

11-1858-cv
Adelpia Recovery Trust v. Goldman, Sachs & Co., et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: April 25, 2012 Decided: April 4, 2014)

Docket No. 11-1858-cv

- - - - -

ADELPHIA RECOVERY TRUST, AKA THE ADELPHIA CONTINGENT VALUE
VEHICLE,

Plaintiff-Counter-Defendant-Appellant,

ADELPHIA COMMUNICATIONS CORP., AND ITS AFFILIATED DEBTORS AND
DEBTORS IN POSSESSION, OFFICIAL COMMITTEE OF EQUITY SECURITY
HOLDERS OF ADELPHIA COMMUNICATIONS CORP., OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF ADELPHIA COMMUNICATIONS CORP.,

Plaintiffs-Counter-Defendants,

v.

GOLDMAN, SACHS & CO.,
Defendant-Appellee,

HARRIS NESBITT CORP., DEUTSCHE BANK AG, BANK OF NEW YORK COMPANY,
INC., DAI-ICHI KANGYO BANK, LTD., THE INDUSTRIAL BANK OF JAPAN,
LIMITED, IBJ WHITEHALL FUNDING 2001 TRUST, MIZUHO CORPORATE BANK,
LTD., J.P. MORGAN SECURITIES, INC., MOUNTAIN CAPITAL CLO I,
MOUNTAIN CAPITAL CLO II, UBS AG, MELLON BANK, N.A., J.P. MORGAN
SECURITIES, INC., DEUTSCHE BANK AG, J.P. MORGAN CHASE BANK, N.A.,
NATIONWIDE LIFE INSURANCE COMPANY, NATIONWIDE LIFE AND ANNUITY
INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, MARATHON
SPECIAL OPPORTUNITY MASTER FUND, LTD., SPRUGOS INVESTMENTS IV,
L.L.C., BNP PARIBAS, FIRST HAWAIIAN BANK, NON-AGENT LENDERS,
PUTNAM DIVERSIFIED INCOME TRUST, PUTNAM HIGH YIELD ADVANTAGE
FUND, PUTNAM HIGH YIELD TRUST, PUTNAM MASTER INCOME TRUST, PUTNAM
MASTER INTERMEDIATE INCOME TRUST, PUTNAM PREMIER INCOME TRUST,
PUTNAM VARIABLE TRUST-PVT DIVERSIFIED INCOME FUND, PUTNAM
VARIABLE TRUST-PVT HIGH YIELD FUND, PUTNAM FLOATING RATE INCOME
FUND, PUTNAM FUNDS TRUST-PUTNAM HIGH YIELD TRUST II, PUTNAM HIGH
YIELD FIXED INCOME FUND, PUTNAM HIGH YIELD MANAGED TRUST, PUTNAM

1 MANAGED HIGH YIELD TRUST, PUTNAM STRATEGIC INCOME FUND, TRAVELERS
2 SERIES FUND, INC.-PUTNAM, KZH HOLDING CORPORATION III, KZH
3 CYPRESS TREE-1 LLC, KZH III LLC, KZH ING-2 LLC, KZH LANGDALE
4 LLC, KZH PONDVIEW LLC, KZH SHOSHONE LLC, KZH WATERSIDE LLC, KZH
5 CNC LLC, KZH HIGHLAND-2 LLC, KZH ING-1 LLC, KZH ING-3 LLC, KZH
6 PAMCO LLC, KZH SOLEIL-2 LLC, KZH STERLING LLC, KZH RIVERSIDE LLC,
7 KZH SOLEIL LLC, MERRILL LYNCH PIERCE, FENNER & SMITH
8 INCORPORATED, MERRILL LYNCH CREDIT PRODUCTS LLC, MIZUHO GLOBAL
9 LIMITED, APEXTRIMARAN-CDO I, LTD., CARAVELLE INVESTMENT FUND,
10 L.L.C., CARAVELLE INVESTMENT FUND II, L.L.C., GOLDMAN SACHS
11 CREDIT PARTNERS, L.P., SEI INSTITUTIONAL INVESTMENTS TRUST AND
12 THE SEI INSTITUTIONAL MANAGED TRUST, FIFTH THIRD BANK, FLEET
13 NATIONAL BANK, BANK OF TOKYOMITSUBISHI TRUST COMPANY, N/K/A BANK
14 OF TOKYO-MITSUBISHI UFJ TRUST COMPANY, MITSUBISHI UFJ TRUST AND
15 BANKING CORPORATION, HALCYON FUND, L.P., EXIS HOLDING LTD., RBS
16 CITIZENS, N.A., KZH ENTITIES, DEUTSCHE BANK AG NEW YORK BRANCH,
17 HCM/Z SPECIAL OPPORTUNITIES LLC, PHOENIX-GOODWIN HIGH YIELD FUND,
18 BNY MELLON CAPITAL MARKETS, LLC, CITIGROUP GLOBAL MARKETS INC.,
19 BANK OF TOKYOMITSUBISHI TRUST COMPANY, MITSUBISHI TRUST AND
20 BANKING CORPORATION, CIBC WORLD MARKETS INC., CREDIT SUISSE, NEW
21 YORK BRANCH, SUNTRUST ROBINSON HUMPHREY, INC., CREDIT SUISSE
22 CAPITAL FUNDING, INC., THE BANK OF NEW YORK MELLON, SOCIETE
23 GENERALE, COWEN AND COMPANY, LLC, BMO CAPITAL MARKETS CORP., SUN
24 TRUST BANK, BANK OF AMERICA SECURITIES LLC,

25 Defendants,

26
27 THE FUJI BANK, LIMITED, THE TORONTO-DOMINION BANK,

28 Defendants-Consolidated-Defendants,

29
30 TORONTO DOMINION (TEXAS) LLC, THE BANK OF NOVA SCOTIA, CREDIT
31 SUISSE (USA), INC., TD SECURITIES (USA) LLC,

32 Defendants-Consolidated-Defendants-Counter-Claimants,

33
34 BANK OF AMERICA, N.A., INDOSUEZ CAPITAL FUNDING IIA, LTD., LCM I
35 LIMITED PARTNERSHIP, CALYON NEW YORK BRANCH, CALYON SECURITIES
36 (USA), INC., LIMITED AND INDOSUEZ CAPITAL FUNDING VI, LTD., BANK
37 OF NEW YORK CAPITAL MARKETS, INC., HSBC BANK USA, NATIONAL
38 ASSOCIATION, BANK OF MONTREAL, CITIBANK, N.A. AND CITICORP USA,
39 INC., BARCLAYS BANK PLC, PNC BANK, N.A., DEUTSCHE BANK TRUST
40 COMPANY AMERICAS, SOCIETE GENERALE, S.A., MERRILL LYNCH & CO.,
41 INC., MERRILL LYNCH CAPITAL CORP., BANK OF NEW YORK, ABN AMRO
42 BANK, N.V., COOPERATIVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A.,
43 "RABOBANK NEDERLAND" NEW YORK BRANCH, MORGAN STANLEY SENIOR
44 FUNDING, INC.,

45 Defendants-Counter-Claimants,

46
47 WACHOVIA BANK, NATIONAL ASSOCIATION,

48 Defendant-Bankruptcy-Movant-Counter-Claimant,

1 WACHOVIA CAPITAL MARKETS LLC, CITIGROUP GLOBAL MARKETS HOLDINGS,
2 INC., COWEN & CO., LLC, SCOTIA CAPITAL (USA), INC.,
3 Consolidated-Defendants-Counter-Claimants,

4
5 CITIGROUP FINANCIAL PRODUCTS, INC.,
6 Consolidated-Defendant,

7
8 ABN AMRO INC., DEUTSCHE BANK SECURITIES, INC., FLEET SECURITIES,
9 INC., CIBC WORLD MARKETS CORP., MORGAN STANLEY & CO.
10 INCORPORATED, BARCLAYS CAPITAL INC., SUNTRUST CAPITAL MARKETS,
11 INC., BANC OF AMERICA SECURITIES LLC., PNC CAPITAL MARKETS LLC,
12 CIBC INC., BMO CAPITAL MARKETS FINANCING, INC., SUNTRUST BANK,
13 THE ROYAL BANK OF SCOTLAND PLC,
14 Counter-Claimants.

15
16 - - - - -
17
18 B e f o r e: WINTER, WALKER, and CABRANES, Circuit Judges.

19
20 Appeal from a judgment of the United States District Court
21 for the Southern District of New York (Lawrence M. McKenna,
22 Judge) granting summary judgment to defendant-appellee Goldman,
23 Sachs & Co. and dismissing Adelpia Recovery Trust's fraudulent
24 conveyance claim brought pursuant to 11 U.S.C. § 548(a)(1)(A).
25 We affirm on grounds of judicial estoppel.

26 DAVID M. FRIEDMAN (Michael C. Harwood &
27 Howard W. Schub, on the brief),
28 Kasowitz, Benson, Torres & Friedman,
29 LLP, New York, NY, for Plaintiff-
30 Counter-Defendant-Appellant.

31
32 MELVIN A. BROSTERMAN (Claude G. Szyfer
33 and Francis C. Healy, on the brief),
34 Stroock & Stroock & Lavan LLP, New York,
35 NY, for Defendant-Appellee.

36
37 WINTER, Circuit Judge:

38
39 The Adelpia Recovery Trust, an entity created to represent
40 the non-whole creditors of a debtor corporation that is party to
41 a bankruptcy proceeding described below, appeals from Judge
42 McKenna's grant of summary judgment dismissing its fraudulent
43 conveyance claim against Goldman, Sachs & Co. In such a

1 fraudulent conveyance claim, the Trust may recover only property
2 owned by the parent-company debtor. The various schedules and
3 Chapter 11 plan, which were consummated with the agreement of
4 appellant and its predecessors in interest in the bankruptcy
5 proceeding, all treated the property transferred as owned by a
6 separate subsidiary. We, therefore, affirm on grounds of
7 judicial estoppel.

8 BACKGROUND

9 Adelphia Communications Corp. ("ACC") was the parent company
10 of some 200 holding and operating subsidiaries (collectively,
11 "Adelphia"). At its peak, Adelphia formed the fifth-largest
12 cable company in the United States. ACC, at all relevant times a
13 publicly traded company, was founded by John Rigas in 1986, and
14 members of the Rigas family held several top positions at ACC.
15 After ACC disclosed that it had several billion dollars in
16 fraudulently concealed, off-balance-sheet debt, Rigas family
17 members were forced to resign from their positions and faced
18 various civil and criminal actions. See, e.g., United States v.
19 Rigas, 490 F.3d 208 (2d Cir. 2007).

20 On June 25, 2002, ACC and its subsidiaries entered
21 bankruptcy under Chapter 11. Pursuant to an ensuing plan of
22 reorganization, substantially all assets of ACC and its
23 subsidiaries were liquidated, and all secured creditors of ACC
24 and its subsidiaries were paid in full. In addition, all
25 unsecured debt of the subsidiaries was also paid in full with
26 interest, and a portion of ACC's unsecured debt was paid. Those

1 creditors of ACC who were not paid in full received an interest
2 in any remaining assets that appellant can recover.

3 In July 2003, appellant's predecessor in interest filed suit
4 against over 400 lenders, investment banks, and other financial
5 institutions, seeking damages for their alleged participation in
6 the Rigas family fraud. This action included the present action
7 against Goldman, Sachs & Co. ("Goldman").¹

8 Appellant's action against Goldman alleges a fraudulent
9 conveyance under 11 U.S.C. §§ 548(a)(1)(A) and 550(a). It arose
10 out of a 1999 multi-million margin loan that Goldman had extended
11 to Highland Holdings II LLP ("Highland"), an entity owned by the
12 Rigas family (a Rigas family entity, or "RFE") unconnected to
13 Adelpia. The loan, which was secured by ACC stock owned by
14 Highland, was allegedly used by the Rigases to purchase
15 additional ACC stock and thereby to maintain their control over
16 Adelpia. As ACC's stock price decreased following the
17 disclosure of the fraudulent concealment of debt in 2002, Goldman
18 issued several margin calls to Highland. The complaint alleged
19 that the Rigases caused ACC to make cash payments of \$63 million
20 to cover these margin calls.

¹ On June 17, 2008, the claims asserted on behalf of ACC subsidiary debtors, who had already been paid in full, were dismissed for lack of standing. Adelpia Recovery Trust v. Bank of Am., N.A., 390 B.R. 80, 97 (S.D.N.Y. 2008). The remaining claims were ultimately settled or dismissed against all defendants other than Goldman, Sachs & Co. Although Goldman had also moved for dismissal of the claim against it, the district court allowed the claim to continue to summary judgment to determine whether the source of the payments to Goldman was ACC or a subsidiary.

1 Appellant's allegations against Goldman were amended several
2 times at the suggestion of the district court. The court was
3 concerned that "[t]he Amended Complaint does not identify which
4 fraudulent conveyances came from ACC and which came from the
5 [subsidiaries]. This omission is significant because [appellant]
6 lacks standing to pursue claims to recover for fraudulent
7 conveyance on behalf of the [subsidiaries]." Adelphia Recovery
8 Trust v. Bank of Am., N.A., No. 05-civ-9050, 2009 WL 1676077, at
9 *2 (S.D.N.Y. June 16, 2009). The district court, therefore,
10 directed appellant to "submit a revised version of paragraph 1359
11 of the Amended Complaint. The revised paragraph should identify
12 which payments to [Goldman] came from ACC." Id.

