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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

REPLY BRIEF 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

In the Memorandum in Opposition to Representative Defendant's Motion to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1) dated June 6, 2016 (Dkt. 872) ("Opp." or "Opposition"), Plaintiff does not dispute and therefore concedes the following arguments made in Representative Defendants' Memorandum (Dkt. 870):

1. The PAT Election does not specifically reference federal securities law claims
2. Assignments are generally interpreted narrowly with the scope thereof limited by the terms and language of the assignment itself
3. General control principles govern the interpretation of the rights and obligations transferred by assignment, including the "question of what rights and remedies pass with a given assignment depends upon the intent of the parties"
4. Unique factual circumstances are not present in the instant matter to protect against *Blue Chip Stamps* policy considerations: (i) a "strong connection between the assignor and assignee" or (ii) an assignment pursuant to a court-approved settlement.

Rather, the Opposition argues that Assignors "assigned ***all*** of their causes of action to the PAT[,]" by generally relying on: (i) three pages of irrelevant factual statements in a blatant attempt to create bias and prejudice Representative Defendants (Opp. at pp. 3-6); (ii) interpretations of the assignment unsupported by its plain language; (iii) extrinsic evidence that is inapplicable under both the parol evidence rule and the authority in which Plaintiff conceded to; (iv) arguments barred under well-established rules of contract interpretation and not "warranted by existing law;" and (v) the inapplicable doctrine of issue preclusion.[1]

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[1] This Reply will not respond to the Opposition's lack of civility. *See, e.g.*, Opp. at 7 ("***pretending*** that they have discovered new arguments…premised on ***willful distortions of the facts***…the operative documents. Looking through Defendants' smokescreen[.]"); Opp. at 8 ("purported new arguments….relies on a ***willful misreading***"). Of note, such is a clear violation of the Attorney's Responsibilities to Other Counsel to "treat all other counsel, parties and witnesses in a civil and courteous

ARGUMENT

I. THE PAT ELECTION DOES NOT PROVIDE FOR VOLUNTARY AND EXPRESS ASSIGNMENT OF FEDERAL SECURITIES CLAIMS

As previously argued, the PAT Election does not "voluntarily and expressly assign" Assignors' federal securities law claims. In order to establish a voluntary and express assignment of a federal securities law claim, the PAT Election must either:

1. Make "specific reference to" the federal securities law claims in the assignment. *See Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 440 (3d Cir. 1993); or
2. Assignment must convey "***all of***" of the assignor's "causes of action, ... claims and demands ***of whatsoever nature***.'" *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106, 112 (3d Cir. 1993) (emphasis added); *see also In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 897-98 (C.D. Cal. 2012).

See generally, Memorandum at 15-18.

A. PAT Election Does Not Specifically Reference Federal Securities Law Claims

Plaintiff does not dispute (nor cannot it) – and therefore concedes – that the PAT Election does not specifically reference federal securities law claims and thus, does not "voluntarily and expressly assign" Assignors' federal securities law claims under *Gulfstream*.

B. Assignment Does Not Convey "All Of" Assignor's Causes of Action, Claims and Demands of Whatsoever Nature; Not All-Inclusive

Plaintiff misquoted the applicable rule, and its citation in the Memorandum in arguing that "an assignment conveying 'all of' the assignor's causes of action constitutes an express assignment of securities fraud claims." Opp. at p. 8. However, the Third Circuit Court of Appeals in *Lerman* court held that an "assignment [that] refers to ***'all of' [assignor's] 'causes of action' and 'claims ... of whatsoever nature'"*** constitutes an express assignment because "[t]his language is ***unambiguous and all-inclusive***." *Lerman*, 10 F.3d 106, 112 (3d Cir. 1993).

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manner, not only in court, but also in all other written and oral communications." *See* Idaho State Bar, Standards for Civility in Professional Conduct (https://isb.idaho.gov/general/civilityguidelines.html).

