

Not Reported in F.Supp.2d, 2004 WL 1941248 (E.D.Pa.)
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United States District Court,
E.D. Pennsylvania.
L-3 COMMUNICATIONS CORPORATION,
Plaintiff

v.

Wayne CLEVENGER; Larry Colangelo; John
Fleury; Edward Gorman; Midmark Capital L.P.;
Midmark Associates, Inc.; Milan Resanovich;
Joseph Robinson; and Paul Tischler, Defendants

No. 03-CV-3932.

Aug. 31, 2004.

Carl M. Buchholz, Matthew J. Siembieda, Timothy
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MEMORANDUM AND ORDER

BRODY, J.

I. INTRODUCTION

*1 On July 1, 2003, plaintiff L-3 Communications Corporation (“L-3”) filed this action against defendants Wayne Clevenger (“Clevenger”), Larry Colangelo (“Colangelo”), John Fleury (“Fleury”), Edward Gorman (“Gorman”), Midmark Capital L.P. (“Midmark”), Midmark Associates, Inc.

(“Midmark Associates”), Milan Resanovich (“Resanovich”), Joseph Robinson (“Robinson”), and Paul Tischler (“Tischler”). Plaintiff filed an amended complaint on October 7, 2003. The amended complaint includes seven claims: (1) securities fraud under § 10(b) of the 1934 Securities and Exchange Act (“SEA”); (2) a derivative securities violation under § 20(A) of the 1934 SEA; (3) common law fraud; (4) civil conspiracy; (5) negligent misrepresentation; (6) negligence/gross negligence; and (7) breach of fiduciary duty.

All defendants have moved to dismiss the complaint in its entirety.^{FN1} On July 15, 2004, the parties presented oral argument. The court has subject matter jurisdiction over the case. The motions will be granted.

FN1. Defendants have actually filed three separate motions to dismiss. The motion to dismiss of defendants Clevenger, Colangelo, Robinson, Midmark and Midmark Associates is Docket # 16. The motion to dismiss of defendants Fleury, Gorman and Tischler is Docket # 22. The motion to dismiss of defendant Resanovich is Docket # 23. Because all defendants have incorporated by reference the memoranda of law submitted by their co-defendants, I will address all three motions together.

II. BACKGROUND

A. *The Parties*

Plaintiff L-3 is a leading merchant supplier of secure communications technology and other products. L-3’s customers include the United States Department of Defense and United States Department of Homeland Security. (Pl. Resp. Mot. Dismiss 1.) In April 1998, SPD Technologies, Inc. (“SPD Technologies”) was the parent of four separ-

ate wholly-owned subsidiaries: (1) SPD Electrical Systems, Inc. (“SPD Electrical”); (2) Henschel, Inc. (“Henschel”); (3) PacOrd, Inc. (“PacOrd”); and (4) Power Paragon, Inc. (“Power Paragon”). (Am.Compl.¶ 17.) SPD Electrical, the only subsidiary discussed in the complaint, manufactures circuit breakers and switchgear for the United States Navy’s nuclear powered ships and submarines (the “Nuclear Powered Fleet”). (Am.Compl.¶ 19.)

At all relevant times, defendants Clevenger, Colangelo, Resanovich, and Robinson served on the Board of Directors of SPD Technologies. (Am.Compl.¶¶ 2, 3, 8, 9.) Defendant Colangelo also served as President, Director and Chief Executive Officer (“CEO”) of SPD Electrical and as President and CEO of SPD Technologies. (Am.Compl.¶ 3.) Defendant Fleury served as Chief Financial Officer (“CFO”), Vice President, and Secretary of SPD Electrical, as well as serving as Vice President, CFO, Treasurer and Secretary of SPD Technologies. (Am.Compl.¶ 4.) Defendant Gorman was an Officer and Vice President of Operations of SPD Electrical. (Am.Compl.¶ 5.) Defendant Tischler was the Director of Manufacturing for SPD Electrical. (Am.Compl.¶ 10.) Defendant Midmark was a majority shareholder of SPD Technologies and defendant Midmark Associates was the General Partner of Midmark. (Am.Compl.¶¶ 6-7.)

B. *The Allegations* ^{FN2}

FN2. As required when ruling on a motion to dismiss, the facts as averred by plaintiffs are accepted as true for purposes of this motion. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996).