13 Pursuant to this order, appellant submitted a revised
14 version of the complaint that alleged, in relevant part:

15 [T]he Rigases caused ACC to commingle funds
16 in the concentration account that it
17 controlled, in the name of [a subsidiary]
18 Adelphia Cablevision LLC, from such sources
19 as customer receipts, liquidation of
20 overnight investment accounts, and transfers
21 from various subsidiary entities . . . in
22 order to satisfy these margin calls. On each
23 date identified in the following charts, the
24 Rigases caused ACC to direct that the funds
25 it had gathered in the concentration account
26 be distributed by Adelphia Cablevision LLC
27 directly to the Margin Lenders or to the RFE
28 for immediate payment over to the Margin
29 Lenders.

30
31 Rev. Second Am. Compl. ¶ 1359.

32 It appears from this allegation and the record that the
33 pertinent payments were made either: (i) directly to Goldman

1 from a particular account (the "Concentration Account"), which
2 contained most of the funds in the cash management system through
3 which the collective cash of ACC and its subsidiaries was
4 managed; or (ii) indirectly from the Concentration Account
5 through an RFE and then to Goldman. Appellant seeks in this
6 action to recover \$63 million.

7 In the district court, and here, appellant faced the problem
8 that the payments to Goldman were made in the name of the
9 subsidiary, Adelpia Cablevision LLC, that held the Concentration
10 Account and that has paid all its scheduled creditors, which did
11 not include ACC, in full. Accordingly, appellant lacked standing
12 to sue the subsidiary. It therefore argued, based on the amended
13 allegation quoted above, that ACC was the real owner of, and
14 payor from, the Concentration Account. Adelpia Recovery Trust
15 v. Bank of Am., N.A., No. 05-cv-9050, 2011 WL 1419617 at *2
16 (S.D.N.Y. Apr. 7, 2011). The district court disagreed and
17 granted Goldman's motion for summary judgment. Id. The court
18 stated, "it is admitted by [appellant's] own revised pleading
19 that the margin loan payments were not made by ACC but by
20 Adelpia Cablevision LLC, an ACC subsidiary on whose behalf
21 [appellant] does not have standing to sue." Id.

22 This appeal followed.

23 DISCUSSION

24 We review de novo whether Goldman was entitled to summary
25 judgment as a matter of law. See, e.g., Miller v. Wolpoff &

1 Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003); Mario v. P&C
2 Food Mkts., Inc., 313 F.3d 758, 763 (2d Cir. 2002).

3 The sole issue is whether the amended complaint states a
4 valid claim of a fraudulent conveyance under 11 U.S.C.
5 §§ 548(a)(1)(A) and 550(a). Section 548(a)(1)(A) provides, in
6 relevant part:

7 The trustee may avoid any transfer . . . of
8 an interest of the debtor in property . . .
9 that was made or incurred on or within 2
10 years before the date of the filing of the
11 [bankruptcy] petition, if the debtor
12 voluntarily or involuntarily . . . made such
13 transfer . . . with actual intent to hinder,
14 delay, or defraud any entity to which the
15 debtor was or became, on or after the date
16 that such transfer was made[,] . . .
17 indebted.

18
19 11 U.S.C. § 548(a)(1)(A). The avoidance power thus applies only
20 to "transfers of property of the debtor," Begier v. IRS, 496 U.S.
21 53, 58 (1990), which includes "all legal or equitable interests
22 of the debtor in property as of the commencement of the case," 11
23 U.S.C. § 541(a)(1). Whether the margin loan payments to Goldman
24 were transfers of the property of ACC, or should be deemed to be
25 so, is the issue on appeal.

