IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
SUBMICRON SYSTEMS CORPORATION, et al.,	)	Case Nos. 99-2960 through 99-2962 (SLR)
	)	
Debtors.	)	Jointly Administered
	)	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. A-00-484
	)	
SUBMICRON SYSTEMS CORPORATION, SUBMICRON SYSTEMS, INC., SUBMICRON WET PROCESS STATIONS, INC., SUBMICRON SYSTEMS HOLDINGS, INC., THE KB MEZZANINE FUND II, L.P., EQUINOX INVESTMENT PARTNERS LLC, CELERITY SILICON, LLC, DAVID FERRAN and AKRION, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

I. INTRODUCTION

On September 1, 1999, debtors SubMicron Systems Corporation ("SMS"), SubMicron Systems, Inc. ("SSI"), SubMicron Wet Process Stations, Inc. ("SWPS"), and SubMicron Systems Holdings, Inc. ("SSH") filed separate voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101.[1] On April 18, 2000, the Official Committee of Unsecured

[1]SMS is a holding company which owns all of the issued and outstanding common stock of SSI and SWPS. SSH purchased substantially all of the assets of SMS in December 1997. (D.I.

Creditors (the "Committee") filed this action as an adversary proceeding against debtors, KB Mezzanine Fund II, L.P. ("KB"), Equinox Investment Partners LLC ("Equinox"), Celerity Silicon, LLC ("Celerity"), David Ferran and Akrion, LLC ("Akrion"), alleging claims of equitable subordination, recharacterization, breach of fiduciary duty and unjust enrichment.[2] (D.I. 1) Currently before the court are KB and Equinox's motion for summary judgment (D.I. 39, 79), Celerity's motion for summary judgment (D.I. 82), various motions to strike expert reports (D.I. 95, 99, 119), plaintiff's motion to compel discovery (D.I. 109), and KB and Equinox's motion in limine to exclude evidence not disclosed in discovery. (D.I. 133) For the following reasons, the court shall deny all of the pending motions.

II. BACKGROUND

A. The Parties

Debtors are Delaware corporations engaged in the design, manufacture and marketing of advanced chemical processing and distribution systems used in the fabrication of semiconductors. (D.I. 91 at B00223) KB is an investment fund created for the

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81A at A00527)

[2]On April 23, 2001, pursuant to the Plan of Liquidation, Howard S. Cohen, the Plan Administrator, was substituted for the Committee as plaintiff. (D.I. 112) Claims of wrongful transfer of proceeds and aiding and abetting were abandoned by plaintiff, and the only remaining defendants are KB, Equinox and Celerity. (D.I. 18, 114)

purpose of investing in debt and stock instruments. Equinox manages KB's affairs and was the general partner of KB.[3] (D.I. 81D at A01961) Celerity is a California-based investment fund. (D.I. 81A at A00529)

B. Pre-Petition Financing by KB/Equinox and Celerity

1. The 1997 Notes

After several profitable years in the early 1990s, debtors suffered a series of financial losses. In 1997, debtors sought to reverse their situation by the following:

> (1) issuing $9.2 million of Series A Convertible Non-Redeemable Preferred Stock and $8.7 million of 8% Convertible Subordinated Notes due in March 2002 (the "8% Notes") to the previous holders of SMS's 9% Convertible Subordinated Notes due in December 1997;
>
> (2) in connection with the sale of SMS's subsidiary, System Chemistry, Inc., issuing to The BOC Group, Inc. a $5 million Subordinated Promissory Note due in August 2000 (the "BOC Note");
>
> (3) entering into a new revolving credit facility with Greyrock Business Credit ("Greyrock") for up to $15 million (the "Greyrock Facility");[4] and
>
> (4) issuing $20.5 million of 12% Senior Subordinated Notes to KB/Equinox and Celerity, due in February 2002 with interest payable in cash (the "1997 Notes").[5]

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[3]Where KB and Equinox acted jointly in their dealings with debtors, the court will refer to them as "KB/Equinox."

