IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KONINKLIJKE NUMICO N.V., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 02-1529 GMS
	)	
KEB ENTERPRISES LP, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On October 11, 2002, the plaintiffs, Koninklijke Numico N.V., and Nutricia USA, Inc. (collectively "Numico"), filed the above-captioned action against the defendants, KEB Enterprises, L.P., Madeleine L.L.C., G^3 Holding L.L.C., Nutritional Supplement Investors, L.L.C., VLE 1X, LTD., Windriver Capital Limited/ICGL, DAB Investments, L.P., Glenn J. Boschetto, Kenneth and Linda Brailsford, S. Peter Ehrich, Blake H. Larsen, Calvin W. McCausland, Audrey Shorin, and Kurt B. Larsen (collectively "the Named Enrich Shareholders").

Presently before the court is the Named Enrich Shareholders' motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7). For the following reasons, the court will grant this motion in part and deny it in part.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *See Kost v. Kozakiewicz*, 1 F.3d 183 (3d Cir. 1993). Thus, in deciding a motion to dismiss, the factual allegations of the complaint must be accepted as true. *See Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir. 1997); *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). In particular, the court looks to "whether sufficient facts are pleaded to determine that

the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir.1988). However, the court need not "credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3rd Cir.1997). A court should dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *See Graves*, 117 F.3d at 726; *Nami*, 82 F.3d at 65 (both citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Thus, in order to prevail, a moving party must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In deciding a motion to dismiss, the court may also consider, for certain purposes, the content of undisputedly authentic documents that are integral, or are incorporated by reference into the complaint.[1] *See e.g. Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

III. BACKGROUND

A. The Merger Agreement

On February 17, 2000, Numico and Enrich International, Inc. ("Enrich") entered into an "Agreement and Plan of Merger" (the "Merger Agreement"), pursuant to which Numico agreed to acquire Enrich. Article III of the Merger Agreement states, in relevant part:

> Enrich hereby represents and warrants to Purchaser and Merger Sub that, except as set forth on the specific respective part or subpart of the Disclosure Schedule which corresponds to the specific section or sub-section of this Article III or as may be cross-referenced from one

[1]The parties to the present action do not dispute that the documents in question are authentic.

> item of a particular part of such Disclosure Schedule to a specific item of another part of such Disclosure Schedule along with an explanation of the relevance of such cross-reference, the following is true and correct on the date hereof and as of the Effective Time [.]

A "Disclosure Schedule to Agreement of Merger" (the "Disclosure Schedule") accompanied the Merger Agreement. The Disclosure Schedule qualified the representations and warranties made by Enrich in Article III of the Merger Agreement.

B. Indemnification Agreement and the Guaranty Agreements

The Enrich acquisition closing occurred on February 29, 2000. Among the agreements executed upon closing of the transaction was an "Indemnification Agreement By and Among Nutricia Utah, L.P., Shareholders' Representative and Certain Shareholders of Enrich International, Inc." (the "Indemnification Agreement."). The Indemnification Agreement requires that the Enrich shareholders provide Numico with post-closing indemnification under certain circumstances for losses caused by breaches of representations, warranties, and covenants made by Enrich in the Merger Agreement. The Indemnification Agreement also provides that the Enrich shareholders are not responsible for certain losses until the losses exceed, in the aggregate, a $1,000,000 threshold amount.

C. Third Party Claims

Section 4(d) of the Indemnification Agreement, entitled "Matters Involving Third Parties," requires that specific procedures be followed as a condition to indemnification for third party claims asserted against Numico. In particular, Section 4(d) provides that the alleged indemnifying party be notified of any third party claims and be provided with an opportunity to defend any third party claims for which indemnification will be sought. Specifically, section 4(d) states:

> [i]f any third party shall notify any Purchaser Indemnified Party or

> Shareholder Indemnified Party (the "Indemnified Party") with respect to any matter (a "Third Party Claim") which may give rise to a claim for indemnification against any other Party (the "Indemnifying Party") under this § 4, then the Indemnified Party shall, as soon as practicable following receipt of written notice of such claim, notify the Indemnifying Party thereof in writing (setting forth in reasonable detail the relevant facts) . . . . The Indemnifying Party will have the right to defend the Indemnified Party against the Third Party Claim with counsel of its choice reasonably satisfactory to the Indemnified Party . . . .

