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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

JAMES R. ZAZZALI, as Trustee for the DBSI Private Actions Trust,

Plaintiff,

v.

ALEXANDER PARTNERS, LLC, et al.

Defendants.

Civil Action No: 1:14-cv-00419

MEMORANDUM IN SUPPORT OF REPRESENTATIVE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF STANDING AND SUBJECT MATTER JURISDICTION PURSUANT TO RULE 12(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

Defendants [redacted] (collectively, "Representative Defendants") submit this memorandum in support of their motion to dismiss the Amended Complaint ("Complaint") in its entirety pursuant to Rule 12(b)(1) for lack of standing.

Contrary to the assertions in Plaintiff's Amended Complaint ("Complaint"), the assignments by former customers of Representative Defendants (the "Assignors") to the DBSI Private Actions Trust ("PAT") were not "express assignments" under federal common law "without specific reference" to the securities claims and "cannot validly transfer the right to pursue those claims." *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 440 (3d Cir. 1993). Rather, the assignments were enumerated and limited by their unambiguous language to explicit causes of action and parties defined as Non-Estate Causes of Action without specifying federal securities claims as a type of action assigned therein.[1]

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,

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[1] Of note, this motion focuses on whether the securities claims were validly transferred pursuant to "express assignments" as defined by controlling federal common law compared to the [redacted] Order (defined herein). Representative Defendants, through common counsel, are aware of this court's "Order on…[redacted] Defendants' Motion to Dismiss First Amended Complaint" in a related case (Case No. 1:14-cv-00422-RJB, Dkt. 310) brought by Plaintiff ("[redacted]Order"). However, in the pleading analyzed in the Waveland Order, there was no briefing, in particular, of the meaning of an "express assignment."

Further, Representative Defendants are aware of Plaintiff's Motion to Compel and plan to respond; however, as this issue is determinative of the action, determined that filing this motion prior to responding was in the interest of judicial economy.

¶ 9. 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. Some of those sales were made through numerous broker-dealers pursuant to agreements between DBSI and the broker-dealers.

On October 26, 2010, the Bankruptcy Court issued a Confirmation Order confirming DBSI's Second Amended Joint Chapter 11 Plan of Liquidation ("Plan"). *Id*., ¶ 12. *See also* Declaration of Brett G. Evans in Support of Registered Representatives' Motion to Dismiss ("Evans Declaration"), Exhibit A, ("Plan"). 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. *See also*, Evans Declaration, Exhibit B ("PAT Agreement"). 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*. at 14.

On June 27, 2012, based upon the alleged assignments of claims to the PAT, Plaintiff, as Trustee of the PAT, initiated this suit by filing a single complaint against 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 and 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 their customers, Representative Defendants allegedly committed securities fraud.

On September 25, 2013, the Delaware District Court issued an order on various motions to dismiss for failure to state a claim. Dkt. 420. As to the federal claims, the order denied, in part, the motions to dismiss Plaintiff's § 10(b) and Rule 10(b)-5 claims based on a narrow group of

statements, and granted the motions to dismiss the Plaintiff's §20(a) claim. *Id*. It dismissed any federal claims based on a transactions which occurred before June 27, 2007 in accord with the five year statute of repose. *Id*. That Order granted the motions to dismiss Plaintiff's claims for breach of contract. *Id*. It denied the motions to dismiss the state law claims of fraud on the same limited ground on which the motions to dismiss the § 10(b) and Rule 10(b)-5 claims were denied. *Id*. The Order denied the motions to dismiss the negligence and breach of fiduciary duties claims. *Id*. The Order also directed the Plaintiff to file an amended complaint to clarify certain issues, which Plaintiff filed on February 7, 2014. Dkts. 420 and 436 (the "Complaint").

On September 25, 2014, without any motions to transfer pending in the case, the Delaware District Court issued a memorandum opinion and order that transferred the case to the U.S. District Court of Idaho. Dkt. 533.

On February 6, 2015, this Court issued an Order on Motions to Dismiss on several motions to dismiss of various moving defendants. Dkt. 604 (the "Order"). The Order, in material parts, adopted the prior Delaware District Court opinion and summarized the Complaint as follows:

> The Amended Complaint asserts that "the false and omitted statements were contained in the Subscription Agreements and/or Letter of Intent and/or Purchaser Questionnaire each investor was required to execute." *Id*. It maintains that "[i]n 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.'" *Id*. It further alleges that "[i]n addition, with almost no exception, 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 'suitable investment for the Purchaser.'" *Id*. The Amended Complaint maintains, then, that "[e]ach 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." *Id*. The Amended Complaint alleges that the representations (that the defendants would comply with all "state and federal

securities laws and NASD Rule 2819" and that they had "reasonable grounds to believe" that these were "suitable investments for the Purchaser") were false and misleading because each of the defendants either "knew or recklessly failed to know" the representations were false and misleading because they never did conduct an appropriate due diligence investigation. Dkt. 436, at 61. It maintains that the defendants "knew or recklessly failed to know that the red flags identified above made the [DBSI investments] unsuitable for any investor." *Id*.

SUMMARY OF ARGUMENT

1. PAT Election Does Not Provide for Express Assignment of Claims. Federal securities law claims cannot be transferred via general assignments. Instead, any federal securities law assignment must be "express" – it must either make a specific reference to the federal securities law claims or it must unambiguously and all-inclusively assign all legal claims.
2. Unambiguous Specified Claims Assigned in PAT Election and Plan Do Not Confer Standing to Pursue the Causes of Action Alleged in the Complaint
3. Present Action Lacks Unique Factual Circumstances to Protect Against *Blue Chip Stamps* Policy Considerations Limiting Assignment of Federal Securities Law Claims
4. Procedural Issues Arise from PAT, Plan and PAT Election that Prejudices Representative Defendants
5. Anti-Assignment Provision in Subscription Agreement and/or Purchase Agreement Bar Causes of Action for Alleged Misrepresentation or Omissions Therein

SUMMARY OF RELEVANT FACTS

The facts most relevant to this Motion to Dismiss include:

I. PAT ELECTION AND PLAN PROVIDE FOR SPECIFIC ASSIGNED CLAIMS DEFINED AS "NON-ESTATE CAUSES OF ACTION"

Assignments were accomplished by "[e]ligible investors…completing and signing" the Private Actions Trust Election. *See* Evans Declaration, Exhibit C (hereinafter, the "PAT Election"). "The ***only claims that will be assigned are those defined as Non-Estate Causes of***

Action in the Plan." *Id*. (emphasis added). All "[c]apitalized terms in [the PAT Election] are defined in the Plan and the terms of the Plan will control." *Id*. at n.1. Thus, the PAT "holds all Non-Estate Causes of Action[] assigned to that trust by creditors and equity holders of DBSI."[2] Complaint, ¶ 14.

II. NON-ESTATE CAUSES OF ACTION ARE LIMITED BY SPECIFIED TYPES OF CAUSE OF ACTION AND BY EXPLICIT PARTIES AND DO NOT REFERENCE SECURITIES CLAIMS

"Non-Estate Causes of Action" is defined in the Plan as:

> those Causes of Action which are held by a TIC Investor, or a Holder of a Note Claim, a Bond Claim, a Preferred Unit, a Sharing Unit or a Non-Preferred Unit, arising from any matter involving the Plan Debtors and Consolidated Non-Debtors against: (i) all current and former officers, directors, members, shareholders or employees of any of the Plan Debtors; (ii) all Persons or Entities that conducted transactions with any of the Plan Debtors, including, without limitation, investment bankers and lenders; and (iii) ***all Persons or Entities that provided professional services to any of the Plan Debtors, including, without limitation, all attorneys, accountants, auditors, financial advisors and other parties providing services to the Plan Debtors in connection with the public issuance of debt or equity, including, without limitation, all underwriters, due diligence providers, or securities brokers/dealers***; provided, however, Non-Estate Causes of Action shall exclude (a) contract claims against third parties, (b) claims for violations of securities laws that are currently being asserted in the class action styled Myles W. and Jannelle S. Spann Trust v. DBSI Inc., et al., Case No CV OC 0820435, Fourth Judicial District Court, Ada County, Idaho (the "Spann Action"); and (c) other claims currently being asserted in class actions relating to the Plan Debtors, if any ("Other Class Actions"). A non-exclusive list of potential defendants in the Non-Estate Causes of Action is attached to the Disclosure Statement as Schedule 11.
> Complaint, ¶ 14 n. 5. *See also*, Evans Declaration, Exhibit A, Plan at § 1.151 (emphasis added).

Specific Causes of Action are limited, relevant to this action, to the acts or activities of persons that "provided professional services…***in connection with the public issuance of debt or equity***." *Id*. (emphasis added).

Specific Parties are Limited, relevant to this action, to persons that "professional services

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[2] Complaint, ¶ 14.

to any of the ***Plan Debtors***[3]….including, without limitation, …***securities brokers/dealers***." *Id*. (emphasis added). *See* Complaint, ¶¶ 15-19 (defendants are "registered brokers" and registered representatives thereof).