[4]The Greyrock Facility permitted borrowings on an asset-based formula, and was secured by first priority liens on and security interests in substantially all of debtors' assets. (D.I. 91 at B00208)

[5]In connection with the 1997 Notes, KB/Equinox and Celerity received warrants to purchase shares of SMS common stock and two seats on SMS's Board of Directors. (D.I. 91 at B00207) The 1997

(D.I. 91 at B00170, B00207-08, B00235)

2. The 1998 Notes

The following year, debtors continued to sustain financial losses. Debtors renewed the Greyrock Facility, but under new conditions:

> (1) the maximum credit line was reduced from $15 million to $10 million;
>
> (2) debtors were required to raise a minimum of $4 million in new equity or subordinated debt prior to December 31, 1998; and
>
> (3) debtors had to receive interest deferral, effective through October 1, 1999, on all KB/Equinox and Celerity debt and on 80 percent of all other subordinated debt.

(D.I. 92 at B00408-09; B00586-97) In accordance with these new conditions, debtors obtained additional financing from KB/Equinox and Celerity. Specifically, the 1997 Notes were modified to provide that all interest due and payable in cash from August 1, 1999 would instead be payable in the form of "Interest Units." KB/Equinox and Celerity also advanced $4 million to debtors in exchange for $4 million of Series B 12% Senior Subordinated Notes due in February 2002 (the "1998 Notes").[6] (D.I. 81D, Ex. 35)

Notes described themselves as debt instruments, and were secured by a perfected security interest in all of debtors' assets, junior only to Greyrock's security interest. (D.I. 81D, Ex. 34) The 8% Notes and the BOC Note were unsecured and subordinate to the 1997 Notes. (D.I. 81C, Exs. 24, 25)

[6]In connection with the 1998 Notes, KB/Equinox and Celerity also received warrants to purchase shares of SMS common stock. The 1998 Notes described themselves as debt instruments, and were secured by a perfected security interest in all of debtors' assets, on a pari passu basis with the 1997 Notes. The 1998

3. The 1999 Notes

By 1999, the semiconductor industry fell into a worldwide decline, and debtors began actively seeking a merger or sale of their assets. In a letter dated February 8, 1999, Robert Wickey, one of three KB/Equinox designees on SMS's board of directors, wrote to his investor partners proposing "a plan for exchanging certain SMS debt obligations for [debtor's] common stock" to render debtors more attractive to a third party investor.[7] (D.I. 92 at B00695-700) During an Equinox Investment Committee Meeting held on February 24, 1999, Mr. Wickey stated:

> The exchange offer is necessary to restructure the balance sheet and eliminate the large debt load, which [debtors are] incapable of servicing, now or at any time in the foreseeable future. The exchange will position [debtors] for a sale to a strategic buyer or for an investment by a third party investor. We have heard from two separate equipment manufacturers that the [debtors'] present balance sheet is an impediment to any merger. Also the two classes of junior notes, the 8% Junior Convertible Notes and the Promissory Note to the BOC Group, both contain a no sale clause which gives them an ability to stop any sale or investment that does not meet their needs. An exchange offer would eliminate these rights and give us greater control to sell [debtors].

Notes required no cash payments until October 1, 1999. (D.I. 93 at B00758-64)

[7]Mr. Wickey wrote that SMS's "balance sheet must be recapitalized before any serious consideration can be given to a third party transaction" and that "no strategic acquirer or investor will take on the task of negotiating settlements with SMS's four layers of relatively short term funded debt and its diverse group of public shareholders." (D.I. 92 at B00698)

(Id. at B00670) Thus, in March 1999, KB/Equinox sent letters to holders of the 8% Notes and the BOC Note proposing a debt-to-equity exchange, stating that the exchange is "critical for positioning [debtors] for success and providing an exit strategy for all of its investors" and that "[debtors] will be unable to continue operations without additional capital infusions." (Id. at B00719-52) A draft of the letter was sent to Celerity prior to being sent to the other note holders.[8] (Id. at B00695-700)

Beginning on March 10, 1999 and continuing until debtors filed for bankruptcy, KB/Equinox and Celerity made weekly or bi-weekly cash infusions to debtors, which took the form of Series 1999 12% Senior Subordinated Convertible Notes due on February 1, 2002 (the "1999 Notes").[9] (D.I. 93 at B00754) The 1999 Notes were allegedly approved by a Special Financing Committee of SMS's Board of Directors, authorized and empowered to negotiate and