D. The Claim Notices

Section 4(e) of the Indemnification Agreement requires that Numico provide the former Enrich shareholders with a claim notice demanding indemnification. On December 20, 2001, Numico sent the former Enrich shareholders a first claim notice (the "Claim Notice") demanding indemnification for certain losses. Numico subsequently amended the Claim Notice, and on April 26, 2002, sent a Supplemental Claim Notice pursuant to Section 4(c) of the Indemnification agreement. The Supplemental Claim Notice purports to contain the claims that are the subject of this lawsuit.

E. The Complaint

The complaint alleges that Numico sustained losses in excess of $14.5 million as a result of breaches of Enrich's representations and warranties in the Merger Agreement. It thus seeks indemnification for those alleged losses from the Named Enrich Shareholders pursuant to the Indemnification Agreement and the Guaranty Agreements.

IV. DISCUSSION

A. Disclosure

Article III of the Merger Agreement states that the representations and warranties set forth in the Merger Agreement are qualified by the disclosures contained in the Disclosure Schedule. The Named Enrich Shareholders now argue that Numico is not entitled to indemnification for losses caused by items disclosed on the Disclosure Schedule. According to them, both of the items that form the basis for Count II of Numico's complaint were disclosed on the corresponding part of the Disclosure Schedule. For the following reasons, the court must agree.

There are two components to Count II of the complaint: (1) a claim that Numico should be indemnified for $408,700 to settle a claim for unclaimed property escheat by the State of Utah, and (2) a claim that Numico should be indemnified for $1,751,366 paid to settle tax issues raised by the Canadian taxing authorities. Each of the claims alleges that Enrich breached the representations and warranties contained in Section 3.8 of the Merger Agreement, which relates to taxes and tax returns.

The first item under the heading "Audits of Enrich and its Subsidiaries" on the two-page portion of the Disclosure Schedule at Part 3.8(a)(ii) discloses that there was an audit in progress regarding income taxes by Revenue Canada. The second page of that portion of the Disclosure Schedule discloses the notice of a possible audit from the State of Utah for unclaimed property taxes. Thus, both the Utah unclaimed property escheat and the Canadian tax audit items were excluded from the representations made in Section 3.8 of the Merger Agreement.

Further, Section 3.8 of the Merger Agreement explicitly carves out the items on Part 3.8(a)(ii) of the Disclosure Schedule from the representations and warranties made in that section of the Merger Agreement. Section 3.8 provides that, "[e]xcept as may be set forth in the 1999 Audited Balance Sheet or on Part 3.8(a)(iii) of the Disclosure Schedule, (i) there are no deficiencies or claims asserted for Taxes against Enrich or any of the subsidiaries . . . ." Part 3.8(a)(iii) of the

Disclosure Schedule includes the "items listed in Disclosure Schedule Part 3.8(a)(ii)," which in turn includes the part of the Disclosure Schedule listing both the Utah unclaimed property escheat and the Canadian tax audit.

Thus, the Utah unclaimed property escheat and the Canadian tax audit were excluded both by virtue of their disclosure on the Disclosure Schedule and the carve-out contained in Section 3.8 of the Merger Agreement itself. For these reasons, Count II must be dismissed. The court need not, therefore, reach the Named Enrich Shareholders' alternative ground for dismissal based on lack of notice.

B. The Ripeness Requirement

When the essential facts establishing the right to relief have already occurred, the case is ripe for adjudication. *See Riehl v. Travelers Ins. Co.*, 772 F.2d 19, 22 (3d Cir. 1985); *Mendelson v. Delaware River & Bay Auth*., 112 F. Supp. 2d 386, 396 (D. Del. 2000). However, indemnification claims are properly dismissed as a matter of law when the plaintiffs "seek indemnity for liabilities which they have not yet incurred." *See e.g. Vista Co. v. Columbia Pictures Indus., Inc.*, 725 F. Supp. 1286, 1291 (S.D.N.Y. 1989) (dismissing claim for indemnification of tax claims where the plaintiffs had not yet paid any judgment arising from the Tax Court decision, even though the Tax Court had ordered payment).