On August 13, 1998, L-3 entered into a merger agreement with SPD Technologies and Midmark whereby L-3 purchased all outstanding stock of SPD Technologies. (Am.Compl.¶¶ 36, 38.) L-3 alleges that, from 1996 to 2002, defendants engaged

in a fraudulent scheme designed to: (1) make SPD Technologies attractive for acquisition; (2) induce L-3 to pay an artificially inflated price for the company; and (3) cover up the misrepresentations and omissions made in the acquisition phase from plaintiff even after the merger took place. L-3 alleges that it did not learn of the fraudulent scheme until January 2002 when the Navy provided L-3 with revealing information about the alleged fraud. (Am.Compl.¶ 67.)

*2 L-3 filed this complaint on July 1, 2003. Because my decision regarding the statute of limitations is dispositive, many facts which may have been relevant to determining whether plaintiff adequately pled its claims have been omitted from this section.

III. STANDARD OF REVIEW

A motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) challenges the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir.1993). In ruling on a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a court must “accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.” *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996). Because a court must determine whether “under any reasonable reading of the pleadings, the plaintiff may be entitled to relief,” a claim may be dismissed only “if it appears that the plaintiffs [can] prove no set of facts that would entitle them to relief.” *Id.*

IV. DISCUSSION

Defendants move to dismiss on four grounds: (1) plaintiff’s complaint is time-barred; (2) plaintiff fails to properly plead a federal securities fraud claim under § 10(b) of the SEA; (3) plaintiff fails to properly plead an action for control person liability under § 20(a) of the SEA; and (4) plaintiff’s state

common law claims of fraud and negligent misrepresentation are precluded by the economic loss doctrine. Because I find that plaintiff's federal claims are time-barred, I will not reach defendants' other arguments.

A. Statute of Limitations

Defendants contend that plaintiff's federal securities claims are time-barred. L-3's federal securities fraud claims are brought under §§ 10(b) and 20(a) of the SEA. The SEA does not set forth an applicable statute of limitations. Instead, the statute of limitations for these claims was traditionally governed by the Supreme Court's ruling in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In that case, the Supreme Court held that the statute of limitations period governing such a claim is one year from the date of discovery of facts constituting the violation or three years after the violation, whichever is earlier. *Lampf*, 501 U.S. at 364. In addition, the *Lampf* court found the three year period to be a "statute of repose." *Id.* at 362. Finally, the Court held that equitable tolling principles do not apply to the one year/three year structure, reasoning that the one year period makes tolling "unnecessary" because it begins after discovery of the facts constituting the violation, and the three year period of repose is "inconsistent" with tolling because the three year period was "clearly" intended to "serve as a cutoff." *Id.* at 363.

On July 30, 2002, President George W. Bush signed into law the Public Company Accounting and Investor Protection Act of 2002 (popularly known as the "Sarbanes-Oxley Act of 2002"), Pub.L. 107-204, Title VIII, § 804, 116 Stat. 745, 801, codified in part at 28 U.S.C. § 1658(b) [hereinafter "The Act"]. Among other things, the Act amended 28 U.S.C. § 1658 to read:

*3 Time limitations on the commencement of civil

actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues. Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of -

- (1) 2 years after the discovery of the facts constituting the violation; or
- (2) 5 years after such violation.

(b) Effective Date-The limitations period provided by Section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.

(c) Nothing in this section shall create a new, private right of action.

The language of the Act applies to § 10(b) claims as well as § 20(a) claims for control person liability based on a primary violation of § 10(b).

Defendants argue that the *Lampf* limitations periods apply to the claims of securities fraud brought by L-3. The relevant dates are: (1) the fraud occurred on August 13, 1998 when the merger took place; (2) the fraud was discovered in January 2002; ^{FN3} and (3) plaintiff filed its complaint on July 1, 2003. Under the *Lampf* statute of limitations, plaintiff was required to file by the earlier of one year after discovery or three years after the fraud. One year after discovery was January 2003 and three years after the violation was August 13, 2001. Applying this rule, by filing on July 1, 2003, defendants argue

that plaintiff had to file by August 13, 2001 and that plaintiff missed the deadline.