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[8]Mr. Wickey, in his March 1999 letters, specifically acknowledged that SMS's funded debt had relatively short maturities relative to debtors' near term ability to generate cash from operations, and debtors would not be able to honor any of these obligations by their stated maturity dates (D.I. 92 at B00719-52)

[9]The 1999 Notes were secured on a senior basis to the 1997 and 1998 Notes, but junior to the Greyrock security interests and payment to some of debtors' key executives. (D.I. 81D, Ex. 36) The 1999 Notes required no principal payments until February 1, 2002. (Id. at A01853) No cash interest was required to be paid until September 30, 1999, and even then, one-half of the accrued interest could have been re-written and rolled into additional notes at debtors' sole discretion. (Id. at A01853-4) The 1999 Notes were characterized as "debt" in debtors' Schedules and Statements of Financial Affairs, prepared by Mr. Cohen. (Id. at A01933-36)

approve any combination of debt or equity financing it deemed appropriate. (D.I. 92, Ex. 19) The minutes of the February 24, 1999 meeting of Equinox's Investment Committee characterize the cash infusions as "capital contributions":

> [T]he Company will require $1.3 million during the week ending March 5, 1999, and a total of $6.5 million between now and October 29, 1999. These capital contributions will fund working capital, operating losses in the U.S. business and the start up costs of SMS's Asian Joint Venture, Akrion.[10]

(Id. at B00667)

C. Petition for Bankruptcy and DIP Financing Order

On September 1, 1999, debtors filed separate voluntary petitions for bankruptcy protection. Debtors also filed a motion and stipulated order authorizing post-petition financing from KB/Equinox and Greyrock (the "DIP Financing Order"), and a motion to authorize an expedited sale of substantially all of debtors' assets to Akrion, a start-up company formed by KB/Equinox and others. (D.I. 81, Exs. 1, 23) The court authorized debtors to borrow up to $3.9 million from KB/Equinox, and additional financing from Greyrock. (Id., Ex. 1) In return, debtors validated the perfection, validity, priority and enforceability of the pre-petition financing by KB/Equinox, subordinate only to Greyrock's security interest, payment to key employees, liens securing purchase money indebtedness existing prior to the filing

[10]These non-debtor subsidiaries of SMS include Akrion Ptd. Ltd., Akrion Korea Ltd. and Taiwan Akrion Co., Ltd. (collectively, the "Original Akrion Entities"). (D.I. 90 at 1)

date, and interests of lessors under any lease entered into in the ordinary course of business. (Id. at A00015) The DIP Financing Order further provided that

> Debtors and their counsel agree that the perfection, extent, validity, priority and enforceability of the Pre-Petition Security Interests shall not be subject to challenge by the Debtors or, to the extent permitted by law, any successor trustee of the Debtors in these proceedings or any superceding or subsequent proceedings.

(Id.) However, the DIP Financing Order allowed for a creditors' committee to challenge the perfection, validity, priority and enforceability of KB/Equinox's pre-petition interests, but limited such challenge to one initiated within sixty days of the committee's appointment:

> [A]ny challenge to the Pre-Petition Security Interests by the creditor's committee (if one is appointed) must be brought within sixty (60) days of the appointment of such committee.

(Id.)

The Committee was appointed on September 24, 1999. (D.I. 81A at A00578) On October 4, 1999, the Committee filed a motion for reconsideration and rehearing on the DIP Financing Order, but never pursued the motion. (D.I. 93 at B00905-914) KB/Equinox funded the full amount of the DIP Financing Order. (D.I. 81A at A00577-78)

D. The Asset Purchase Agreement and Sale Hearing

In July 1999, debtors' Board of Directors contacted Sunrise Capital Partners, L.P. ("Sunrise"), a New York based capital

management and investment fund, about a potential sale of debtors' assets.[11] (D.I. 81A at A00576) A Section 363 sale between debtors and Akrion (the "Sale") was negotiated and finalized on August 29, 1999. (D.I. 81D, Ex. 33) Akrion was funded at start-up with cash contributions by Sunrise, KB/Equinox and an entity formed by David Ferran to participate in the transaction. (Id. at A01972) Immediately prior to the Sale, KB/Equinox sold all of its interests in the 1997, 1998 and 1999 Notes to Akrion in return for an equity interest in Akrion. (Id.) The Asset Purchase Agreement provided that debtors transfer their assets, including their stock in the Original Akrion Entities, to Akrion in exchange for consideration of $55.5 million, consisting of:

(1) $5.5 million cash to be paid to the holders of the 1999 Notes;[12]

(2) repayment of debtors' indebtedness to Greyrock;

(3) $850,000 for administrative expenses;

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[11]In July 1999, debtors' Board of Directors consisted of one Celerity designee, two KB/Equinox designees, and CEO David Ferran. (D.I. 92 at B00636) Celerity alleges that it disagreed with KB/Equinox's sale strategy and, therefore, did not participate in the negotiations with Sunrise and abstained from voting on the transaction. (D.I. 93 at B00935-39) Celerity stopped funding debtors on July 19, 1999 and resigned from the Board around the time of the bankruptcy petition date. (Id.)

[12]Since Akrion was the holder of the 1999 Notes when the Sale occurred, the $5.5 million reverted back to Akrion. Akrion, in turn, assigned the 1999 Notes to debtors, who cancelled the 1999 Notes. (D.I. 81A at A00612)

(4) a credit bid of $40 million on account of the 1997 Notes, the 1998 Notes, and the 1999 Notes; and

(5) assumption of liabilities of debtors to certain trade creditors deemed critical to ongoing operations and to certain SMS employees, officers, and managers to be retained by New Akrion.

(D.I. 81A at A00532)

On October 7, 1999, the Committee filed objections to the Sale, and the court subsequently held a three-day evidentiary hearing on the Sale (the "Sale Hearing"). (D.I. 81A, Ex. 2; D.I. 81B, Ex. 22) On October 13, 1999, the court issued a memorandum order setting forth the following findings:

(1) the Asset Purchase Agreement was made with accurate and reasonable notice;

(2) the Asset Purchase Agreement was made for a sound business purpose;

(3) the Asset Purchase Agreement was made with fair and reasonable consideration, and that no appraisal or valuation of the debtors' assets was necessary;

(4) the Asset Purchase Agreement was made in good faith;

(5) the Asset Purchase Agreement does not unfairly benefit the "management insiders";

(6) KB/Equinox and Celerity are secured lenders, and not holders of equity.[13]

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[13]Specifically, the court concluded that based on the record presented, . . . the debtors, with the support of Equinox and Celerity, diligently pursued an infusion of equity pre-petition; . . . the status of Equinox and Celerity did not change from 'secured lender' to 'venture capitalist' based on debtors' deteriorating financial condition; and . . . the negotiations leading to the transaction at issue were at arms' length.

(Id., Ex. 3)

On October 14, 1999, the Committee filed a notice of appeal of the court's memorandum order with the Third Circuit, but subsequently dismissed that appeal on June 9, 2000. (Id., Ex. 9) On October 15, 1999, the court issued an order approving the Sale (the "Sale Order"). (Id., Ex. 4) The Sale Order provided that

> [n]otwithstanding any other provision of this Sale Order, **all claims or causes of action of any kind or nature, if any, that the Official Committee of Unsecured Creditors . . . may assert against KB and/or Celerity and/or Equinox are hereby preserved.** In the event that the Creditors' Committee chooses to assert any such claim or cause of action, it shall do so in this Court. If this Court ultimately determines that the Creditors' Committee has a valid claim or cause of action against KB and/or Celerity and/or Equinox and awards damages or sustains an equitable subordination claim . . . against KB and/or Celerity and/or Equinox, then KB and/or Celerity and/or Equinox may satisfy the Award in full by either: (a) **paying the Award in cash up to the amount of the KB Cash Distribution or the Celerity Cash distribution** . . . or, (b) at the option of KB and/or Celerity and/or Equinox, respectively, . . . **paying the Award by transferring to the Creditors' Committee . . . up to the full amount of the equity interest in Akrion and/or the interest in the Series A Appreciation Unit . . . being issued by Akrion to KB, Celerity and/or Equinox in exchange for their respective contribution to Akrion of the claims and rights relating to the Series 1999 Notes and the post-petition financing provided in these cases.**