The Named Enrich Shareholders argue that the complaint seeks indemnification for hypothetical claims that may be brought by foreign taxing authorities because profit markups charged to certain foreign Enrich subsidiaries were allegedly not supported by intercompany pricing studies. The Named Enrich Shareholders now seek dismissal of these claims because none of the relevant taxing authorities have actually challenged the intercompany prices at issue, or succeeded

in obtaining a judgment against Numico for taxes due.

Numico in turn suggests that its claims are not hypothetical because the potential intercompany tax issues were not properly accounted for on Enrich's financial statements in the first place. Therefore, according to Numico, it does not matter that the foreign taxing authorities never challenged Enrich's intercompany pricing methodologies. For the following reasons, however, the court finds that these claims are not yet ripe for adjudication.

Numico's argument overlooks the fact that it is seeking indemnification, not a declaratory judgment. In the present case, the Indemnification Agreement makes clear that the former Enrich shareholders' indemnification obligations relate only to "losses" suffered.[2] Indeed, the complaint's prayer for relief requests that the defendants "be ordered to pay" for Numico's losses. However, Numico has not offered any facts to show that it has suffered an actual loss arising from the alleged improper intercompany pricing. It has merely alleged that foreign taxing authorities would likely challenge Enrich's intercompany prices and that Enrich should have accounted for this possibility.

The court thus concludes that, even if Numico were correct that Enrich employed improper intercompany pricing methodologies, Numico's own allegations demonstrate that, as of yet, it has suffered no losses for which it can seek indemnification.[3] Accordingly, the intercompany pricing

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[2]The Indemnification Agreement defines "losses" as "all damages, dues, penalties, fines, costs, amounts paid in settlement, liabilities (whether liquidated or accrued), obligations, Taxes, liens, losses, expenses, and fees, including court costs and reasonable attorneys' fees and expenses including, but not limited to, those arising from or relating to actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, order, decrees and rulings, including, without limitation, with respect to costs and expenses incurred in connection with the enforcement of this Agreement."

[3]The court expresses no opinion on whether Enrich did in fact employ improper intercompany pricing methodologies.

portions of Count III seeking damages in the amount of $3,676,429 must be dismissed.

C. Joinder

Finally, the Named Enrich Shareholders seek dismissal of the complaint in its entirety for failure to join all of the former Enrich shareholders. In particular, they express concern at the omission of three former Enrich shareholders who are now senior officers of Unicity Network, a Numico affiliate. According to the Named Enrich Shareholders, each of these three former shareholders owned a significant percentage of Enrich and would together be liable for more than 10.5% of any judgment in Numico's favor. In response, Numico asserts that liability under the Indemnification Agreement is joint and several; therefore it need not name all of the shareholders for a just adjudication of the matter. The court must disagree with Numico.

Federal Rule of Civil Procedure 19 governs joinder of necessary and indispensable parties. Rule 19(a) concerns whether a party is a necessary party who should be joined in the action. If the answer to that question is yes, then the court must order that the party be joined if feasible. *See Bank of America v . Hotel Rittenhouse Assoc.*, 844 F.2d 1050, 1053 (3d Cir. 1988). For the following reasons, the court concludes that the unnamed former Enrich shareholders are necessary parties who can be feasibly joined.

Under the Indemnification Agreement, the former Enrich shareholders agreed to indemnify Numico jointly and severally only "up to their respective Allocable Portion of the Holdback and Allocable Portion of the Remainder [.]" Indemnification Agreement at § 4(b). However, Numico has not alleged a specific amount of damages sought in this action. Thus, it is not clear that a judgment could be satisfied by recourse only to the respective Allocable Portions assigned to the Named Enrich Shareholders. Furthermore, Numico has not suggested that joining the unnamed

former shareholders would act to deprive the court of its diversity jurisdiction over this case. Nor has it suggested that it would be otherwise impossible to join the remaining shareholders. Thus, the court concludes that joinder of the remaining shareholders is both necessary and feasible under Federal Rule of Civil Procedure 19(a).

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The Defendants' Motion to Dismiss (D.I. 53) is GRANTED in part and DENIED in part.
2. The Plaintiffs shall join the remaining former Enrich shareholders within thirty (30) days of the date of this order.

Dated: March 31, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE