IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES R. ZAZZALI, as Trustee for the DBSI Private Actions Trust, Plaintiff, v. ALEXANDER PARTNERS, LLC, et. al. Defendants.	)	C.A. No. 12-00828 GMS

OPENING BRIEF IN SUPPORT OF [redacted]

MOTION TO DISMISS AMENDED COMPLAINT IN ITS ENTIRETY FOR FAILURE TO SUFFICIENTLY STATE CLAIMS FOR RELIEF

Dated: March 14, 2014

[redacted]

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INTRODUCTION

The Amended Complaint ("Complaint") (D.I. 436) filed by Plaintiff James R. Zazzali, as Trustee for the DBSI Private Action Trust ("Trustee") against Defendants [redacted] ("Representative Defendants") is a valiant effort to plead around the clear deficiencies of a party attempting to recover by making a claim against the "last man standing" from a clearly unfortunate loss. While this Court has previously determined that the record is clear that the Representative Defendants did not possess the ultimate responsibility of communicating each PPM's representations as the speaker, drafter and creator of the PPM's was DBSI, *see* D.I. 420, the Complaint continues to argue the Trustee's prior position, with force and clarity, but without any particularity or factual support, that the Representative Defendants had the "ultimate responsibility of communicating each PPM's representations to the Investor[.]" Complaint ¶ 38.

The Complaint neither amends the Complaint in relation to this Court's prior ruling on September 23, 2013 that all claims against the Representative Defendants under the Securities Exchange Act of 1934 ("Exchange Act") were barred by the applicable statute of repose thereunder nor dismisses the Representative Defendants from the Complaint. The amended Complaint continues to highlight the Trustee's failure to plead with any particularity and should be dismissed in its entirety. In continuing to bring the present claims against Representative Defendants, the Trustee contradicts the express order of this Court dismissing Representative Defendants from the claims under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") "with respect to all but the alleged but the alleged misrepresentations…that were made on or after June 27, 2007[,]" D.I. 420, and utterly fails to put Representative Defendants on notice of the claims against them, much less provide the details of the serious allegations of fraud

contained in the Complaint, and accordingly should be dismissed under the Federal Rules of Civil Procedure 9(b) ("Rule 9(b)") and the PSLRA. The Complaint, by continuing to plead as the defendants as a whole, fails to put the Representative Defendants on notice of the continued claims against them without providing any additional arguments to continue to claim the very same dismissed claims under the Exchange Act. As a result, Representative Defendants request this Court to dismiss them from the action due to its prior ruling, request the Court to decline to exercise supplemental jurisdiction, and further, make motions to dismiss the state law claims for the Complaint's failure to state a claim for relief based on failures to plead with particularity, the claims are time-barred and that certain claims fail as a matter of law.

NATURE AND STAGE OF PROCEEDING

On November 10, 2008, Diversified Business Services & Investments, Inc. and ninety-three of its related entities (collectively "DBSI") filed petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Complaint, ¶ 8. *See, In re: DBSI, Inc.*, No. 08-12687 (Bankr. D. Del. filed June 9, 2009) ("Bankruptcy Court"). DBSI had, until that time, been a national real estate investment firm. Prior to its bankruptcy filing, DBSI sold interests in its real estate investments to accredited investors in unregistered securities offerings. Complaint at ¶ 101, Ex. I. Some of those sales were made through broker-dealers. *Id*. at ¶ 38.

On November 21, 2008, certain tenant in common ("TIC") investors in the DBSI Bankruptcy moved to appoint an examiner alleging that DBSI "intentionally concealed the fair market value of certain property, failed to maintain any cash reserves[,] to make guaranteed payments, and committed banking fraud and tax fraud." *In re: DBSI*, (D.I. 124). The motion for an examiner was subsequently made by the State of Idaho Department of Finance, *id*. (D.I.

1384), and subsequently joined by the respective securities regulatory agencies with the States of California, Hawaii, Montana, Washington, Colorado and several other states over concerns of potential commingling, mismanagement of reserve funds and fraud at DBSI. *See, e.g. Id*., (D.I. 1596), (D.I. 1703), (D.I. 2064), (D.I. 2241v, (D.I. 2339).

On April 3, 2009, the U. S. Trustee filed a notice of appointment of Joshua R. Hochberg as examiner (the "Examiner"), which was approved by the Bankruptcy Court on April 14, 2009. *Id*., (D.I. 3308). The Examiner issued his First Interim Report on August 3, 2009 ("Interim Report"), *id*., (D.I. 4159), and his Final Report on October 19, 2009 (D.I. 4544) ("Final Report") finding that DBSI used investor proceeds in current offerings to pay existing investors in notes offerings and for DBSI working capital shortages, commingling of funds including using accountable reserves for corporate working capital, and highly questionable accounting and valuation practices.

On August 3, 2009, based on the Examiner's findings, the U.S. Trustee filed a motion to appoint a Chapter 11 Trustee "for cause" under "including fraud, dishonesty, incompetence, or gross mismanagement…by current management[.]" 11 U.S.C. § 1104(a)(1). *Id.*, (D.I. 4170).

Based on the Examiner's findings, on October 26, 2010, a Confirmation Order confirming DBSI's Second Amended Joint Chapter 11 Plan of Liquidation ("Plan"). *Id*., ¶ 12. In pertinent part, the Plan provided for the creation of a private action trust ("PAT"), and the vesting of authority in the Trustee to prosecute claims and causes of action assigned to the PAT. *Id.*, ¶ 13. The Plan contemplated that certain holders of DBSI securities would transfer their claims and causes of action against broker-dealers to the PAT, in exchange for the Trustee's prosecution of the same and the grant of a beneficial interest in the trust. *Id*.

On June 27, 2012, based upon the alleged assignments of claims to the PAT, the Trustee initiated this suit by filing a single complaint based on almost one thousand individualized securities transactions involving hundreds of different purchasers and dozens of different private securities offerings against Representative Defendants, hundreds of other current or former registered representatives, fifteen broker-dealers, over twenty-four parent companies, minority owners or shareholders of parent companies of certain broker-dealers, over fifty individual owners or officers of certain broker-dealers and John Does 1-500. The Trustee claims that, in connection with the sale of DBSI securities to the Defendants' customers, as identified on Exhibit A of the Complaint, the Defendants allegedly committed securities fraud. This brief is in support of a motion to dismiss that Complaint.

On November 30, 2012, Representative Defendants, along with other similarly situated individuals, filed a motion to dismiss for failure to state a claim for relief in which relief can be granted, which included arguments that the securities fraud allegations contained in the Trustee's initial complaint, D.I. 1, were time-barred. (D.I. 264).

On September 25, 2013, after extensive briefing by the Trustee and Representative Defendants, this Court issued its decision on several motions to dismiss and ordered that all claims under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") "with respect to all but the alleged misrepresentations…that were made on or after June 27, 2007." (D.I. 420). Thereby, this Court dismissed Representative Defendants from the claims under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act").

SUMMARY OF ARGUMENT

1. The Complaint should be dismissed because the federal securities law causes of action are time-barred.

2. The Court should decline to exercise supplemental jurisdiction, after all claims providing a federal question are dismissed at this early stage in the case, leaving only state law claims that present genuine questions under state law.

3. The Complaint should be dismissed because the Trustee's only remaining alleged misrepresentation as to fraud and securities fraud amounts to no more than artfully pleading a private cause of action under an alleged violation of a self-regulatory organization's rules.

4. The state law claims should be dismissed because the various causes of action are time-barred under the various statutes of limitation.

5. The state law claim for breach of fiduciary duty should be dismissed because the Complaint fails to a claim for relief either as a matter of law or fails to plead the required elements required by applicable state law.

SUMMARY OF RELEVANT FACTS

The facts most relevant to the Motion to Dismiss are that each and every investment by the assignees to the Trustee forming the basis of the Complaint were made prior to June 27, 2012.[1]

Representative Defendants, in support of one of their previously filed motions to dismiss, attached as an appendix including each and every one of the subscriptions agreements or purchaser questionnaires ("Subscription Agreements") associated with such investments. *See* Exhibits A-S to the Appendix (D.I. 261).

[1] Exhibit A to the Complaint lists the names of the assignees, the investments made and the names of the registered representative (as well as other information).

The dates of investments, as provided in the Subscription Agreements, occurred before June 27, 2012 and are summarized below for each Representative Defendant:

Representative Defendant	Assignee	Investment	Investment Date
[redacted]	[redacted]	DBSI2001 A	3/7/2001
[redacted]	[redacted]	DBSI2001 A	3/12/2001
[redacted]	[redacted]	DBSI2001 B	8/27/2001
[redacted]	[redacted]	DBSI2001 B	9/18/2001
[redacted]	[redacted]	DBSI2001 C	1/2/2002
[redacted]	[redacted]	DBSI2001 C	2/25/2002
[redacted]	[redacted]	DBSI2001 C	3/20/2002
[redacted]	[redacted]	DBSI REF 9	1/22/2003
[redacted]	[redacted]	DBSI REF 9	2/22/2003
[redacted]	[redacted]	DBSI REF 9	5/30/2003
[redacted]	[redacted]	DBSI REF 9	6/4/2003
[redacted]	[redacted]	DBSI REF 9	7/3/2003
[redacted]	[redacted]	DBSI REF 9	9/17/2003
[redacted]	[redacted]	DBSI REF 9	9/26/2003
[redacted]	[redacted]	DBSI REF 9	9/26/2003
[redacted]	[redacted]	DBSI REF 9	8/25/2004
[redacted]	[redacted]	Chattahoochee Corners	7/27/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/6/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/7/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/23/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/27/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	10/19/2005
[redacted]	[redacted]	DBSI Short Term Development Fund	7/10/2006

[redacted]	DBSI 2006 Land Opportunity Fund	7/19/2006
[redacted]	DBSI Short Term Development Fund	8/22/2006
[redacted] III	DBSI 2006 Land Opportunity Fund	8/27/2006
[redacted]	DBSI 2006 Secured Notes Corporation	10/26/2006
[redacted]	DBSI Short Term Development Fund	11/22/2006
[redacted]	DBSI 2006 Secured Notes Corporation	11/29/2006
[redacted]	DBSI 2006 Secured Notes Corporation	12/6/2006
[redacted]	DBSI 2006 Secured Notes Corporation	12/13/2006
[redacted]	DBSI 2006 Secured Notes Corporation	1/11/2007
[redacted]	DBSI 2006 Secured Notes Corporation	1/19/2007
[redacted]	DBSI 2007 Land Improvement & Development Fund LLC	2/14/2007

PLAINTIFF'S ALLEGATIONS

In a convoluted argument, the primary allegations of the Trustee is that the Representative Defendants made "untrue statements of material fact and omitted to state material facts[,]," Complaint ¶ 76, by "disseminat[ing] or approv[ing] false statements" the private placement memorandums ("PPM") drafted by drafted by DBSI and its counsel, *id*. ¶¶ 1, 60, 75, 127, 183, 281, because the Representative Defendants:

- signed Subscription Agreements, *representing to DBSI not the investor assignees*, [2] that they had "reasonable grounds to believe, on the basis of information supplied by the Purchaser, and other pertinent information," that the investment was a "suitable investment for the Purchaser." *Id*. ¶ 282.
- *allegedly, but without any single piece of factual support,*[3] "executed a Dealer Agreement for each DBSI" investment sold, in which Representative Defendant agreed they "would 'make no representation with respect to the offering and/or sale of the interests not contained in the [PPM]." *Id*. ¶ 38.

As a result, the Trustee alleges that the Representative Defendants had the "ultimate responsibility of communicating each PPM's representations to the Investor[,]"*id*. ¶ 38, while this Court has previously stated, "the Complaint as well as the attached sample Dealer Agreement make clear that the actual content resided with DBSI." (D.I. 420 fn. 5). The Trustee never alleges that the Defendants contributed to the drafting of the PPMs for any offering which contained the "false and omitted statements" along with other documents drafted by DBSI, including the subscription agreements, soliciting dealer agreements and marketing "brochures with similar information."[4]

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[2] Each investor represented to DBSI that they have only relied on information contained in the PPM and the exhibits thereto and they have "relied only on the information contained in said materials and have not relied upon any representations made by any other person." *See* Exhibits A-S to the Appendix (D.I. 261); *see also* Exhibit I to the Complaint.

[3] While the Trustee alleges that both Registered Representative Defendants and Broker-Dealer Defendants executed the Soliciting Dealer Agreement, this was clearly not case as evidenced by Exhibit H to the Complaint, similar to the Court ordering clarification as to the signatories to the certification on the Subscription Agreement. (D.I. 420).

[4] The PPMs were drafted by DBSI and its counsel, including the alleged misstatements and omissions causing the alleged fraud. *See* Complaint, *Zazzali et. al. v. Hirschler Fleischer P.C. et al.*, No. 11-00614 (D. Del. filed July 11, 2011) [D.I. 1] ("Hirschler Fleischer P.C., beginning in 2004 through 2006, "drafted all of the PPMs used by connection with their 1031 exchange TIC syndications" and "was intimately involved in drafting and reviewing fraudulent and misleading

Therefore, the Trustee argues, with force and clarity*, but without any factual support*, that the Defendants did not (i) draft the PPMs, (ii) did not draft the tax opinion, (iii) did not create, oversee, or demonstrate any actual knowledge of the valuation or lending practices, (iv) did not commingle, use the accountable reserves or freely transfer investor money throughout the DBSI companies or demonstrate any actual knowledge thereof because the Defendants "knew or should have known" the statements in the PPM's were false and misleading. *See, generally*, Complaint. While the Complaint fails to follow the guidance of this Court in amending the Complaint, the apparently only factual allegation, with any particularity, surviving previous motions to dismiss would be alleged statements in the Subscription Agreement.

ARGUMENT

I. SECTION 10(B) AND RULE 10B-5 CLAIMS ARE TIME-BARRED

The Trustee's claims under Section 10(b) and Rule 10b-5 are time barred and have been dismissed by this Court pursuant to its decision issued on September 25, 2013. (D.I. 421). As discussed therein, § 10(b) claims are time-barred under 28 U.S.C. § 1658(b) and may not 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. The Third Circuit has identified § 1658(b)(1) as a statute of limitations and § 1658(b)(2) as a statute of repose. *See In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199 (3d Cir. 2007). *See, also Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (citations omitted) (tolling is "inconsistent" with a period

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language found in the PPMs and other offering materials issued by DBSI[.]"); Complaint, *Zazzali et. al. v. Foley & Lardner LLP et al.*, No. 11-00614 (D. Del. filed July 11, 2011) [D.I. 1] (Foley and Lardner LLP furthered the fiction that "[a]ccountable Reserves would be escrowed and used only for the purposes stated in the PPMs, the Insiders disseminated to Investors tax opinion letters," drafted by Foley.)

of repose because the period of repose is meant to "impose an outside limit" and "clearly to serve as a cutoff" of securities claims.").

As previously argued and documented extensively, with hundreds of pages of exhibits, as well as summarized and demonstrated with simplified tables applying the statute of limitations and statute of repose under 28 U.S.C. § 1658(b) to the alleged § 10(b) claims and demonstrated extensively, with hundreds of pages of exhibits and simplified charts applying the statute of limitations and statute of repose under 28 U.S.C. § 1658(b) to the alleged § 10(b) claims contained in the Trustee's Exhibit A to the Complaint, all claims against Representative Defendants should be dismissed with prejudice as all securities claims fall outside either the five-year statute of repose. As this Court has read thousands of pages of briefing, the Statute of Limitations Chart previously provided, (D.I. 364), is reproduced as follows for this Court's ease of reference:[5]

Name	Assignee	Investment	Investment Date
[redacted]	[redacted]	DBSI2001 A	3/7/2001
		DBSI2001 A	3/12/2001
		DBSI2001 B	8/27/2001
		DBSI2001 B	9/18/2001
		DBSI2001 C	1/2/2002
		DBSI2001 C	2/25/2002
		DBSI2001 C	3/20/2002
		DBSI REF 9	1/22/2003
		DBSI REF 9	2/22/2003
		DBSI REF 9	5/30/2003

[5] The Statute of Limitations Chart, amended to remove certain defendants not part of the present motion, is based off the Subscription Agreements of the investors associated with Representative Defendants listed on Exhibit A of the Complaint. *See* Exhibits to Opening Brief [D.I. 262]. The Court may consider such documents "that form the basis of a claim" such as the Subscription Agreements. *Lum v. Bank of Am.*, 361 F.3d 217, 232 (3d Cir. N.J. 2004) ("A document forms the basis of a claim if the document is 'integral to or explicitly relied upon in the complaint.'"); *see, also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

	[redacted]		
[redacted]	[redacted]	DBSI REF 9	6/4/2003
[redacted]	[redacted]	DBSI REF 9	7/3/2003
[redacted]	[redacted]	DBSI REF 9	9/17/2003
[redacted]	[redacted]	DBSI REF 9	9/26/2003
[redacted]	[redacted]	DBSI REF 9	9/26/2003
[redacted]	[redacted]	DBSI REF 9	8/25/2004
[redacted]	[redacted]son	Chattahoochee Corners	7/27/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/6/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/7/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/23/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	9/27/2005
[redacted]	[redacted]	DBSI 2005 Secured Notes	10/19/2005
[redacted]	[redacted]	DBSI Short Term Development Fund	7/10/2006
[redacted]	[redacted]	DBSI 2006 Land Opportunity Fund	7/19/2006
[redacted]	[redacted]	DBSI Short Term Development Fund	8/22/2006
[redacted]	[redacted]	DBSI 2006 Land Opportunity Fund	8/27/2006
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	10/26/2006
[redacted]	[redacted]	DBSI Short Term Development Fund	11/22/2006
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	11/29/2006
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	12/6/2006
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	12/13/2006
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	1/11/2007
[redacted]	[redacted]	DBSI 2006 Secured Notes Corporation	1/19/2007
[redacted]	[redacted]	DBSI 2007 Land Improvement &	2/14/2007

		Development Fund LLC	

While the above demonstrates that the Trustee's claims against Representative Defendants should have been dismissed pursuant to this Court's order issued on September 23, 2014, the Trustee has failed to dismiss Representative Defendants, continues to bring the first cause of action against Representative Defendants and other similarly situated individuals and failed to provide any particularity as the remaining allegations as to Representative Defendants as required under both Rule 9(b) and the PLRSA.

II. THE STATE LAW CLAIMS SHOULD BE DISMISSED

A. The Court Should Decline to Exercise Supplement Jurisdiction

The Court should decline to exercise supplemental jurisdiction and dismiss the state law claims because the Trustee failed to state a cognizable claim under federal law. 28 U.S.C § 1367(c)(3).

> [A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.
>
> *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

If the Court retained jurisdiction over the remaining claims, then it would be burdened with adjudicating claims subject to dozens and dozens of different state laws, because the (anonymous) investors presumably came from many, many states and so do the Representative

Defendants. In light of the early stage of the litigation and the appropriateness of dismissing the federal securities claims, the Court should dismiss the remaining state law claims.

In addition, once the federal securities law claim is dismissed, this Court will be divested of personal jurisdiction over many of the defendants. At this point, the Trustee can take advantage of the nationwide service of process provisions in the Securities Exchange Act. *See, e.g., Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002). Once that claim is dismissed, this Court will no longer have personal jurisdiction over any defendant that lacks sufficient minimum contacts with Delaware. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).[6]

While pendent jurisdiction is largely discretionary, the Third Circuit has held that, "[i]f it appears that the federal claim is subject to dismissal under F.R.Civ.P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 195-96 (3d Cir. 1976).

The instant case should be dismissed to avoid the result of "the dog would be wagged by his tail" - rewarding a party with nationwide service of process and personal jurisdiction that was clearly barred on the face of the pleading from filing a cognizable claim for relief under a clear, established statute of repose to the detriment of the Representative Parties and their due process rights. *Id*. (quoting *Kavit v. A. L. Stamm & Co*., 491 F.2d 1176, 1180 (2d Cir. 1974)). Similar to the plaintiffs in Tully, the statute of repose "was a threshold bar which precluded [him] from stating in [his] complaint a cognizable claim for relief under the federal securities law." *Tully*, 540 F.2d at 196. Thus, as opposed to the plaintiffs in *Tully*, that failed to file a motion to dismiss, the Complaint did not and "could not [withstand] a motion to dismiss for failure to state a claim

[6] For the avoidance of any doubt, defendants hereby reserve their right to file a motion to dismiss for lack of jurisdiction when the Court dismisses Count I of the Complaint.

under F.R.Civ.P. 12(b)(6)." *Id*. Therefore, this Court should decline to exercise supplemental jurisdiction.

B. The Court Should Dismiss the Claim for Common Law Fraud as Self-Regulatory Rules Do Not Create a Private Cause of Action

This Court, in its September 23, 2013 order, held that "with the exception of the Subscription Agreement certifications, the Complaint fails to allege misrepresentations with sufficient particularity." (D.I. 420). While the Trustee takes several liberties with the Court's order to clarify which defendants made the certifications in the Subscription Agreement as well as to clarify "whether a 'statement that each broker Defendant acknowledged its membership in the Financial Industry Regulatory Authority…and SIPC and its attendant obligation to comply with all federal and state laws, rules, and regulations' actually appeared in the Subscription Agreements[,]" the sole remaining basis for the Trustee's claim for fraud and securities fraud basically amounts to nothing more than a claim for violation of self-regulatory rules and further lowered the bar on particularity. The Complaint, as amended, provides in paragraph 72 that:

> ***Implicit*** with being a licensed securities broker or registered representative is an acknowledgment of the broker's or representative's obligation to comply with all state and federal securities laws and FINRA rules. Moreover, in every instance where a Subscription Agreement was executed in connection with the sale of a DBSI security, the relevant Defendant acknowledged its obligations to comply with all "state and federal securities laws and ***NASD Rule 2810***." In addition, ***with almost no exception***,[7] in the Subscription Agreement and/or Letter of Intent and/or Purchaser Questionnaire for each DBSI security, each Defendant certified that it had "reasonable grounds to believe, on the basis of information supplied by the Purchaser, and other pertinent information," that the DBSI security was a

[7] Representative Defendants assume that "with almost no exception" is an allegation against them, but such allegation leaves one to continue to question whether the Complaint satisfies the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

> "suitable investment for the Purchaser." Each Defendant thereby represented that it had undertaken a due diligence investigation sufficient to cause it to reasonably believe the investment was suitable for the Investor.
>
> Complaint at ¶ 72 (emphasis added).

The allegations, on their face, by alleging a misrepresentation as opposed to the an actual claim for violation of NASD Rule 2810 attempt to side-step the long-standing rule that private rights of action should be determined by the express language and legislative history of the statute, not inferred by the courts regardless of artful pleading. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979).[8] In the instant case, the core of the Trustee's claim is a violation of a self-regulatory organization rule – NASD Rule 2810 required[9] a securities broker, prior to recommending the purchase, sale or exchange of an in interest in a direct participation program to "have reasonable grounds to believe, on the basis of information obtained from the participant concerning his investment objectives, other investments, financial situation and needs, and any other information known by the member or associated person, that" the customer is or will be in a financial position to realize the benefits of the program, has a net worth to sustain the inherent risks, and is otherwise suitable. Based on Touche Ross, several federal courts have held that violations of self-regulatory rules do not create a cause of action. *See, e.g. Walck v. Am. Stock Exch., Inc.*, 687 F.2d 778, 788 (3d Cir. 1982) (NYSE); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679 (9th Cir. 1980) (NYSE know your customer rule); *Russo v. Bache Halsey Stuart Shields, Inc.*, 554 F. Supp. 613, 619 (N.D. Ill. 1982) (CBOE); *Thompson v. Smith Barney,*

[8] The Supreme Court provided that the "question of the existence of a statutory cause of action is, of course, one of statutory construction…SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced…. And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section." *Id*.

[9] NASD Rule 2810 has been superseded by similar provisions contained in FINRA Rule 2310.

Harris Upham & Co., Inc., 539 F. Supp. 859, 864-65 (N.D. Ga. 1982) aff'd, 709 F.2d 1413 (11th Cir. 1983) (NASD suitability rule; NYSE); *Spicer v. Chicago Bd. of Options Exch., Inc.*, 977 F.2d 255, 266 (7th Cir. 1992) (CBOE).

C. The Court Should Dismiss the Common Law Claims as Time-Barred

The Court should dismiss the claim of common law claims against each Representative Defendant as the claims are time-barred[10] under each respective state's statute of limitations:

1. [redacted]'s sales of DBSI occurred no later than November 22, 2006 in Arizona and Idaho.
    a. Arizona has a 1 year statute of limitations for consumer fraud, Ariz. Rev. Stat. § 12-541(5), a 3 year statute of limitation for fraud or mistake, Ariz. Rev. Stat. § 12-543(3), and a 2 year statute of limitations for negligence and breach of fiduciary duty, Ariz. Rev. Stat. § 12-542.
    b. Idaho has a 3 year statute of limitations for fraud, Idaho Code Ann. § 28-1-101, and a 4 year statute of limitations for breach of fiduciary duty, Idaho Code Ann. § 28-1-101.
2. [redacted]' sales of DBSI occurred no later than February 14, 2007 in Oregon, which has a 2 year statute of limitations for fraud, negligence and breach of fiduciary duty, Or. Rev. Stat. § 12.110(1).
3. [redacted] sales of DBSI occurred no later than January 19, 2007 in Virginia, which has a 2 year statute of limitations for fraud, 2 year statute of limitations for negligence, and a 1 year statute of limitations for breach of fiduciary duty, Va. Code Ann. § 8.01-243.
4. [redacted] sales of DBSI occurred no later than June 11, 2003 in California, which has a 3 year statute of limitations for fraud, Cal. Civ. Code § 338, 2 year statute of limitations for negligence, Cal. Civ. Code § 335.1, and a 4 year statute of limitations for breach of fiduciary duty, Cal. Civ. Code § 343.

[10] While certain states provide potential tolling depending on the claim, the Complaint fails to plead the necessary elements under various state laws to effectuate such a claim. However, the allegation related to one sale by Mark Pearson is not barred by the relevant statute of limitation.

5. [redacted]'s sales of DBSI occurred no later than July 27, 2005 in Wyoming, which has a 4 year statute of limitations for negligence, fraud and breach of fiduciary duty, Mont. Code Ann. § l-3-105.
6. [redacted]'s sales of DBSI occurred no later than September 27, 2005 in Washington and Minnesota.
    a. Washington has a 3 year statute of limitations for fraud, negligence and breach of fiduciary duty, Wash. Rev. Code § 4.16.080.
    b. Minnesota has a 2 year statute of limitations for negligence, Minn. Stat. § 541.07, 6 year statute of limitations for fraud, Minn. Stat. § 541.05(1), and 6 year statute of limitations for breach of fiduciary duty, Minn. Stat. § 541.05(1).
7. [redacted]'s sales of DBSI occurred no later than October 26, 2006 in Minnesota. Minnesota has a 2 year statute of limitations for negligence, Minn. Stat. § 541.07, 6 year statute of limitations for fraud, Minn. Stat. § 541.05(1), and 6 year statute of limitations for breach of fiduciary duty, Minn. Stat. § 541.05(1).

D. The Court Should Dismiss the Common Law Claim for Fiduciary Duty as to Certain Representative Defendants and Claims

The Complaint alleges claims for breach of fiduciary duty against the Representative Defendants without satisfying the various state laws requiring the pleading of facts establishing a fiduciary relationship (e.g., one of significant trust, confidence and reliance) as well as claims in states that have either uniformly held as a matter of law that a fiduciary relationship does not exist between a securities broker and a customer, like the assignees, or a in states that have significantly limited its application or the duties thereunder.

Washington and Minnesota do not recognize a fiduciary duty between a securities broker and customer. *See Stewart v. Estate of Steiner*, 122 Wash.App. 258 (Div.1 2004) ("no fiduciary relationship" between client and broker); *Suter v. Virgil R. Lee & Son*, 51 Wn. App. 524, 528 (Div.2 1988); *Minneapolis Employees Retirement Fund v. Allison-Williams Co.*, 508 N.W.2d 805 (Ct.App.Minn. 1993)(overturned on other grounds). Virginia and Oregon do not recognize a

fiduciary relationship unless the securities broker is operating a discretionary account for the customer. *See Fey v. Walston & Co., Inc.*, 493 F.2d 1036 (7th Cir. 1974); *CFTC v. Heritage Capital Advisory Services, Ltd.*, 823 F.2d 171 (7th Cir. 1987). *Berki v. Reynolds Sec., Inc.*, 277 Or. 335, 342, 560 P.2d 282, 286 (1977). Idaho requires the demonstration of "a special confidence imposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of one reposing the confidence." *Stearns v. Williams*, 72 Idaho 276, 288, 240 P.2d 833, 840-41 (1952) (citations omitted). Only California, as applied to Representative Defendants, recognizes the fiduciary relationship generally between securities brokers and customers. *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App. 2d 690, 709 (Cal. Ct. App. 1968)

The Complaint fails to state a claim upon which relief can be granted under the applicable state law, other than California, and the claim for breach of fiduciary duty should be dismissed with prejudice as to Representative Defendants.

CONCLUSION

For the foregoing reasons, Representative Defendants respectfully request that the Court grant its motion and dismiss the Trustee's Complaint and grant any such other and further relief as this Court deems just and proper.

Dated: March 14, 2014

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