Here, the PAT Election is not "all-inclusive" because it contains exceptions/exclusions to the causes of action assigned. *See* Merriam-Webster's Dictionary (defining "all-inclusive" as "including everything."); *see also* INCLUDE, Black's Law Dictionary (10th ed. 2014) (defining "include" to "contain as a part of something") (thus, "all" would modify to include "all of something"); *see also* EXPRESS, Black's Law Dictionary (10th ed. 2014) (defining "express" as "clearly and unmistakably communicated"). By the very terms of the assignment, it clearly and unambiguously "***excludes***: (a) contract claims against third parties, (b) claims for violations of securities laws that are currently being asserted in the class action … (the "Spann Action"); and (c) other claims currently being asserted in class actions relating to the Plan Debtors, if any[.]"[2] *See* Opp. at pp. 9-10; *see also* Memorandum, Statement of Relevant Facts, § II. Further, the PAT Election is limited to "only claims….defined as Non-Estate Causes of Action in the Plan" and thus, arguably, one "that merely assign the 'rights, title and interest' in the subject of the agreement [that] have been held deficient." *See In re WellPoint*, 903 F. Supp. 2d at 898.

II. LANGUAGE OF ASSIGNMENT ITSELF DETERMINES INTENT; DEFICIENT ASSIGNMENT NOT CURED BY RELIANCE ON EXTRINSIC EVIDENCE

Plaintiff does not dispute – and therefore concedes – that "[a]ssignment agreements are

[2] The Bankruptcy Court, in ruling on an interpleader action for D&O Insurance proceeds, determined such actions to be "related" for purposes of notice. *See In re DBSI, Inc.*, No. 08-12687 PJW, 2011 WL 3022177, at *5 (Bankr. D. Del. July 22, 2011). The specific exclusions demonstrate not only that the assignment was not "all-inclusive," but that due to the commonality of the allegations in the Spann Action, an express assignment would clearly have to reference the specific securities law claims. See, e.g., Declaration of Brett G. Evans in Support of Reply Brief, Exhibit A, Spann Action Complaint ($2 billion class action that accused DBSI (and various affiliates (Plan Debtors), including DBSI Securities Corp.), executives, and Does ("additional individuals…identities and specific evidence of the culpability await discovery") alleging securities fraud and racketeering based on claims related to this action: (i) "[a]lleged misrepresentations and omissions in [PPMs] and similar documents;" (ii) "[u]se of the Master Lease arrangement, including guaranty of performance;" and (iii) "[t]he DBSI enterprise as a "Ponzi" scheme." *See In re DBSI, Inc.*, No. 08-12687 PJW, 2011 WL 3022177, at *6 (Bankr. D. Del. July 22, 2011). Of note, while clearly excluded, Plaintiff nonetheless alleged "contract claims" in the original complaint (Dkt. 1).

generally interpreted narrowly[;]" accordingly, "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. 2013); *see also In re WellPoint*, 903 F. Supp. 2d at 896 (C.D. Cal. 2012) (*citing Eden Surgical Ctr. v. B. Braun Med., Inc.*, 420 F. App'x 696, 697 (9th Cir.2011) (providing "the Ninth Circuit has recently reiterated that courts must look to the language of an…assignment itself to determine the scope of the assigned claims."); *see generally*, Memorandum at pp. 18-20.

Nevertheless, Plaintiff relies on the summary description in the PAT Election (Opp. at pp. 11-12) and the Soliciting Dealer Agreements (Opp. at pp. 10-11) in an attempt to engraft terms to the assignment to cure its deficiency, or otherwise create a "voluntary and express" assignment. Notably, even such rule of interpretation of assignment were ignored, reliance on such information neither (i) specifically references the federal securities law claims nor (ii) provides an unambiguous and all-inclusive assignment of claims.