26 Appellant argues that we should follow decisions of the
27 Fifth and Tenth Circuits, Matter of Southmark Corp., 49 F.3d 1111
28 (5th Cir. 1995) and In re Amdura Corp., 75 F.3d 1447 (10th Cir.
29 1996), to determine whether ACC was the true owner of the
30 commingled Concentration Account. Together, these cases are said
31 to support a principle of attributing ownership of funds
32 aggregated in a communal account to a parent when the parent

1 exercises complete dominion over the funds, and has all legally
2 cognizable indicia of ownership. In Southmark, the court
3 determined that because Southmark owned and controlled the cash
4 management account, the subsidiary's settlement payment from that
5 account to its former president and director could be avoided by
6 Southmark because the funds were part of, and under complete
7 control by, Southmark's estate. 49 F.3d at 1117. And in Amdura,
8 the court held that funds in a commingled cash management account
9 belonged to the parent Amdura, even though subsidiaries had
10 contributed to the account, because Amdura was listed as the
11 owner and "possessed all other legally cognizable indicia of
12 ownership." 75 F.3d at 1451.

13 However, neither decision was rendered in a legal context
14 similar to the one before us or involved application of the
15 judicial estoppel doctrine. Throughout the reorganization
16 proceedings here, the Concentration Account was listed as an
17 asset only of two successive ACC subsidiaries, not the property
18 of ACC. The theory that the Concentration Account was actually
19 the property of ACC appeared for the first time late in the
20 present litigation, as described above, and well after
21 consummation of the plan of reorganization.

22 Appellant's (or its predecessors' in interest) position in
23 the bankruptcy proceedings regarding ownership of the account is

1 inconsistent with the claim it makes on appeal.² Given the
2 importance to bankruptcy proceedings of determining with finality
3 a debtor's ownership of particular assets, we hold that
4 appellants are estopped from pursuing a claim that would
5 reattribute asset ownership based on a determination of asset
6 ownership among the various entities agreed to by the pertinent
7 parties, after a plan of reorganization has been confirmed and
8 substantially consummated.

9 a) Principles of Judicial Estoppel

10 In New Hampshire v. Maine, the Supreme Court made clear that
11 the exact criteria for invoking judicial estoppel will vary based
12 on "specific factual contexts," and that "courts have uniformly
13 recognized that its purpose is to protect the integrity of the
14 judicial process by prohibiting parties from deliberately
15 changing positions according to the exigencies of the moment."
16 532 U.S. 742, 749-51 (2001) (internal citations and quotation
17 marks omitted). New Hampshire explains that,

18 Courts have observed that the circumstances
19 under which judicial estoppel may
20 appropriately be invoked are probably not

² Attribution of the Concentration Account to ACC required an explicit claim of ownership by ACC in the bankruptcy proceeding. First, bank statements listed the account holder's Taxpayer ID Number as that corresponding to the ACC subsidiary National Cable Acquisition Associates. Second, within Adelphia the Concentration Account was referred to as the Adelphia Cablevision (an ACC subsidiary) account, and Adelphia Cablevision was the entity that made and received payments involved with the Account. Finally, any of ACC, its subsidiaries, or RFEs could direct that money be paid from the Account on their behalf by wire or check regardless of how much they had contributed to the account, and if at any time the payments on behalf of these entities exceeded the entity's contribution to the Account, an intercompany payable to Adelphia Cablevision by those entities was created.

1 reducible to any general formulation of
2 principle. Nevertheless, several factors
3 typically inform the decision whether to
4 apply the doctrine in a particular case:
5 First, a party's later position must be
6 clearly inconsistent with its earlier
7 position. Second, courts regularly inquire
8 whether the party has succeeded in persuading
9 a court to accept that party's earlier
10 position, so that judicial acceptance of an
11 inconsistent position in a later proceeding
12 would create the perception that either the
13 first or the second court was misled. . . . A
14 third consideration is whether the party
15 seeking to assert an inconsistent position
16 would derive an unfair advantage or impose an
17 unfair detriment on the opposing party if not
18 estopped. In enumerating these factors, we do
19 not establish inflexible prerequisites or an
20 exhaustive formula for determining the
21 applicability of judicial estoppel.
22

23 Id. at 750-51. (internal citations and quotation marks omitted).

24 Although we have recognized that "[t]ypically" the application of
25 judicial estoppel requires showing unfair advantage against the
26 party seeking estoppel, DeRosa v. Nat'l Envelope Corp., 595 F.3d
27 99, 103 (2d Cir. 2010) (requiring a party to show a clearly
28 inconsistent position, adoption of that position by a court in an
29 earlier proceeding, and unfair advantage against the party
30 seeking estoppel in the ADA context), we have not required this
31 element in all circumstances. See Maharaj v. BankAmerica Corp.,
32 128 F.3d 94, 98 (2d Cir. 1997) (not requiring the element of
33 unfair advantage); Mitchell v. Washingtonville Cent. Sch. Dist.,
34 190 F.3d 1, 6 (2d Cir. 1999) (same). This is consistent with New
35 Hampshire's admonishment that the application of the judicial
36 estoppel doctrine depends heavily on the "specific factual
37 context[]" before the court. 531 U.S. at 751. We do note,

1 though, that every case emphasizes that “[b]ecause the doctrine
2 is primarily concerned with protecting the judicial process,
3 relief is granted only when the risk of inconsistent results with
4 its impact on judicial integrity is certain.” Republic of Ecuador
5 v. Chevron Corp., 638 F.3d 384, 397 (2d Cir. 2011) (internal
6 quotation marks omitted).