FN3. Defendants argue that two earlier incidents should have alerted L-3 to the alleged fraudulent scheme and that one of these incidents should therefore be considered the day on which the clock began to run for statute of limitations purposes. The face of plaintiff's complaint indicates that: "It was not until new management personnel at SPD Electrical Systems met with the United States Navy in January 2002, that L-3 first realized it may have been defrauded." (Am.Compl.¶ 67.) Taking plaintiff's allegation as true, as required on a motion to dismiss, I find the fact-intensive inquiry requested by defendants to be inappropriate at this juncture, and accept plaintiff's proposed date of January 2002 as the alleged date of discovery. *See Marks v. CDW Comp. Centers, Inc.*, 122 F.3d 363, 367 (7th Cir.1997) ("Whether a plaintiff had sufficient facts to place him on inquiry notice of a claim for securities fraud under S.E.C. Rule 10b-5 is a question of fact, and such is often inappropriate for resolution on a motion to dismiss under Rule 12(b)(6)") (citations omitted); *In re Lucent Technologies*, 217 F.Supp.2d 529, 542 (D.N.J.2002) ("Though inquiry notice in some cases is decided as a matter of law, it is inappropriate to dismiss claims as time-barred where the analysis is so fact intensive.") (internal quotations and citations omitted.)

Plaintiff argues for application of the Sarbanes-Oxley Act statute of limitations, which allows plaintiffs to file within the earlier of two years after discovery or five years after the fraud. Applying Sarbanes-Oxley to the present facts sets a deadline of August 13, 2003. By filing on July 1, 2003, plaintiff contends that it met its deadline.

The question is whether to apply the *Lampf* statute of limitations, under which plaintiff's claim is time-barred, or the expansive Sarbanes-Oxley statute of limitations, under which plaintiff met the deadline. To date, several district courts, but no appellate court, have addressed the issue. Although the majority have held that under these circumstances a plaintiff cannot avail itself of the newly enacted Sarbanes-Oxley statute of limitations, a number of district courts have ruled otherwise. *See*, in the Eastern District of Pennsylvania, *Lieberman v. Cambridge Partners, L.L.C.*, No. Civ. A. 03-2317, 2004 WL 1396750, 2004 U.S. Dist. LEXIS 11553 (E.D.Pa. June 21, 2004) (Judge Cynthia Rufe), *appeal docketed*, No. 04-3079 (3d Cir. July 27, 2004) (Sarbanes-Oxley does not revive stale claims); *see also Worldcom, Inc. Secs. Litig.*, No. Civ. A. 02-3288, 2004 WL 1435356, 2004 U.S. Dist. LEXIS 11696 (S.D.N.Y. June 28, 2004) (same); *Glaser v. Enzo Biochem, Inc.*, 303 F.Supp.2d 724 (E.D.Va.2003) (same); *In re Heritage Bond Litig.*, 289 F.Supp.2d 1132 (C.D.Cal.2003) (same); *In re Enterprise Mortgage Acceptance Co., LLC Secs Litig. ["EMAC"]*, 295 F.Supp.2d 307 (S.D.N.Y.2003) (same); *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, No. Civ. A. H-01-3624, 2004 WL 405886, 2004 U.S. Dist. LEXIS 8158 (S.D.Tex. Feb.25, 2004) (same); *Ato Ram, II, Ltd. v. SMC Multimedia Corp.*, No. Civ. A. 03-5569, 2004 WL 744792, 2004 U.S. Dist. LEXIS 5810 (S.D.N.Y. Apr.7, 2004) (applying the amended statute of limitations because plaintiff's claims were not time-barred when Sarbanes-Oxley was passed); *Friedman v. Rayovac Corp.*, 295 F.Supp.2d 957 (W.D.Wis.2003) (applying the Act's longer limitations period to securities fraud claims against a defendant added to the complaint after July 30, 2002, although original complaint was filed before Sarbanes-Oxley); *Roberts v. Dean Witter Reynolds, Inc.*, No. Civ. A. 8:02-CV-2115-T-26EAJ, 2003 WL 1936116, 2003 U.S. Dist. LEXIS 5676 (M.D.Fla. Mar.31, 2003) (relying on legislative history to find Congressional

intent to revive stale claims).

*4 For many years Supreme Court jurisprudence counseled that statutes of limitations “strictly affect the remedy, and not the merits.” *Campbell v. Holt*, 115 U.S. 620, 626, 6 S.Ct. 209, 29 L.Ed. 483 (1885) (quoting *Townsend v. Jemison*, 50 U.S. 407, 413, 9 How. 407, 13 L.Ed. 194 (1850)); see *Chase Secs. Litig. v. Donaldson*, 325 U.S. 304, 314, 316, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945) (finding that statutes of limitations are “by definition arbitrary” and that “lifting a bar of a statute of limitations so as to restore a remedy lost through mere lapse of time” does not offend the Fourteenth Amendment even if it affects a party’s expectation interests); see also *Int’l Union Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 244, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (applying *Chase* to find that “Congress might constitutionally provide for retroactive application” of an extended statute of limitations period.) This could suggest that statutes of limitations are procedural and that the statute in effect at the time the action was commenced would be the limitation that controlled.