(Id. at A00554) (emphasis added) On November 15, 1999, the Committee filed a notice of appeal of the Sale Order with the Third Circuit. This appeal was dismissed for lack of prosecution. (D.I. 81B, Ex. 13)

(D.I. 81A at A00538)

E. The Plan of Liquidation

On May 3, 2000, the court entered an order confirming the debtors' joint Plan of Liquidation (the "Plan"), which became effective on June 15, 2000. (Id., Ex. 6) Under the terms of the Plan, most of debtors' secured claims, including those of KB/Equinox and Celerity, were deemed paid pursuant to the Sale. Once all of the secured creditors and prior liens are paid in full, the general unsecured creditors will receive a pro rata share of the proceeds from the sale or other liquidation of debtors' property, including the proceeds from this adversary action. (Id.)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is

correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Defendants' Motions for Summary Judgment Are Denied

1. Plaintiff Has Standing to Bring This Action

Because some of the unsecured creditors' claims have been paid, defendants argue that plaintiff (formerly the Committee and

now the Plan Administrator) does not have standing to sue because it does not represent all of the unsecured creditors. The court finds no case authority supporting this proposition. The cases cited by defendants state that a committee or trustee may not bring an adversary proceeding on behalf of individual creditors, such as defrauded investors, where only a few creditors stand to benefit from the action. See, e.g., In re Martin, 154 B.R. 490, 493 (Bankr. C.D. Ill. 1993) ("[T]he trustee has no standing to bring **personal** claims of creditors. A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors.") (emphasis in original); Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1349 (7th Cir. 1987) ("A trustee may maintain only a general claim. . . . To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors."). The cases cited by defendants do not distinguish between paid and unpaid creditors in a general action such as the proceeding at bar. Here, plaintiff alleges a general equitable subordination claim from which all unsecured creditors (with

allowed claims) stand to benefit, therefore, plaintiff has standing to bring this claim.

2. Plaintiff May Challenge the 1999 Notes

The DIP Financing Order allowed only a 60-day period for the Committee to challenge the 1999 Notes. During this period, however, the court approved a Sale Order that preserves the Committee's causes of action, and even specifically mentions a possible claim of equitable subordination. Furthermore, although the court addressed similar issues after the Sale Hearing, in light of some inconsistent evidence and new expert reports, the court will reconsider plaintiff's claims. Plaintiff, therefore, is not barred from challenging the 1999 Notes.

3. Plaintiff Possesses Means for Relief

Defendants argue that there are no pre-petition claims to subordinate, since the 1999 Notes reverted to debtors and were cancelled upon the Sale. However, the Sale Order specifically provides for relief in an equitable subordination action based on the cancelled Notes. Because the parties contracted for avenues of relief in the event that the court sustains a claim of equitable subordination, the court finds that the present action is not moot.

4. There Exist Genuine Issues of Material Fact to Warrant a Trial

In the face of conflicting expert reports and some inconsistent evidence, the court finds that genuine issues of

material fact exist as to whether the 1999 Notes should be characterized as secured debt or equity, and whether defendants committed a breach of fiduciary duty.

B. The Parties' Motions to Strike Expert Reports Are Denied

Because this case will be tried before the court, the court will consider the admissibility, reliability and sufficiency of any expert testimony during the trial.

C. Plaintiff's Motion to Compel Discovery Is Denied.

The court has conducted an in camera inspection of the four documents at issue, and has determined that the redacted portions are not relevant to the case at bar. Plaintiff's motion to compel discovery is denied.

V. CONCLUSION

Therefore, at Wilmington, this 27th day of June, 2001;

IT IS ORDERED that:

1. KB, Equinox and Celerity's motions for summary judgment (D.I. 39, 79, 82), and plaintiff's motion to strike defendants' reply brief (D.I. 116) are denied.

2. The parties' motions to strike expert reports (D.I. 95, 99, 119) are denied, and plaintiff's motion for leave to file a reply brief (D.I. 117) is denied as moot.

3. Plaintiff's motion to compel discovery (D.I. 109) is denied.

4. KB and Equinox’s motion in limine (D.I. 133) is denied.

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United States District Judge