7 Our holding in this regard is shaped by the context of a
8 complicated bankruptcy proceeding involving 250 related,
9 insolvent entities, and the risk to judicial integrity if we were
10 to allow a party, after the consummation of a bankruptcy, to take
11 a position that unravels key decisions in the proceedings. We
12 first turn to a description of the legal mechanics of such a
13 proceeding.

14 b) The Bankruptcy Context

15 Following a filing for Chapter 11 bankruptcy reorganization,
16 the debtor must file “a list of creditors[,], a schedule of assets
17 and liabilities[,], a schedule of current income and current
18 expenditures[, and] a statement of the debtor’s financial
19 affairs.” 11 U.S.C. § 521(a)(1). The debtor is given a 120-day
20 exclusive period in which to submit a plan of reorganization, 11
21 U.S.C. § 1121(b), and a disclosure statement containing “adequate
22 information” to allow interested parties to evaluate that plan.
23 11. U.S.C. § 1125(a)-(b). This plan includes items like complete
24 asset schedules. See Sure-Snap Corp. v. State St. Bank & Trust
25 Co., 948 F.2d 869, 873 (2d Cir. 1991); see also Chartschlaa v.
26 Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008) (The

1 bankruptcy estate includes "all legal or equitable interests of
2 the debtor in property as of the commencement of the case" and
3 "[i]t would be hard to imagine language that would be more
4 encompassing than this broad definition." (internal citations and
5 quotation marks omitted)).

6 The debtor is given 180 days, extendable up to 20 months by
7 the court, from filing for Chapter 11 relief in which to obtain
8 the approval of "each class of claims or interests that is
9 impaired under the plan." 11 U.S.C. § 1121(c)-(d). If the debtor
10 fails to file a plan or the debtor's exclusive filing period
11 expires without acceptance of a proposed plan by the parties in
12 interest, any party in interest can file a competing plan and
13 seek approval by the parties in interest. 11 U.S.C. § 1121(c).
14 Both the debtor's plan and any competing plan must meet various
15 mandatory provisions and may meet various discretionary
16 provisions. 11 U.S.C. §§ 1122, 1123(a), (b). Foremost among the
17 mandatory requirements is that the plan designate classes of
18 claims and classes of interests and specify how these classes
19 will be treated under the plan. 11 U.S.C. §§ 1122, 1123(a).

20 Once a conforming plan has been proposed, parties in
21 interest can vote to approve it. Following approval by at least
22 one class of impaired non-insider claims -- claims that will not
23 be paid completely or will have some other right altered under
24 the plan -- the court can confirm the plan and bind all creditors
25 if the plan is feasible, was proposed in good faith, and is in
26 compliance with the Bankruptcy Code. 11 U.S.C. § 1129(a)(10),

1 (b); Fed. R. Bankr. P. 3020(b)(2). Once the plan is confirmed,
2 the debtor is discharged from any prepetition debts, subject to
3 specific exceptions not relevant here, as long as the confirmed
4 bankruptcy plan is followed. 11 U.S.C. §§ 1141(d)(1), 523.

5 c) Application of Judicial Estoppel

6 As the recitation of bankruptcy procedures and time frames
7 makes clear, debtors and creditors have ample periods of time
8 within which to finalize asset ownership schedules and fashion a
9 plan dependent upon those schedules.