Here, the language of the assignment itself (in the PAT Election) clearly and unambiguously provides that all terms are defined and controlled by the Plan:

> The ***only claims that will be assigned*** are those defined as Non-Estate Causes of Action in the Plan[.]
> *See* PAT Election (emphasis added); *see also* Opp. at 12; Memorandum, Summary of Relevant Facts, § I.

> Capitalized terms in this summary are defined in the Plan and the ***terms of the Plan will control if there is any conflict between it and this summary***.
> *See* PAT Election fn. 1 (emphasis added); *see also* Memorandum, Summary of Relevant Facts, § I.

Thus, Plaintiff's reliance on the summary description in the PAT Election and Soliciting Dealer Agreements does not cure the deficient assignments.

III. WELL-ESTABLISHED RULES OF CONTRACT INTERPRETATION BAR PLAINTIFF'S ARGUMENTS (PAROL EVIDENCE RULE, SPECIFIC TRUMPS GENERAL)

Plaintiff does not dispute – and therefore concedes – that the "question of what rights and

remedies pass with a given assignment depends upon the intent of the parties"[3] with "general contract principles"[4] governing the interpretation of rights and obligations transferred. *See* Memorandum at p. 19; *see also In re Isbell Records, Inc.*, 586 F.3d 334, 337-38 (5th Cir. 2009) (reviewing assignment under principles of contract interpretation to determine standing). Further, to the extent that the assignment pursuant to the PAT Election is controlled and defined by the Plan, the Plan is also governed by general principles of contract interpretation. *See* Memorandum at p. 19.[5] As the Fifth Circuit Court of Appeals, in a case relied upon by Plaintiff (Opp. at p. 13), provided:

> A bankruptcy plan, this court has said, represents a kind of consent decree that should be interpreted as a contract. The language of these documents taken as a whole, if unambiguous, is the controlling expression of the parties' intentions. *In re Texas Commercial Energy*, 607 F.3d 153, 158 (5th Cir. 2010).[6]

Nevertheless, while barred by well-established rules of contract interpretation and not "warranted by existing law," Plaintiff argues that the Assignors "assigned ***all*** of their causes of action to the PAT[,]" by relying on: (i) the summary description in the PAT Election (Opp. at pp. 11-12); (ii) Soliciting Dealer Agreements (Opp. at pp. 10-11); and (iii) the definition of "Causes of Action." (Opp. at pp. 12-13). In addition to the following general principles of contract principles, "is the general maxim that a contract should be construed most strongly against the drafter, which in this case was the [Plaintiff]." *United States v. Seckinger*, 397 U.S. 203, 210 (1970).

A. Parol Evidence Rule Requires Court to Analyze Plan by its Language Without

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[3] *Pac. Coast Agr. Exp. Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975) (internal citations omitted).
[4] *See, e.g., Britton v. Co-op Banking Grp.*, 4 F.3d 742, 746 (9th Cir. 1993)
[5] *citing 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.").
[6] *citing Kimbell Foods, Inc. v. Republic Nat. Bank of Dallas*, 557 F.2d 491, 496 (5th Cir. 1977), *aff'd sub nom. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

Resort to Extrinsic Considerations

As the language of the Plan is unambiguous, under the parol evidence rule, "the court is 'required to analyze a contract's [i.e., the Plan's] meaning by its language without resort to extrinsic considerations.'" *In re Texas Commercial Energy*, 607 F.3d at 161 (citations omitted).[7] Here, Plaintiff does not allege that the Plan is ambiguous, but nonetheless, "asks the court to look beyond the plain meaning of the…Plan to parol evidence" in the summary description in the PAT Election and Soliciting Dealer Agreements, but the "plain language of the …Plan is sufficiently clear and unambiguous to resolve this dispute." *Id*.

