1999, August 16, 1999, March 29, 2001, August 14, 2001 and November 9, 2001 (collectively, the "Management Representation Letters").

87. The signatories on the Management Representation Letters varied but always included Tim Rigas, Brown and Mulcahey who signed as "Director of Accounting and Assistant Treasurer".

88. In each Management Representation Letter, the signatories confirmed "to the best of our knowledge and belief" that (1) each was responsible for the fair presentation of Adelphia's financial statements (in the case of year-end audits) or financial information (in the case of interim reviews) in conformity with generally accepted accounting principles ("GAAP"); and (2) Adelphia's financial statements or financial information were presented in conformity with GAAP and consistent with the contemporaneous or most recent audited financial statements.

89. Mulcahey made the representations contained in the Management Representation Letters without having reviewed Adelphia's financial statements. As he put it in his sworn declaration, "[i]t is true I did not review the financial statements."

90. Mulcahey asserts that he subjectively believed that the financial information or state-

ments were fairly presented in conformity with GAAP and, therefore, so much of the Management Representation Letters as asserted that that the financial information or statements were fairly presented is true. He bases this on the fact that he knew the people involved in the preparation of the financial statements and had every reason to believe they had done their job properly.

91. The import of Mulcahey's actual representations was quite different than he now portrays them. With regard to the financial statements, he was not asked for, nor did he provide, a negative representation, e.g. one asserting that he is not aware of any variance from GAAP in the preparation of the financial statements. Rather the Management Representation Letters required – and Mulcahey provided – an affirmative representation that "we are responsible for the fair presentation of the financial information in conformity with [GAAP] . . . ." and "[t]he financial information . . . is fairly presented in conformity with [GAAP] . . . ."

92. Mulcahey's false statements in the Management Representation Letters were material. If Deloitte had known that the person who had signed the Management Representation Letters as "Director of Accounting and Assistant Treasurer" could say no more than, not having read the financial statements, he had no reason to believe they were false, it would have sent up red flags and caused further inquiry by Deloitte.

93. Adelphia provided the March 29, 2001 Management Representation Letter to Deloitte "in connection with [its] audits of the consolidated balance sheets of Adelphia as of December 31, 1999 and 2000." Adelphia's annual Form 10-K for 2000 contains Deloitte's unqualified audit opinion, based partly upon the March 29, 2001 Management Representation Letter. The financial statements and the unqualified audit opinion in the 10-K were relied upon by the investing public in purchasing and selling the public securities of Adelphia.

94. Adelphia's investors have suffered enormous losses due to the fraudulent conduct at

Adelphia.

95. Mulcahey's false and fraudulent acts occurred repeatedly for several years. Beginning in 1998 through 2001, Mulcahey falsely signed eight management representation letters. In April 2000 and again in August 2000, Mulcahey falsely signed a total of twenty-two Debt Compliance Certificates. From October 2001 through February 2002, Mulcahey signed the two false Cross Receipts and caused to be fabricated the phony Borrowing Notice and Paydown Notice.

96. Mulcahey acted with a high degree of scienter. Mulcahey knew the content of the false and phony documents that he prepared and signed, and the fact that they were false and phony.

97. The high degree of scienter, the repetition of wrongdoing and the failure to acknowledge wrongdoing all lead me to the conclusion that there is a likelihood that he would violate the federal securities laws in the future unless enjoined.

98. The varied and repetitive nature of Mulcahey's fraudulent and otherwise violative conduct establishes that he is unfit to serve as an officer or director of a public company now and in the future.

99. Mulcahey's salary—at its maximum $140,000—with a bonus in the range of $5,000 to $10,000 was not so large as to amount to a badge of fraud. It was not disproportionate with the lawful duties assigned to him. The S.E.C. has not demonstrated any compensation pattern that would lead this Court to conclude that Mulcahey received an identifiable financial benefit from the frauds, beyond the continuation of employment.

100. The fact that Mulcahey continues to work for a company owned and controlled by members of the Rigas family creates the danger that Mulcahey, ever the loyal soldier, will be rewarded handsomely in the future for his past frauds that benefited members of the Rigas family.

CONCLUSIONS OF LAW

101. At the trial of this action, the S.E.C. offered the May 18, 2006 declaration of Tim Rigas in which he asserts his Fifth Amendment privilege against self-incrimination in response to questions presented to him in the declaration. The S.E.C. does not assert that Tim Rigas improperly invoked his constitutional protection. The S.E.C. asks this court to infer from the declarant's silence that his answers would be supportive of its case. For example, in his declaration Tim Rigas says that, if he were asked the following question, he would assert his Fifth Amendment privilege:

> Were the Cross Receipts part of a scheme involving you and Mulcahey to create the false appearance for the public and Adelphia's outside auditors, Deloitte & Touche LLP ("Deloitte"), that the October 2001 Direct Placement involved the receipt of cash proceeds by Adelphia when, in fact, Adelphia received no cash proceeds as a result of the October 21, Direct Placement?

As the quote demonstrates, the S.E.C. seeks to import into the wording of the question a version of the facts favorable to its case and then from the constitutionally-protected invocation of the privilege, infer that the answer would support its case. True, a party's invocation of the privilege in a civil proceeding may give rise to an inference against him. See, e.g., S.E.C. v. Brennan, 230 F.3d 65, 76 (2d Cir. 2000). Further, the Second Circuit has allowed a non-party's invocation of the constitutional privilege to be used against a former employer, accepting the rationale that "ex-employees' refusals to testify could appropriately be conceptualized 'as vicarious admissions of their former employer'." LiButti v. United States, 107 F.3d 110, 121 (2d Cir. 1997) (citing Brink's Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983)). Here, the S.E.C. urges this Court to draw an adverse inference against a subordinate, from the invocation of the constitutional privilege by a former supervising co-employee. In Libutti, the court outlined four factors that bear upon the appropriateness of the evidentiary use against a party of an invocation of the Fifth Amendment by a non-party. 107 F.3d at 123-24. The Libutti factors appear designed to minimize the danger of unfair prejudice

that results in civil cases from the admission into evidence of an invocation of the Fifth Amendment privilege as the functional equivalent of an affirmative answer to a question crafted by an adverse party's attorney. Examining the four factors, I conclude that drawing an adverse inference on these facts would be unwarranted. First, "the nature of the relationship will invariably be the most significant circumstance" in a consideration of whether the invocation is admissible. Id. at 123. Here, Mulcahey is a former subordinate of Tim Rigas. A statement by Tim Rigas would not qualify as an admission on the part of Mulcahey. There is nothing in the nature of the bond between Tim Rigas and Mulcahey which would prevent Tim Rigas from placing his own interests ahead of those of Mulcahey. Second, I have considered the degree of control of the party over the non-party witness. Id. Mulcahey has no present control over Tim Rigas nor did he ever exercise such control over him. Third, I have considered "the [c]ompatibility of the [i]nterests of the [p]arty and [n]on-[p]arty [w]itness in the [o]utcome of the [l]itigation . . . ." Id. At this stage, Tim Rigas may well wish to see Mulcahey, who continues to work for a company with which he is affiliated, prevail. Tim Rigas may also perceive some benefit in any private lawsuits from a Mulchaey victory. I assume, therefore, that they are allied in interests. I have also considered the "[r]ole of the [n]on-[p]arty [w]itness in the [l]itigation . . . ." Id. Tim Rigas has entered into a Final Judgment with the S.E.C.; he was once a party to the litigation but he is no longer. On balance (and with the exception of compatibility of interests), there is little that weighs in favor of permitting an inference to be drawn against Mulcahey from the invocation of the Fifth Amendment privilege by Tim Rigas. The declaration of Tim Rigas is inadmissible and is stricken.

102. The S.E.C.'s Second Amended Complaint ("SAC") charges four sets of securities law violations against Mulcahey: (1) primary liability for securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder, and Section

17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 78j(b) & 77q(a); 17 C.F.R. § 240.10b-5; (2) the creation of false books and records, in violation of Exchange Act 13(b)(5) and Rule 13b2-1 thereunder, 15 U.S.C. § 78m(b)(5) and 17 CFR § 240.13b2-1; (3) making false statements to auditors, in violation of Exchange Act Rule 13b2-2, 17 C.F.R. § 240.13b2-2; and (4) aiding and abetting violations of Exchange Act Sections 10(b), 13(b)(2)(A), and 13(b)(2)(B) and Rule 10b-5 thereunder, in violation of Exchange Act Section 20(e), 15 U.S.C. § 78t(e).

103. The SAC's Second Claim for Relief charges Mulcahey with violations of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, for making false and fraudulent statements in a March 29, 2001 Management Representation Letter that Adelphia sent to Deloitte and in the twenty-two April and August Certificates (for the year ended December 31, 1999 and the six months ended June 30, 2000), which Mulcahey signed and furnished to Adelphia's public debt Indenture Trustee.

104. To prove its claims under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5, the S.E.C. must prove by a preponderance of the evidence that Mulcahey, "by the use of any means or instrumentality of interstate commerce," knowingly or recklessly made a material false statement or omission in connection with the purchase or sale of a security, or in the "purchase or sale" of a security. See 15 U.S.C. §§ 78j(b) & 77q(a); 17 C.F.R. § 240.10b-5; S.E.C. v. First Jersey Securities, Inc., 101 F.3d 1450, 1467 (2d Cir. 1996), cert. denied 522 U.S. 812 (1997).

105. Because Mulcahey signed the Compliance Certificates and the Management Representation letter at issue and caused them to be delivered to their intended recipients, he made the false statements contained therein for the purposes of the S.E.C.'s securities fraud claims.

106. A false statement or omission is "material" for securities fraud purposes where a substantial likelihood exists that a reasonable investor would consider it important in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); S.E.C. v. Mayhew, 121 F.3d 44, 51 (2d Cir. 1997).

107. To be "material," disclosure of the omitted fact must "have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

108. Mulcahey's false statements contained in the April and August Certificates concerned Adelphia's financial condition (i.e., its leverage ratio) and were material to both a reasonable investor and to the Indenture Trustee.

109. Mulcahey's false statements to Deloitte in the Management Representation letters were material to both Deloitte and to a reasonable investor because it is important to know that Adelphia's Assistant Treasurer had claimed to have been responsible for the fair presentation of financial information without having actually read or reviewed the financial information.

110. Scienter is "a mental state embracing [an] intent to deceive, manipulate, or defraud." Aaron v. S.E.C., 446 U.S. 680, 686 n.5 (1980). The S.E.C. may establish Mulcahey's scienter "by facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Stevelman v. Alias Research, Inc., 174 F.3d 79, 84 (2d Cir. 1999); see also S.E.C. v. U.S. Environmental, Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999); S.E.C. v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998), cert. denied, 525 U.S. 931 (1998).

111. The S.E.C. may establish Mulcahey's scienter by showing his "knowledge of facts or access to information contradicting" his "public statements" or that he "knew facts or had access to information suggesting that" his "statements were not accurate." Novak v. Kasaks, 216 F.3d 300,

308, 311 (2d Cir. 2000), cert. denied, 531 U.S. 1012 (2000). Furthermore, the S.E.C. may establish Mulcahey's recklessness by showing that he made material false statements without investigation or without knowledge of the truth, and "with utter disregard for whether there was a basis for" the statement or omission. Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47-48 (2d Cir. 1978).

112. With knowledge of falsity and an intent to deceive, Mulcahey made the statements contained in the April and August Certificates and in the Management Representation Letters.

113. A statement or omission is "in connection with" the purchase or sale of a security for the purpose of Section 10(b) of the Exchange Act if it "somehow touches upon" or has "some nexus" with "any securities transaction." S.E.C. v. Rana Research, Inc., 8 F.3d 1358, 1362 (9th Cir. 1993); see In re Ames Dept. Stores Inc. Stock Litig., 991 F.2d 953, 963-68 (2d Cir. 1993).

114. By falsely stating in the April and August Compliance Certificates that he had reviewed ratio calculations, Mulcahey, with knowledge of falsity and an intent to deceive, made material false statements in connection with the purchase or sale of Adelphia securities, in violation of Section 10(b) of the Exchange Act and Rule 10b-5. As a result of the false Compliance Certificates, the market was deprived of material information regarding Adelphia's financial condition. Mulcahey made the false statements "in connection with" the purchase and sale of Adelphia's securities.

115. Mulcahey's false statements to the auditors in the Management Representation Letters were made by Mulcahey with knowledge of their falsity. Deloitte relied upon the March 29, 2001 Management Representation Letter as part of its audit of Adelphia's 2000 consolidated financial statement and the unqualified audit opinion it provided for Adelphia's 2000 Form 10-K. Without the audited financials, Adelphia would have been unable to file its Form 10-K. Mulcahey knew that his representations would be relied upon in Deloitte's public report on Adelphia's annual report

of its financial condition. Mulcahey's false statements in the March 29 Management Representation Letter thus meets the "in connection with" requirement.

116. The Complaint's Fifth Claim for Relief charges Mulcahey with violations of Section 13(b)(5) and Rule 13b2-1 thereunder, by creating, or causing to be created (1) the false April Certificates and August Certificates; (2) the false Cross Receipts; and (3) the phony Borrowing Notice and Paydown Notice.

117. Exchange Act Section 13(b)(5) provides in pertinent part that no "person shall knowingly . . . falsify any book, record, or account [of any issuer who is required to file reports pursuant to section 15(d)]." 15 U.S.C. § 78m(b)(5).

118. Rule 13b2-1, titled "Falsification of Accounting Records," provides that no "person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2-1.

119. Scienter is not an element of a cause of action under either Section 13(b) or Rule 13b2-1. McNulty, 137 F.3d at 740-41; see also S.E.C. v. Softpoint, Inc., 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998) (holding that 13b2-1 requires no showing of scienter).

120. To establish its Section 13(b)(5) and Rule 13b2-1 claims against Mulcahey, the S.E.C. need only establish by a preponderance of the evidence that Mulcahey created, or caused to be created, as part of Adelphia's books and records, the false Compliance Certificates, Cross Receipts or Borrowing Notice and Paydown Notices.

121. Mulcahey violated Exchange Act Section 13(b)(5) and Rule 13b2-1 thereunder, by creating the false April Certificates and August Certificates, the false Cross Receipts and the phony Borrowing Notice and Paydown Notice.

122. The Complaint's Sixth Claim for Relief charges Mulcahey with violating Exchange Act Rule 13b2-2 by making, or causing to be made, materially false and misleading statements or omissions to Deloitte in the eight Management Representation Letters, the Cross Receipts and the Borrowing Notice and Paydown Notice.

123. Rule 13b2-2 requires no showing of scienter. McNulty, 137 F.3d at 741.

124. To prove its Rule 13b2-2 claim, the plaintiff need only prove by a preponderance of the evidence that Mulcahey provided, or caused to be provided, the false Cross Receipts, Borrowing Notice and Paydown Notice, or Management Representation Letters to Deloitte.

125. Mulcahey violated Exchange Act Rule 13b2-2 by creating the phony Borrowing Notice and Paydown Notice and providing them to Deloitte.

126. Mulcahey's actions in causing the delivery of the phony Borrowing Notice and Paydown Notice to Deloitte constituted materially false statements to Deloitte.

127. Mulcahey further violated Exchange Act Rule 13b2-2 by falsely signing the Management Representation Letters.

128. Mulcahey's signature on the Management Representation Letters constituted material, false statements to Deloitte that Mulcahey had reviewed Adelphia's consolidated financial statements, when he had not.

129. In the alternative, Mulcahey's false signatures on the Management Representation Letters constituted material omissions of the fact that Mulcahey had not reviewed Adelphia's consolidated financial statements prior to signing the Management Representation Letters.

130. The Commission's Eighth Claim for Relief charges that Mulcahey aided and abetted certain of Adelphia's violations of Sections 10(b), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act

and Rule 10b-5 thereunder, by creating the false Cross Receipts and the phony Borrowing Notice and Paydown Notice.

131. To allege aiding and abetting liability under the federal securities laws, the S.E.C. must allege (1) a securities law violation by the primary wrongdoer; (2) the aider and abettor's knowledge of the violation; and (3) that the aider and abettor substantially assisted in the violation. Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983); see also S.E.C. v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp.2d 454, 467-68 (S.D.N.Y. 2004).

132. Adelphia violated Exchange Act Section 10(b) by (1) falsely and misleadingly reporting in the Third Quarter 2001 Form 10-Q, the January 18 and October 23 Press Releases, and the January 17 Agreements, that Adelphia had received or would receive over $400 million in "proceeds" (or "immediately available funds") from the October 2001 Direct Placements; and (2) by falsely and misleadingly reporting in the Third Quarter 2001 10-Q that Adelphia had used those "proceeds" to pay down its debt and, thus, increase its borrowing ability (when in fact, Adelphia received no cash from those direct placements and merely shifted debt on its books to create the appearance of reduced debt, with no increased borrowing ability), and that Adelphia had sufficient borrowing ability (implicitly, under the OCH Facility) to borrow $423 million.

133. Mulcahey knowingly and substantially assisted Adelphia's fraud by creating the false Cross Receipts and the phony Borrowing Notice and Paydown Notice given to Deloitte to support their accounting of that transaction consistently with Adelphia's public disclosures concerning the October 2001 Direct Placements, and to hide from both Deloitte and the public the false and misleading nature of those public disclosures.

134. Alternatively, Mulcahey aided and abetted Adelphia's violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B).

135. Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B) required Adelphia to keep books and records that "accurately and fairly reflect the transactions and dispositions of assets of" Adelphia and "to devise a system of internal accounting controls sufficient to provide reasonable assurances that," inter alia, "transactions are recorded as necessary . . . to maintain accountability for assets." 15 U.S.C. §§ 78m(b)(2)(A) & (B)(ii).

136. Adelphia violated Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B) by keeping records (i.e., the false Cross Receipts and the phony Borrowing Notice and Paydown Notice) that did not accurately and fairly reflect the October 2001 Direct Placements.

137. Mulcahey aided and abetted Adelphia's Exchange Act violations of Sections 13(b)(2)(A) and 13(b)(2)(B) by creating the false Cross Receipts and the phony Borrowing Notice and Paydown Notice.

REMEDY

138. Section 20(e) of the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2), permit the Court to bar from serving as an officer or director of a public company any person who has violated Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and whose conduct demonstrates "unfitness" to serve as an officer or director.

139. Among the factors that the Court may consider when determining whether to impose an officer and director bar and the duration of such a bar are the following: (1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defen-

dant's economic stake in the violation; and (6) the likelihood that misconduct will recur. S.E.C. v. Patel, 61 F.3d 137, 141 (2d. Cir. 1995).

140. The Court need not find each factor to have been satisfied. Id. Furthermore, the existence of past securities law violations is "not essential for a lifetime ban." Id. at 142. However, where there have been no past violations of the securities laws by the individual, "it is essential . . . that a district court articulate the factual basis for a finding of the likelihood of reoccurrence." Id.

141. Here, Mulcahey's unlawful conduct reoccurred multiple times over a period of years. He acted with a high degree of scienter, egregiously violating numerous securities laws.

142. Because Mulcahey's securities law violations were repeated, varied and knowingly perpetrated, and because a strong likelihood exists that his violations will recur if not enjoined, the Court imposes a permanent officer and director bar against Mulcahey.

143. Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), authorize the S.E.C. to seek permanent injunctions against future securities laws violations upon a showing that (1) violations of the securities laws have occurred; and (2) a reasonable likelihood exists that violations will occur in the future. See S.E.C. v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99-100 (2d Cir. 1978).

144. To determine whether a reasonable likelihood exists that a defendant will commit future violations, the Court may consider: (i) the fact that the defendant has been found liable for illegal conduct, and the egregiousness of the violations; (ii) whether they are isolated or recurrent; (iii) the degree of scienter involved; (iv) the sincerity of any defendant assurances against future violations; and (v) defendant's recognition of the wrongful nature of his conduct. S.E.C. v. Cavanaugh, 155 F.3d 129, 135 (2d Cir. 1998); S.E.C. v. Universal Major Indus. Corp., 546 F.2d 1044, 1048 (2d

Cir. 1976), cert. denied, 434 U.S. 834 (1977); see also S.E.C. v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972).

145. Mulcahey's conduct was unlawful and egregious, his unlawful actions were not isolated but recurred and he acted with a high degree of scienter. While he acknowledges having made certain mistakes, he has not accepted responsibility for his actions. Based upon the foregoing, I conclude that the imposition of a permanent injunction against future securities law violations is necessary and appropriate.

146. "Disgorgement of illicit profits is a proper equitable remedy for securities fraud." Softpoint, 958 F. Supp. at 867. "[T]he proper measure of disgorgement is the amount of the wrongdoer's unjust enrichment." Id.

147. The S.E.C. is not required to establish with certainty the amount to be disgorged; rather its burden is to come forward with a "reasonable approximation of profits causally connected to the violation." First Jersey Sec., Inc., 890 F. Supp. at 1211, rev'd on other grounds, 101 F.3d 1450 (2d Cir. 1996); S.E.C. v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989). As long as the measure of disgorgement is reasonable, courts have held that the wrongdoer should bear the risk of any uncertainty in calculating disgorgement. S.E.C. v. Warde, 151 F.3d 42, 50 (2d Cir. 1998); Patel, 61 F.3d at 140; First City, 890 F.2d at 1232. Once the S.E.C. has done so, the burden shifts to the defendant to come forward with evidence that the requested disgorgement is not a "reasonable approximation" of unjust enrichment. First City, 890 F.2d at 1232.

148. The "court has broad discretion to tailor the [disgorgement] sanction to the wrongful conduct involved." S.E.C. v. Posner, 16 F.3d 520, 522 (2d Cir. 1994), cert. denied, 513 U.S. 1077 (1995).

149. Here, the S.E.C. has failed to demonstrate the receipt of profits or other benefits causally connected to the violation. There is no evidence that Mulchahey ever received a salary in excess of $140,000 or a bonus exceeding $10,000 during his employment by Adelphia. Given his experience, his license as a certified public accountant and his high-level responsibilities within a public company, the compensation package was not so large as to be suggestive of a reward for unlawful activities. It was not so high as to be a badge of fraud. I will not impose the remedy of disgorgement upon Mulcahey.

150. The fact of Mulcahey's continued deep involvement with members of the Rigas family creates the danger that he will profit in the future from his wrongful acts. John Rigas, Timothy Rigas, James Rigas and Michael Rigas have each entered into consent judgments with injunctive relief in the action before me. Because of their forfeiture of property in the criminal action, no disgorgement remedy was imposed upon them. They have profited directly from the same fraud which I have found to have been proven against Mulcahey.

151. Michael Rigas, a defendant in this action, is co-president (with James Rigas) of Mulcahey's present employer, Zito Media. Tim Rigas is also employed by Zito Media. It is lawful for Mulcahey to associate with John, Michael, James and Tim Rigas, despite their consent judgments in this action. However, Mulcahey's decision to continue to work with Michael, James and Tim Rigas provides a potential vehicle for profits from the fraudulent and unlawful conduct to be funneled to Mulcahey disguised as compensation. During the pendency of this litigation that does not appear to have happened and, indeed, Mulcahey's annual rate of compensation is $135,000, a sum, given his background and experience, which is not indicative of the wages of fraud. However, with the instant ruling, Mulcahey would no longer face the specter of a trial of an S.E.C. enforcement action and any

inhibition upon receipt of the fruits of the fraud would be removed, an injunction against receipt of proceeds, therefore, becomes, necessary.

152. This court has discretion to tailor the sanction so that it is appropriate to the wrongdoing. See Posner, 16 F.3d at 522. I construe those equitable powers as extending to an injunction against a defendant receiving the profits of the unlawful and fraudulent scheme in the future.

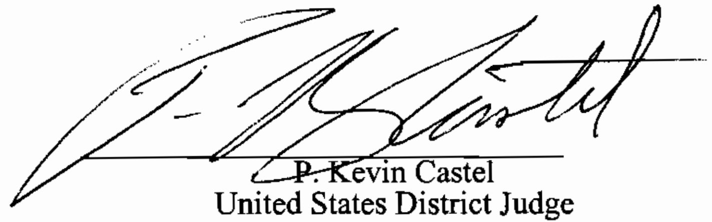
153. An injunction that bars Mulcahey from the receipt of the profits from other wrongdoers (other than indemnification for legal fees) would be impractical to enforce as long as Mulcahey continues to be employed by a company controlled by active wrongdoers who profited from the fraud. It would be exceedingly difficult for a court to determine how much of a compensation package paid by the Rigas' interests is a disguised form of profit from the unlawful activity.

154. Mulcahey and all persons acting in concert or participation with him who have actual notice of this Order are hereby enjoined from receiving anything of value, directly or indirectly, from John J. Rigas, Timothy J. Rigas, James P. Rigas and Michael J. Rigas (the "Rigas Family Members"), the spouses of the Rigas Family Members or any person who is within the third degree of relationship of any of the Rigas Family Members or their spouses (collectively, "Prohibited Persons"), or any entity in which any of the Prohibited Persons is an officer, director, employee, partner, trustee or owns or controls in excess of 5% of the voting, non-voting or other form of ownership of the entity, provided that (a) Mulcahey may continue to be employed at Zito Media at his salary as of July 13, 2006 for 180 days from the entry of this Order, and (b) nothing herein shall effect any right of indemnification that Mulcahey may have from a person or entity otherwise covered by this injunction.

155. The S.E.C. may from time-to-time seek further orders from this court to monitor compliance with the injunctive relief granted herein.

156. The S.E.C. shall submit a Final Judgment setting forth the relief granted herein.

SO ORDERED.



P. Kevin Castel
United States District Judge

Dated: New York, New York
November 16, 2006