10 In the present case, ACC filed for bankruptcy on June 25,
11 2002; the ultimately-confirmed plan was proposed on October 16,
12 2006; and the plan was confirmed on January 5, 2007, leaving over
13 four and a half years to sort out whether ACC or a subsidiary
14 owned the Concentration Account assets. At no time during these
15 proceedings did ACC or any party attribute ownership of the
16 Concentration Account assets to ACC. At the time of bankruptcy
17 filing and again in February 2004, the ACC subsidiary ACC
18 Operations, Inc. identified the Concentration Account as its
19 property; ACC did not. Amendments to the schedules of
20 liabilities in January and May 2005 listed the ACC subsidiary
21 Adelphia Cablevision as the owner of the Account in concluding
22 that "intercompany transfers between a Debtor on the one hand,
23 and Adelphia Cablevision [as owner of the Concentration Account]
24 on the other hand, have been netted in the Intercompany Schedule,
25 creating either a net payable or receivable intercompany balance
26 between each such Debtor and Adelphia Cablevision." ACC never

1 claimed the Account as one of its assets until such a claim of
2 ownership was asserted in the present proceeding in 2009. Nor
3 did any other party assert such a claim or seek a substantive
4 consolidation of ACC and Adelphia Cablevision's bankruptcies, as
5 permitted in bankruptcy proceedings to remedy circumstances where
6 formally separate entities commingle and subject their collective
7 assets to single control. See In re Augie/Restivo Baking Co.,
8 860 F.2d 515, 518-19 (2d Cir. 1988).

9 Further, the bankruptcy plan undeniably was substantially
10 consummated as early as 2007. In re Adelphia Comm'cns Corp., 367
11 B.R. 84, 94 (S.D.N.Y. 2007). Substantial consummation, as
12 defined in 11 U.S.C. § 1101(2), requires the "transfer of all or
13 substantially all of the property" in the plan, "assumption by
14 the debtor . . . of all or substantially all of the property
15 dealt with by the plan," and "commencement of distribution under
16 the plan." Over \$6 billion in cash, \$117 million in tradeable
17 Time Warner shares, and \$9.5 billion in tradeable Adelphia
18 Contingent Value Vehicle shares (shares set up as an interest in
19 Adelphia recoveries against third party lenders and accountants)
20 were distributed to claimholders as of early March 2007, just
21 after confirmation of the plan. Since then, substantially all
22 Adelphia's assets have been liquidated, returning approximately
23 \$18 billion to claimholders.

24 In the bankruptcy context, whether a party's position with
25 regard to the ownership of assets is inconsistent with its later
26 claims is largely informed by the bankruptcy court's treatment of

1 those claims. See Galin v. United States, No. 08-cv-2508, 2008
2 WL 5378387, at *10 (E.D.N.Y. Dec. 23, 2008) ("adoption" in
3 judicial estoppel "is usually fulfilled . . . when the bankruptcy
4 court confirms a plan pursuant to which creditors release their
5 claims against the debtor" (quoting Negron v. Weiss, No. 06-cv-
6 1288, 2006 WL 2792769, at *3 (E.D.N.Y. Sept. 27, 2006))).
7 Determination of the ownership of assets is at the core of the
8 bankruptcy process, and particularly the creation of a bankruptcy
9 reorganization plan, which involves "a schedule of all [the
10 debtors'] liquid assets and liabilities," and thereafter
11 operates, with full preclusive effect, to "bind its debtors and
12 creditors as to all the plan's provisions, and all related,
13 property or non-property based claims which could have been
14 litigated in the same cause of action." Sure-Snap Corp., 948
15 F.2d at 873 (citing 11 U.S.C. §§ 521(a)(1), 1141(a)).

16 It is therefore crucial, both for the sake of finality and
17 the needs of debtors and creditors, that claims to ownership of
18 various assets be determined in the bankruptcy proceedings.
19 Particularly when, as here, the assets in question were claimed
20 by other parties during the bankruptcy proceeding without
21 objection, a debtor's subsequent claim to those assets in a
22 different proceeding must be seen as inconsistent with its prior
23 silence.³ Cf. Chartschlaa, 538 F.3d at 123 ("The Bankruptcy Code

³ A party may be bound by the position taken by its predecessors in interest in prior proceedings. See, e.g., Secured Equities Invs., Inc. v. McFarland, 753 N.Y.S.2d 264, 264 (4th Dep't 2002)).

1 is premised on full and complete disclosure of the debtor's
2 finances."). Any other holding would encourage sharp practices,
3 involving strategic denials or affirmations of asset ownership
4 timed to the legal exigencies of the moment, precisely what the
5 doctrine is intended to prevent.