First, Plaintiff argues that the Motion "relies on a willful misreading of the PAT Election Form[,]" (Opp. at p. 8) as the PAT Election, "[i]n describing the claims to be assigned to the PAT, the PAT Election Form ***explains***," the meaning of the terms of the assignment and that such "***language makes clear*** that the Investors explicitly and unequivocally assigned their securities claims to the PAT." *See* Opp. at pp. 11-12. However, as the scrivener, Plaintiff and its counsel must recognize that the PAT Election clearly and unambiguously provides that all terms are defined and controlled by the Plan. *See* PAT Election fn. 1 ("Capitalized terms in this summary are defined in the Plan and the ***terms of the Plan will control if there is any conflict between it and this summary***.") (emphasis added); *cf*. PAT Agreement at p. 1 (same); *see also* Memorandum, Summary of Relevant Facts, § I.

Second, Plaintiff argues that Representative Defendants "are persons who 'provided professional services' to a Plan Debtor… through the various broker-dealer entities that employed them and signed selling agreements with DBSI, provided professional services to DBSI Inc. and DBSI Securities Corporation, both Plan Debtors as that term is defined in the

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[7] *Id*. ("This is because the language of an agreement, unless ambiguous, represents the parties' intention.)

Plan.'" *See* Opp. at 10.[8] Such agreements provide no assistance to Plaintiff in interpreting an assignment by Assignors – as the Delaware District Court, in this case, already held "it is unclear from the Complaint whether the Soliciting Dealer Agreement or the statements therein were ever communicated to the investors." *See* Dkt. 420 (filed on September 25, 2013) at p. 13 fn. 9.

B. Specific "Non-Estate Causes of Action" Trumps General "Causes of Action"; Principle of Ejusdem Generis

The Opposition argues that the Motion "ignore[s] the Plan's definition of 'Causes of Action,'" and that when "[r]eading the definitions of 'Non-Estate Causes of Action' and 'Causes of Action' together,…it could not be clearer that the Investors assigned all of their causes of action to the PAT." See Opp at 12-13.

However, this interpretation conflicts with principles of contract interpretation, including:

- A "contract should be interpreted as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous." *Transitional Learning Cmty. at Galveston, Inc. v. U.S. Office of Pers. Mgmt.*, 220 F.3d 427, 431 (5th Cir. 2000); *see also Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 860 (Fed. Cir. 1997) ("A contract must be interpreted as a whole in a manner that gives reasonable meaning to all its parts and avoids conflicts in, or surplusage of, its provisions.").

- The "maxim of interpretation that when two provisions of a contract conflict, the specific trumps the general." Millgard Corp. v. McKee/Mays, 49 F.3d 1070, 1073 (5th Cir. 1995) (citations omitted); *see also* 11 Williston on Contracts § 32:10 (4th ed.) ("rule of *ejusdem generis*, literally meaning 'of the same kind or class,'" [which] applies when there is an enumeration or listing of specific things, followed by more general words relating to the same

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[8] Even assuming arguendo that the parol evidence rule does not apply, especially against the scrivener of such contract, the "exemplar Soliciting Dealer Agreement" attached as Exhibit F to the Amended Complaint ("alleged to be identical to those executed for all DBSI Securities that are the subject of the Amended Complaint") provides such agreement was only between the broker-dealer firm and DBSI Securities Corp, not Representative Defendants. See Exhibit F, Soliciting Dealer Agreement, § 3.9 ("You acknowledge that Interests will only be sold by properly FINRA licensed associated persons and that this Agreement does not inure to the benefit of any of your affiliates, including any affiliated investor advisor firms or individual registered investment advisors. Any such affiliates are required to have a separate Agreement with the Company.").

> subject matter, in which case the general words are interpreted as meaning things of the same kind as the specific matters to which the parties refer." 11 Williston on Contracts § 32:10 (4th ed.); *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

Thus, contrary to Plaintiff's argument, "Non-Estate Causes of Action" qualifies and/or limits the meaning of "Causes of Action" – any other reading would not only make "Non-Estate Causes of Action" surplus or meaningless, but directly contradict with the definition thereof (as such expressly excludes certain "Causes of Action").