Although statutes of limitations are not traditionally viewed as conferring substantive rights, in *Hughes Aircraft Co. v. United States* the Supreme Court noted in dicta that “extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action.”^{FN4} 520 U.S. 939, 950, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). In *Hughes* the Supreme Court refused to apply an amendment to the False Claims Act retroactively because it would revive a previously foreclosed *qui tam* action. *Id.* at 949. The Court compared the application of the foreclosed *qui tam* action to the impermissible revival of time-barred claims by newly lengthened statutes of limitations, citing with approval the Ninth Circuit’s decision in *Chenault v. United States Postal Serv.*, 37 F.3d 535 (9th Cir.1994). In *Chenault*, the Ninth Circuit considered whether the newly

lengthened statute of limitations provided in the Civil Rights Act of 1991 could revive previously time-barred claims. First, the *Chenault* court found that Congress did not express a clear intent with respect to retroactivity of any portion of the Civil Rights Act. 37 F.3d at 537. The court then went on to hold that “a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff’s claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party’s liability.” 37 F.3d at 539. By approving of *Chenault* and specifically holding that the revival of time-barred claims is “impermissible,” the Supreme Court has made statutes of limitations subject to the general rule that, absent clear Congressional intent, courts are to apply a presumption against retroactive application of a new law. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

FN4. Prior to *Hughes*, the circuit courts were nearly unanimous in finding that previously time-barred claims could not be revived by newly enacted statutes of limitations. *Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir.1994); *FDIC v. Belli*, 981 F.2d 838, 842-43 (5th Cir.1993) (without a clearly expressed legislative intent to the contrary, a newly enacted statute of limitations will not revive time-barred claims); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir.1990) (finding a presumption against using a newly enacted statute of limitations to revive a time-barred claim); *Million v. Frank*, 47 F.3d 385, 390 (10th Cir.1995) (same); *Resolution Trust Corp. v. Artley*, 28 F.3d 1099, 1103 n. 6 (11th Cir.1994) (same); but see *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-91 (2d Cir.1995) (applying a new statute of

limitations to conduct occurring before the claim was filed because statutes of limitations affect the conduct of plaintiffs filing complaints and not the substantive rights of defendants).

Under *Landgraf*, Congressional intent may operate to override the presumption against retroactive application of the new limitations period. *Landgraf*, 511 U.S. at 280. The “first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retroactively.” *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (declining to extend provisions of the Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA] to aliens whose plea agreements were entered into before IIRIRA’s enactment).^{FN5} The Supreme Court has instructed that the “standard for finding such unambiguous direction is a demanding one.” *Id.* In fact, cases where the Supreme Court has found a true intent to apply a statute retroactively “have involved statutory language that was so clear that it could sustain only one interpretation.” *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n. 4, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (holding that new provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] do not apply to pending noncapital petitions for habeas corpus)).

^{FN5.} *INS v. St. Cyr* directs that the “second step” in determining whether a statute has an impermissible retroactive effect is to determine whether the statute actually produces the effect. 533 U.S. at 320. Because *Hughes* directly answered this question I need not conduct this inquiry. 520 U.S. at 950.

*5 Plaintiff argues that the plain language of § 804(b) necessitates a reading that it apply to *any* complaint filed on or after July 30, 2002, regardless of when the underlying conduct occurred. Plaintiff’s

reading of the statute is that, by stating that the new time limits “shall apply to all proceedings ... that are commenced on or after the date of enactment of this Act” (emphasis added), Congress intended for all complaints filed on or after July 30, 2002 to be considered under the Sarbanes-Oxley period, irrespective of the date of the underlying conduct.

This is not an unreasonable literal interpretation of § 804(b), but it is simply one such interpretation. For example, it is also reasonable to read the statute as applying to all proceedings commenced on or after July 30, 2002 alleging conduct not previously time-barred. This latter interpretation forecloses any potential defendant’s argument that Sarbanes-Oxley should apply only to *conduct* occurring on or after the statute’s enactment date. Such an argument would forbid plaintiffs alleging, for example, conduct that occurred in the months immediately preceding Sarbanes-Oxley from bringing claims within the Sarbanes-Oxley time limitations. Section 804(b) clearly forecloses this potential argument, but does not necessarily open the door for L-3’s claim.