6 The bankruptcy court's treatment of the asset schedules in
7 the present matter underlies their importance and the need for
8 finality. In order for the reorganization to proceed, the
9 Adelpia entities underwent a massive restatement of their
10 accounting records, which sought to provide separate, audited
11 financials for each insolvent entity. In re Adelpia, 368 B.R. at
12 150-51. The allocation of assets to the various entities was of
13 central importance to this process. One of the foremost
14 difficulties the bankruptcy court encountered was the issue of
15 intercompany transfers between the various entities controlled by
16 the Rigas family. See id. at 152. The resolution of this problem
17 depended on the parties' adoption of the so-called "Bank of
18 Adelpia Paradigm,"⁴ which tracked intercompany transfers through
19 a single RFE subsidiary that controlled the main account:
20 Adelpia Cablevision. Id. at 151-53. Adelpia Cablevision was
21 listed as the owner of the Concentration Account in both the

⁴ "[I]ntercompany transactions (e.g., cash receipts, disbursements, acquisition accounting and cost allocations) were deemed to have been made by or to a single entity, Adelpia Cablevision, LLC (the 'Bank of Adelpia'). This methodology, often referred to as the 'Bank of Adelpia Paradigm,' aggregated intercompany transaction balances consistent with the actual flow of funds within the Debtor's cash management system." In re Adelpia, 368 B.R. at 151.

1 January and May amendments to the debtors' schedules of assets
2 and liabilities, and neither ACC nor appellant's predecessors in
3 interest contested that determination.

4 The asset schedules thus played a key role in both the
5 bankruptcy court's supervision of the process and in the parties'
6 understanding of the plan. As the district court noted in its
7 discussion of substantive consolidation, such relief was "highly
8 unlikely" because "the Debtors have issued restated financial
9 statements and filed the May 2005 Schedules, thus evidencing an
10 ability to generally determine the assets and liabilities of each
11 Debtor." Id. at 219 (discussing In re Augie/Restivo, 860 F.2d at
12 519) (internal quotation marks omitted). The Bank of Adelpia
13 paradigm, which included Adelpia Cablevision's ownership of the
14 account in the asset schedules, was the cornerstone of the
15 bankruptcy plan, and without it the entire process would have
16 been at risk of unraveling. We, therefore, decline to issue a
17 ruling inconsistent with the factual underpinnings of this duly
18 confirmed and substantially consummated bankruptcy plan.

19 A different ruling would threaten the integrity of the
20 bankruptcy process by encouraging parties to alter their
21 positions as to ownership of assets as they deem their litigation
22 needs to change, leaving courts to unravel previously closed
23 proceedings. Doing so would allow parties an opportunity to
24 "play[] fast and loose" with the requirements of the bankruptcy
25 process and inject an unacceptable level of uncertainty into its
26 results -- exactly the result that the doctrine of judicial

1 estoppel is intended to avoid. Wight v. BankAmerica Corp., 219
2 F.3d 79, 89 (2d Cir. 2000); accord In re Adelpia Recovery Trust,
3 634 F.3d at 696 (integrity of judicial process threatened by
4 parties taking a short term position that risks being
5 inconsistent with its future position, not only by "knowingly
6 [lying]").

7 In relying upon the prospective harm to the integrity of
8 bankruptcy proceedings that would result from a different ruling,
9 we do not exclude the possibility of specific harm, or unfair
10 disadvantage to, Goldman beyond the possible loss of \$63 million.
11 We simply decline to require Goldman and the courts having to
12 unravel all previous proceedings to determine what would have
13 happened had appellant or its predecessors in interest claimed
14 ownership of the Concentration Account in a timely fashion.

15 We also do not exclude the possibility that, in an unusual
16 case, the allocation of specific assets may be largely irrelevant
17 to the bankruptcy court's actions. However, given the centrality
18 of asset allocation to the integrity of the bankruptcy process,
19 see Chartschlaa, 538 F.3d at 122, particularly where multiple
20 related entities are involved, a creditor who fails to lay claim
21 to an asset in the bankruptcy court only to do so in subsequent
22 litigation must, to prevail, bear the heavy burden of showing a
23 de minimis effect on the bankruptcy proceeding.

24 CONCLUSION

25 The requirements of judicial estoppel are, therefore, met.
26 The asset schedules showing that the Concentration Account was

1 held by a subsidiary of ACC were approved by appellant's
2 predecessors in interest. The bankruptcy court adopted the asset
3 schedules and approved a plan of reorganization that treated ACC
4 separately from its subsidiaries based on those schedules.
5 Revisiting the accuracy of those schedules to permit the present
6 action to proceed would clearly threaten the integrity of
7 bankruptcy proceedings. We, therefore, hold that appellant's
8 complaint is barred by the doctrine of judicial estoppel. The
9 judgment of the district court is affirmed.

10

11