Only Specific Reference to "Violations of Securities Laws" is an Exclusion: "Non-Estate Causes of Action ***shall exclude***…(b) claims for violations of securities laws that are currently being asserted in the class action styled Myles W. and Jannelle S. Spann Trust v. DBSI Inc., et al." *Id*. (emphasis added).

III. ASSIGNORS MAY RETAIN, RESCIND OR TRANSFER RIGHTS ASSIGNED UNDER PAT ELECTION AND PAT MAY FUNCTION AS EITHER ASSIGNEE OR REPRESENTATIVE

The Plan provides that "[t]o the extent that any Non-Estate Causes of Action cannot be transferred to the Private Actions Trust because of a restriction on transferability under applicable non-bankruptcy law…such Non-Estate Causes of Action shall be deemed to have been retained by the grantor, as applicable, and the Private Actions Trustee shall be deemed to have been designated as a representative of such grantor to enforce and pursue such Non-Estate Causes of Action on behalf of such grantor." *See* Plan at p. 113-14; PAT Agreement at § 1.7.

The right assigned may be reassigned or reverted back to the Assignor under certain

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[3] Plan Debtors is defined as:

> DBSI Inc., DBSI Asset Management LLC, DBSI Development Services LLC, DBSI Discovery Real Estate Services LLC, DBSI Land Development LLC, DBSI Properties Inc., DBSI Realty Inc., DBSI Securities Corporation, DBSI/Western Technologies, LLC, DCJ, Inc., FOR 1031 LLC, Spectrus Real Estate Inc., DBSI 2001A Funding Corporation, DBSI 2001B Funding Corporation, DBSI 2001C Funding Corporation, DBSI 2005 Secured Notes Corporation, DBSI 2006 Secured Notes Corporation, DBSI 2008 Notes Corporation, DBSI 2008 Development Opportunity Fund LLC, DBSI 2007 Land Improvement & Development Fund LLC, DBSI 2006 Land Opportunity Fund LLC, DBSI Guaranteed Capital Corporation, DBSI Real Estate Funding Corporation, and DBSI Short-Term Development Fund LLC.
> Plan at § 1.169.

Consolidated Non-Debtors is defined as "DBSI Redemption, DBSI Investments, Stellar and the Non-Debtor Affiliates described on Schedule 1 to the Disclosure Statement." Plan at § 1.32.

situations, such as the Plaintiff's failure to prosecute. See PAT Agreement at § 1.2 (e)-(f).

Assignors May or May Not be Purchasers of DBSI Securities as a "secondary purchaser of a Non-Estate Cause of Action may participate" in the PAT. See Plan at p. 114.

Assignors may transfer or exchange their interest. See PAT Agreement at § 2.5

IV. PAT FORMED FOR LITIGATION PURPOSES TO POTENTIALLY PREJUDICE DEFENDANTS WITH SIGNIFICANT FUNDING

PAT was funded by the former estate of DBSI in the amount of $1,000,000 and may seek additional contributions, without interest or court approval, and may seek additional financing through other channels. See PAT Agreement at § 1.6.

PAT may be amended or terms waived with approval of bankruptcy court. See PAT Agreement at § 10.1.

PAT restricts the discoverability as all communications and all documents exchanged among the PAT, the Trust Oversight Committee, and its agents and representatives shall be deemed and treated as "privileged communications, not subject to discovery, disclosure, or process seeking the same, based upon their common interests, joint litigation privileges, and joint attorney-work product protections[.]" See PAT Agreement at § 11.12.

The restrictions on privileged communications would effectively include the documents delivered and cooperation of Assignors. See PAT Agreement at § 1.2 (b)-(c).

Allegations are made on Plaintiff's personal knowledge, not based on investigation of Assignors or their knowledge. Complaint at ¶ 1.

ARGUMENT

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or

controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *See Baker v. Carr*, 369 U.S. 186, 198 (1962). "In its constitutional dimension, standing imports justiciability; whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III" of the U.S. Constitution. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In the "absence of standing, a federal court 'lacks subject matter jurisdiction over the suit.'" *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1172 (9th Cir. 2013) (citations omitted).

As Representative Defendants' Motion is a factual attack[4] on jurisdiction, the Court "court need not presume the truthfulness of the plaintiff's allegations" and "may review evidence beyond the complaint[.]" *Safe Air*, 373 F.3d at 1039 (internal citations omitted); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). A federal court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225.