The language of § 804(c) further bolsters a finding that § 804(b) is ambiguous. Section 804(c) states that, “Nothing in this section shall create a new, private right of action.” Pub.L. 107-204, Title VIII, § 804(c). Allowing a claim to proceed when it had previously been time-barred is arguably comparable to creating a new right of action.

Furthermore, Congress has expressed its unambiguous intention to apply statutes of limitations to time-barred claims. See e.g. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 1821(d)(14)(C)(i) (1994) (amending the Act to provide that “the Corporation may bring an action ... on such claim without regard to the expiration of the statute of limitation applicable under State law”); and the Higher Education Technical Amendments of 1991, 20 U.S.C. § 1091a(a)(2) (eliminating statute of limitations with regard to recovering on defaulted student loans by stating “no

limitation shall terminate the period within which suit may be filed.”) The fact that a statute of repose is at play here, rather than a statute of limitations as in the above cases, makes the need for Congressional clarity even greater.^{FN6}

FN6. Several courts have found that rights of repose are substantive and not procedural. See *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 422 (7th Cir.1998) (“A statute of repose is essentially different from a statute of limitations, in that a limitations statute is procedural, giving a time limit for bringing a cause of action, with the time beginning when the action has ripened or accrued; while a repose statute is a substantive statute, extinguishing any right of bringing the cause of action, regardless of whether it has accrued.”) (internal citation omitted); *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir.1998) (“a statute of repose may bar commencement of an action even before the cause of action accrues”); *Christ v. Prater Indus., Inc.*, 67 F.Supp.2d 491, 492 (E.D.Pa.1991) (same); *Crouch v. General Electric Co.*, 699 F.Supp. 585, 592 n. 5 (S.D.Miss.1988) (“Statutes of repose acquire a substantive character since they operate to extinguish not only the right to enforce a remedy but the substantive right itself.”); *Moore v. Liberty Nat’l Ins. Co.*, 108 F.Supp.2d 1266, 1275 (N.D.Ala.2000) (same). Regarding statutes of repose as substantive rights suggests an even greater presumption against permitting new legislation to open the gates to claims that had already been time-barred.

Plaintiff urges me to study Sarbanes-Oxley's legislative history for insight into Congress's intent. Such an inquiry would be inappropriate in light of the requirement that the statute be unambiguous. It is not impossible that Congress did in fact intend

claims like L-3's to be revived, but the statute is not “so clear that it could sustain only one interpretation.” *Lindh*, 521 U.S. at 328 n. 4.^{FN7} Therefore, the statute cannot overcome the presumption against applying it to previously time-barred claims.

FN7. Also finding ambiguity in the Sarbanes-Oxley context are: *EMAC*, 295 F.Supp.2d at 312; *Roberts*, 2003 WL 1936116, at *3; *Glaser*, 303 F.Supp.2d at 734; *Heritage Bond*, 289 F.Supp.2d at 1148; *Worldcom*, 2004 WL 1435356, at *7; and *Lieberman*, 2004 WL 1396750, at *3.

*6 Because the language of § 804 is ambiguous, I am bound to apply the *Landgraf-Hughes* presumption against revival of time-barred claims. Under the *Lampf* statute of limitations, plaintiff's claims were time-barred after August 13, 2001—nearly a year before Sarbanes-Oxley was passed. I will therefore dismiss plaintiff's 10(b) and 20(a) claims.

B. Jurisdiction over State Law Claims

I have discretion as to whether to retain supplemental jurisdiction over the state law claims in light of my dismissal of the federal claims. 28 U.S.C. § 1367(c)(3). The Third Circuit has instructed that, “where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state law claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.” *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir.2000). No scheduling order has been entered in this case, thus alleviating any concerns about judicial economy and fairness to the parties. I find no affirmative justification for deciding these pendent state law claims, and decline to exercise supplemental jurisdiction over them. Under 28 U.S.C. 1367(d),

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plaintiff has thirty days to file its surviving claims
in state court.

ORDER

AND NOW, this day of 2004, defendants' motions
to dismiss (Docket # 16, Docket # 22 and Docket #
23) are GRANTED. This matter is DISMISSED.
The Clerk's Office shall mark this case closed for
statistical purposes.

E.D.Pa.,2004.

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