I. FEDERAL LAW GOVERNS STANDING AND ASSIGNABILITY OF CLAIMS UNDER FEDERAL SECURITIES LAWS

Federal law "governs the construction of all aspects of Rule 10b-5," and federal securities laws, "such as standing to sue," *Alley v. Miramon*, 614 F.2d 1372, 1382 n. 18 (5th Cir. 1980), and "the assignability of claims under the federal securities laws." *Bluebird Partners, L.P. v.*

[4] *See, Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.").

First Fid. Bank, N.A. New Jersey, 85 F.3d 970, 973 (2d Cir. 1996).[5] As the Fifth Circuit has held, "[t]he guidepost case determining standing rules for 10b-5 actions is *Blue Chip Stamps v. Manor Drug Stores*." *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992). In *Blue Chip Stamps*, the Supreme Court "intended to tightly restrict the availability of Rule 10b-5 actions" by limiting those actions "to persons who are either purchasers or sellers." *Smith*, 977 F.2d at 950. This holding was premised on two policy considerations: (1) the danger that an expansion of potential Rule 10b-5 plaintiffs would result in "vexatious" or "nuisance" suits; and (2) the evidentiary problems created by allowing non-purchasers or non-sellers to assert Rule 10b-5 claims. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-43 (1975). Consistent with the holding and reasoning of *Blue Chip Stamps*, federal courts have held that, although Rule 10b-5 claims may be expressly assigned under certain circumstances, "those circumstances are limited by the concerns set forth in Blue Chip" and are thus "extremely rare." *Aviva Life & Annuity Co. v. Davis*, 20 F. Supp. 3d 694, 701-702 (S.D. Iowa 2014).

II. ASSIGNMENT IS NOT EXPRESS WITHOUT SPECIFIC REFERENCE TO FEDERAL SECURITIES CLAIMS AND THUS CANNOT VALIDLY TRANSFER RIGHT TO PURSUE THOSE CLAIMS

The PAT Election does not "voluntarily and expressly assign" Assignors' federal securities law claims as it is neither (i) specifically references the federal securities law claims nor (ii) provides an unambiguous and all-inclusive assignment of claims. A limited exception to the purchaser-seller standing requirements of *Blue Chip Stamps* has been recognized in two district court cases "due to unusual circumstances" for "express assignments" when "a party voluntarily and expressly assigns its securities claim to another." *Farey-Jones v. Buckingham*,

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[5] *See also In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1489 (9th Cir. 1985) ("A claim which arises under a federal statute and implicates federal policy is appropriately decided under federal law."); Waveland Opposition at 18.

132 F. Supp. 2d 92, 101 (E.D.N.Y. 2001).

The federal common law governs "the validity of the assignment of an antitrust claim" and federal securities law claims. *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir. 1993); *see also Bluebird Partners*, 85 F.3d at 973 ("federal law governs the assignability of claims under the federal securities laws."). In *Gulfstream*, the Third Circuit held:

> that any assignment of antitrust claims, as a matter of federal common law, must be an express assignment; general assignments, ***without specific reference to antitrust claims, cannot validly transfer the right to pursue those claims***.
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> 995 F.2d at 440 (emphasis added).[6]

Further, as Section 4 of the Clayton Act, 15 U.S.C. § 15, served as the model for the provision of the RICO statute authorizing private civil actions, 18 U.S.C. § 1964, courts have likewise held that RICO assignments must be "express." *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993); *see also In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 897-98 (C.D. Cal. 2012). In "[a]pplying this standard, assignments conveying 'all of' the assignor's 'causes of action, ... claims and demands of whatsoever nature,' have been held sufficient, while those that merely assign the 'rights, title and interest' in the subject of the

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[6] The Third Circuit found no express assignment of the antitrust claims were made "under the terms of that assignment, plaintiff '[sold], assign [ed], transfer[red] and set over ... all of its rights, title and interest in and to the [G–III] and the Purchase Agreement.'" *Id*. at 431, 440. The Court stated that it reached such conclusion "because many routine transfers of ownership may involve a general assignment of rights. Because of the direct purchaser rule, such transfers cannot carry with them the right to assert antitrust claims. Therefore, interpreting a general assignment to include antitrust claims would run afoul of the direct purchaser rule. This conflict would be obviated by an express assignment, which entirely eliminates any problems of split recoveries or duplicative liability." *Id.*

agreement have been held deficient." *Id.* (*citing Lerman*, 10 F.3d at 112). Thus, when an assignment is "unambiguous and all-inclusive" it may be express.[7] *See, e.g., In re Nat'l Smelting of New Jersey, Inc. Bondholders' Litig.*, 722 F. Supp. 152, 176 (D.N.J. 1989) (in dicta stating that assignment was express where "assignment from Alston & Bird *'to the extent permitted by law*, to the Settlement Class [of] ***all rights, claims and causes of action*** which [Alston & Bird] has, formerly had, or could, shall or may have which relate to the Project or the Bonds against ... Windels, Marx, Davies & Ives, James Conroy, [and] Boris Gresov.'") (emphasis in original; emphasis added).

In addition, courts "look to federal law for guidance in determining validity of the… assignment of the breach of [ERISA] fiduciary duty claims…only an express and knowing assignment of an ERISA fiduciary breach claim is valid." *Texas Life, Acc. Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co.*, 105 F.3d 210, 218 (5th Cir. 1997). The Fifth Circuit found that the plaintiff did not have standing with "no evidence in record that the [ERISA] Plan Administrators expressly and knowingly assigned the fiduciary duty breach claims." *Id.* at 218-19 (*quoting* Restatement (Second) of Contracts § 324 (1981) ("It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee.")). The Eleventh Circuit found that plaintiff's contention that they had standing to assert a claim for breach of fiduciary duty under ERISA "stretches beyond its breaking point the plain meaning of the agreement, which assigns

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[7] In *Lerman*, the Third Circuit found the language of the assignment to be "unambiguous and all-inclusive" to find an express assignment for purposes of a RICO claim because it "expressly assigned to Joyce 'all of' LOPC's 'causes of action, ...claims and demands of whatsoever nature.'" 10 F.3d at 112.

only the right to receive benefits and not the right to assert claims for breach of fiduciary duty or civil penalties. Because the agreements do not support the plaintiffs' position, they lack standing to bring claims under § 502(a)(3) and § 502(c)." *Sanctuary Surgical Ctr., Inc. v. Aetna Inc.*, 546 F. App'x 846, 852 (11th Cir. 2013).

Here, the PAT Election only "assign[ed] the 'rights, title and interest' in the subject of the agreement" without any specific reference to securities claims, rather than an "unambiguous and all-inclusive" assignment of "'all of' the assignor's 'causes of action'" – the PAT Election provides "[t]he only claims that will be assigned are those defined as Non-Estate Causes of Action in the Plan." *See* Plan, PAT Election, Statement of Relevant Facts *supra*, § II. Such Non-Estate Causes of Action are not all-inclusive and do not refer or specifically include the federal securities claims of the Assignors. Thus, the PAT Election does not constitute an "express assignment" and does not validly transfer the federal securities claims to the PAT.

III. SPECIFIC ASSIGNED CLAIMS IN PAT ELECTION ARE UNAMBIGUOUS AND DO NOT CONFER STANDING TO PURSUE CAUSES OF ACTION ALLEGED IN COMPLAINT

Even assuming the assignments was valid and express, the "[PAT Election] nowhere indicates that, by executing the assignment, [assignors] were assigning to [Plaintiff] rights to bring claims for breach of fiduciary duty[,]" violations of § 10(b) and Rule 10(b)(5) of the Securities Exchange Act of 1934, common law fraud or negligence. *See Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1292 (9th Cir. 2014)[8] (*citing Britton v. Co–op Banking Grp.*, 4 F.3d 742, 746 (9th Cir.1993)). "Assignment agreements are generally interpreted narrowly," and the scope of an assignment cannot exceed the terms of the assignment agreement itself." *Sanctuary Surgical*, 546 F. App'x 846, 851-52 (11th Cir.

[8] cert. denied sub nom. *United Healthcare of Arizona v. Spinedex Physical Therapy USA, Inc.*, 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015).

2013).

While a "valid assignment confers upon the assignee standing to sue in place of the assignor[,]" *Misic v. Bldg. Serv. Employees Health & Welfare Trust*, 789 F.2d 1374, 1378 (9th Cir. 1986), the "question of what rights and remedies pass with a given assignment depends upon the intent of the parties." *Pac. Coast Agr. Exp. Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975) (internal citations omitted). General contract principles governing interpretation of rights and obligations transferred. *See, e.g.*, *Britton*, 4 F.3d at 746;[9] *see also In re Isbell Records, Inc.*, 586 F.3d 334, 337-38 (5th Cir. 2009) (reviewing assignment under principles of contract construction to determine standing). Similarly, as the PAT Election relies on the definition and construction of the Plan, it should also be construed as a contract. *See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan…should be construed basically as a contract.").[10]

If a contract or assignment is "expressed in unambiguous language, its terms will be given their plain meaning and will be enforced as written." *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 821 (5th Cir. 2003). A contract "is ambiguous only if its meaning is susceptible to multiple interpretations. The mere fact that the parties may disagree on the meaning of a contractual provision is not enough to constitute ambiguity." *Id*. In determining

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[9] *Id*. ("Additionally, general contract principles dictate that to prove an effective assignment, the assignee must come forth with evidence that the assignor meant to assign rights and obligations under the contracts. *See generally Restatement (Second) of Contracts*, § 317(1) (1981) ("[a]n assignment of a right is a manifestation of the assignor's intention to transfer it"); *id*. at § 324 ("[i]t is essential to an assignment of a right that the [assignor] manifest an intention to transfer the right to another person").").

[10] *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 107 (3d Cir. 1986) ("It is a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter, they should be construed together and interpreted as a whole, each one contributing to the ascertainment of the true intent of the parties."

intent, courts "look to the plain language of the contract, its commercial context, and its purposes." *Id*. at 822. A "contract provision specifying such is evidence of such an intent, of course." *Britton,* 4 F.3d at 746.

Here, pursuant to the unambiguous language of the PAT Election and Plan, the assigned Non-Estate Causes of Action are expressly limited, as relevant to the present litigation, to claims against defendants: (i) "in connection with the public issuance of debt or equity," and (ii) those related to "services to any of the Plan Debtors[.]" *See supra* Statement of Relevant Facts, § II.

First, each and every claim in the Complaint arises out of or "in connection with" the allegation that Representative Defendants "marketed and sold securities issued by the DBSI Funding Entities through private placements *pursuant to* ***Regulation D*** *of the Securities Act, which* ***exempts*** *certain securities offerings from the registration requirements of the Securities Act*." *See* Complaint at ¶¶ 74, 59 (emphasis added).[11] The plain language is unambiguous – Rule 506 of Regulation D provides that "[o]ffers and sales of securities by an issuer that satisfy the conditions in…this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(a)(2) of the Act." 17 C.F.R. § 230.506.[12] Second, to the extent

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[11] *Compare* Complaint at ¶ 259. Without any elaboration or claim associated therewith, Plaintiff summarily alleges that the "DBSI securities were improperly sold as exempt from the registration requirements under Rule 506 of Regulation D of the federal securities laws."

[12] The Securities and Exchange Commission ("SEC") promulgated Regulation D in 1982 in an effort to provide issuers with greater certainty as to when an offering of securities constitutes a private offering exempt from registration. *See* Securities Act Release No. 6389 (Mar. 8, 1982). Regulation D provides a nonexclusive safe harbor for issuers; thus, an issuer that fails to satisfy all of the requirements of Regulation D can still maintain that it did not engage in a "public offering" under Section 4(2). *Id*. Prior to enactment of Regulation D, the Supreme Court found that a transaction is not a "public offering" under Section 4(2) if it is made solely to offerees who (i) are able to "fend for themselves" such that they do not require the protection afforded by registration (i.e., the offeree is sophisticated) and (ii) have "access to the kind of information" that would be provided in a registration statement. *See Sec. & Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 119, 124-26 (1953).

that Plaintiff alleges any claims against Representative Defendants involving the offer or sale of securities in any DBSI Securities other than the Plan Debtors, Plaintiff lacks standing. For example, Plaintiff brings a claim against Jeffrey Augspurger for the sale of interests in DBSI Chambers & Hess LLC to James Wiegand – such sale is neither the sale of an interest in Plan Debtors nor providing service to any such Plan Debtor. *See* Complaint, Exhibit A.

Thus, by the very terms of the Plan and the PAT Election, Assignors did not express any indication to assign the causes of action in the Complaint. *See, e.g.*, *In re WellPoint*, 903 F. Supp. 2d at 898.

IV. LACK OF UNIQUE FACTUAL CIRCUMSTANCES PRESENT TO PROTECT AGAINST *BLUE CHIP STAMPS* POLICY CONSIDERATIONS

While standing requirements in Blue Chip Stamps may not prohibit the express assignment of § 10(b) claims, "[o]nly two courts have held that Rule 10b–5 claims may be expressly assigned." *Dobyns v. Trauter*, 552 F. Supp. 2d 1150, 1154 (W.D. Wash. 2008) (*citing Farey–Jones*, 132 F.Supp.2d at 100–02 (E.D.N.Y.2001); *AmeriFirst Bank v. Bomar*, 757 F.Supp. 1365, 1371 (S.D.Fla.1991)).[13] However, *Farey-Jones* and *AmeriFirst Bank* arose in unique factual circumstances not present here. As the court in *Dobyns* stated, those cases involved "very unique factual situations": (i) a "strong connection between the assignor and assignee" or (ii) an assignment pursuant to a court-approved settlement. 552 F. Supp. 2d at 1156-57; *see also Aviva Life*, 20 F. Supp. 3d at 699-702 (noting "extremely rare nature of allowable express assignment" of 10b-5 claims).

In *Farey-Jones*, a limited partnership assigned a 10b-5 claim to its general partner. 132 F.

[13] *Dobyns* also noted that "several members of an en banc panel of the Third Circuit in dicta opined that express assignments are permissible." 552 F. Supp. 2d at 1154 (citing *Lowry v. Baltimore & Ohio R.R. Co.*, 707 F.2d 721 (3d Cir.1983)).

Supp. 2d at 101. Although it acknowledged that assignment of Rule 10b-5 claims is "unusual," the court permitted the claim to proceed because (i) the plaintiff-general partner was the only remaining member of the limited partnership at the time of the suit, and (ii) the assignment raised no evidentiary issues because the plaintiff-general partner was the person to whom the alleged misrepresentation was made. *Id*. at 101-02. The court further noted that had the limited partnership (the assignor) brought the action, the general partner (the assignee) would have been the person testifying on behalf of the partnership. *Id*. at 102. Thus, the "instant express assignment of 10b-5 rights [was] unusual….from the facts alleged in the amended complaint it appears that the only person who retained an interest in Acorn at the time Acorn expressly assigned its 10b–5 rights was the general partner to whom Acorn assigned those rights." *Id*. at 101.

A similarly idiosyncratic fact pattern was at issue in *AmeriFirst Bank*. In that case, pursuant to a court-approved settlement of securities claims against the issuer, shareholders assigned to the issuer a 20% interest in their 10b-5 claims against the issuer's officers, directors and accountants not subject to the settlement. 757 F. Supp. at 1369. Under these circumstances, where the securities claims were going to be prosecuted by the shareholders in the absence of the assignment and the shareholders remained parties to the action, the *Blue Chip Stamp* policy concerns were not implicated, and the court therefore permitted the assignment. *Id*. at 1372.

Here, these unique factual circumstances are not present here – "[t]he strong connection between the assignor and assignee that was present in *Farey–Jones* [and] in *AmeriFirst* where the assignment was pursuant to a court approved settlement agreement and the plaintiff was asserting only a portion of the allegedly injured parties' claims." *Dobyns*, 552 F. Supp. 2d at 1156-57. The PAT appears to be nothing more than a litigation vehicle purporting to

assert claims of the actual purchasers of DBSI Securities who were allegedly defrauded. *See, e.g., Farey-Jones*, 132 F. Supp. 2d at 102 ("whether the assignment was for a facially valid business purpose." None of those purchasers are parties to these actions. As the Fifth Circuit recognized in *Smith v. Ayres*, Blue Chip Stamps "was intended to tightly restrict the availability of Rule 10b-5 actions." 977 F.2d at 950. Plaintiff does not allege why the actual purchasers who were supposedly defrauded are incapable of prosecuting their own claims. At least from the Complaint, the assignments in the PAT Election appear to be solely for litigation purposes. In sum, Plaintiff fails to allege any facts related to the PAT suggesting that the assignments here are so "unusual" that these cases qualify as the "extremely rare" instance where an assignment of a Rule 10b-5 claim should be permitted.

In addition, permitting these actions to proceed would raise the exact evidentiary concerns set forth in *Blue Chip Stamps*. Where these evidentiary concerns are presented, "*Blue Chip Stamps* renders such an assignment inoperable as a matter of law." *Aviva Life*, 20 F. Supp. 3d at 702. As the Court is aware, under Section 10(b) and Rule 10b-5, a plaintiff must prove reliance and damages. The PAT did not purchase the DBSI Securities, and the actual purchasers on whose behalf they seek to sue are not parties to these actions. Yet it is those non-party purchasers' reliance and damages that must be proven in these actions. As *Aviva Life* recognized, "the evidentiary issues created by . . . [an] assignee attempting to bring a § 10(b) claim are apparent." 20 F. Supp. 3d at 702. The assignee is not "involved" in the transaction at issue, and thus would "require the involvement" of the actual non-party purchaser "to prove its case." *Id.*; *see Dobyns*, 552 F. Supp. 2d at 1156 (non-party purchaser-assignor would "be a key witness in determining whether a violation of the securities laws occurred because he allegedly sold his shares based on misrepresentations and/or omissions by certain of the Defendants").

V. PROCEDURAL PROBLEMS ARISING FROM ASSIGNMENT PREJUDICES REPRESENTATIVE DEFENDANTS

Even if the assignment pursuant to the PAT Election does not rise to "the type of prohibitive evidentiary concerns raised in Blue Chip and Smith, the Assignments nevertheless raise several problematic procedural issues." *See In re: BP p.l.c. Sec. Litig.*., No. 4:10-MD-2185, 2016 WL 29300, at *5 (S.D. Tex. Jan. 4, 2016). *In re: BP*, the district court held:

> Several factors indicate that the Purchasers' assignments were not made for "ordinary business purposes." As the Supreme Court noted, such assignments raise "additional prudential questions," and here, those questions must be answered in Defendants' favor. Allowing the Purchasers (and claimants generally) to bring claims through newly-formed, affiliated shell companies allows them to avoid several of the carefully crafted rules of federal procedure and evidence. While this may not have been the subjective intent of the Purchasers here, the objective characteristics of their litigation structuring are inescapable. The Court therefore holds the Assignments inoperable for the purposes of this litigation, and dismisses the Assignee Plaintiffs' Complaints for lack of standing.
> *Id*. at * 9.

Similar to BP, Representative Defendants "argue that the [PAT's] non-party status—which the [Plaintiff and PAT] manufactured by assigning their claims to newly-formed shell companies [or trust] — will have a prejudicial effect both on [Representative] Defendants' ability to litigate the case and the Court's ability to adjudicate it." *Id*. at * 5. For example:

- Discovery will be more cumbersome as Assignors are not parties to this action, Representative Defendants' right to seek discovery from Assignors may to limited to the discovery rights available against non-parties. Further, any discovery may be protected under the privilege arising under the PAT. *See supra* Statement of Relevant Facts, § IV.
- Pursuant to the terms of the PAT and Plan, the actual Assignors may change based on the provisions therein, including that the Plaintiff may be representing Assignors not as an Assignee but as a Representative, which violative of the policy considerations of *Blue*

Chip Stamps. *See supra* Statement of Relevant Facts, § IV.

- Operative provisions of the PAT are prejudicial to Representative Defendants based on formation and lack of business purpose of formation, the ability to properly defend against only the actual investors in which such Representative Defendants actually are alleged to have offered or sold DBSI Securities and the funding inequalities of the PAT.
- The terms and actual term of the PAT are subject to amendment and/or waiver and may be liquidated and/or dissolved prior to conclusion of the action. *See supra* Statement of Relevant Facts, § IV.

PAT and Plaintiff stand in stark contrast to two cases that have upheld express assigned and Plaintiff has not identified any unique circumstances justifying assignment, the basis for any prejudicial effect on Representative Defendants or even why the claims were assigned.

VI. ALLEGED MISREPRESENTATIONS OR OMISSIONS ARISE IN OR UNDER SUBSCRIPTION AGREEMENTS AND ARE BARRED BY ANTI-ASSIGNMENT PROVISION

Here, the alleged misrepresentations and omissions arise in or under the Subscription Agreements and/or Purchase Agreements and are barred by the anti-assignment provisions therein. See Complaint at ¶¶ 41-42. In the Subscription Agreement, each Assignor agreed that he "may not not transfer or assign this Agreement, or any Interest herein, and any purported transfer shall be void[.]" *See* Exhibit G to the Complaint.[14] Thus, the assignments are void. "As a general rule, all contracts are assignable unless an assignment is forbidden by statute or by the terms of the contract itself." *Panhandle Lumber Co. v. Mackay*, 21 F.2d 916, 917 (9th Cir. 1927). *See,*

[14] Similarly, in the Purchase Agreement, each Assignor provided that he "not assign its rights under this Agreement except to Accommodator without first obtaining Seller's written consent, which consent may be withheld in Seller's sole and absolute discretion. No such assignment shall operate to release the assignor from the obligation to perform all obligations of Buyer hereunder." *See* Exhibit G to the Complaint.

e.g., *Physicians Multispecialty Grp. v. Health Care Plan of Horton Homes, Inc.*, 371 F.3d 1291, 1296 (11th Cir. 2004) ("unambiguous anti-assignability provision in an ERISA-governed welfare benefit plan voids any purposed assignment."). As an assignee stands in the shoes of an assignor, Plaintiff can have no more rights than the Assignor could grant.

CONCLUSION

For the foregoing reasons, Representative Defendants respectfully requests that the Court grant its motion and dismiss the Amended Complaint with prejudice for lack of standing, decline to exercise supplemental jurisdiction on any remaining state law claims and dismiss the claim in its entirety, and grant any such other and further relief as this Court deems just and proper.

DATED: May 19, 2016

[redacted]

-and-

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