IV. *BLUE CHIP STAMPS* CONCERNS AND PREJUDICE TO REPRESENTATIVE DEFENDANTS

Plaintiff argues that the prejudice and Blue Chip Policy concerns identified in the Motion "are based solely on conjecture and not on the facts of this case." *See* Opp. at 13. The following are just a few examples of actual discovery concerns restricting Representative Defendants' ability to propound discovery:

- Interrogatories: may only be propounded on parties. Fed. R. Civ. P. 33(a)(1).
- Request for Production of Documents and Things: may only be propounded on parties. Fed. R. Civ. P. 34(a).
- Requests for Admission: may only be propounded on parties. Fed. R. Civ. P. 36(a)(1).
- Depositions: Depositions are the only way to obtain testimony and documents from a nonparty witness (Assignors), which requires subpoena (compared to notice). Fed. R. Civ. P. 30(a)(1); 45.
  - Limited Number: no more than 10 depositions by Representative Defendants, collectively, unless stipulation or court order. Fed. R. Civ. P. 30(a)(2)(A)(i) (e.g., if the party seeking the deposition is one of several defendants, more than 10 depositions by all defendants).
  - Sanctions: only contempt citation; no authority for any other sanction (except reimbursement of expenses on a motion to compel). Fed. R. Civ. P. 37(a)(5), 45(g); cf. Fed. R. Civ. P. 37(b)(2)(A)(i)-(ii) (issue establishment and issue preclusion).
  - Expense Shifting: order to compel production "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii); see Legal Voice v. Stormans Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (requires the court "to shift a non-party's costs of compliance with a subpoena, if those costs are

significant.").

- Initial Disclosures: Plaintiff did not provide the telephone number of each Assignor. Fed. R. Civ. P. 26(a)(1); *see* Exhibit C to Opposition.

The above are similar to the procedural problems addressed by the Southern District of Texas in finding the litigation vehicle, like the PAT, lacked standing and assignments inoperable:

> *Sprint's* caveat is well-founded. With unfettered discretion to assign their claims, claimants could easily use assignments as a tool to manufacture the types of tactical advantages that Defendants attribute to the Assignee Plaintiffs here. A number of the burdens imposed by the Federal Rules of Evidence and Civil Procedure apply only to parties to litigation. A wily claimant, however, could skirt these obligations by assigning his claim to a litigation vehicle. With the litigation vehicle serving as the nominal plaintiff, the real claimant would potentially be beyond the reach of court sanctions, conventional discovery protocols, certain evidentiary rules, and other obligations that are incumbent upon parties to litigation. This type of chicanery would be detrimental to the legal process, and the Court sees no reason to permit the type of assignments that could facilitate it.
> *In re: BP p.l.c. Sec. Litig..*, No. 4:10-MD-2185, 2016 WL 29300, at *6 (S.D. Tex. Jan. 4, 2016).

Further, Plaintiff does not dispute[9] – and therefore concedes that the PAT "may be liquidated and/or dissolved prior to conclusion of the action." *See* Memorandum at p. 25; *see also* PAT Agreement, § 9.1(a) (initial term of five years already expired, with limited one year extensions pre-approval of Bankruptcy Court).[10]

Finally, Plaintiff misconstrues the "ordinary business purpose" in arguing such purpose is satisfied by the economies of scale in litigation and burden of litigation costs. *See* Opp. at 15. Here, the assignments at issue are at odds with *Sprint* requirements because they were executed solely for the purpose of the litigation in question, rather than for on-going business purposes. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 292 (2008) (acknowledging that

[9] *See* Opposition at 15 (cleverly sidestepping the issue).
[10] Of note, the Plaintiff already breached such section of the PAT Agreement by applying for an extension with the Bankruptcy Court after expiration of the sixth month period.

"additional prudential questions might perhaps arise" if an assignment was made for purposes other than "ordinary business purposes.").[11] Thus, Plaintiff fails "to articulate a business-related justification for assigning their claims to" the PAT separate and distinct from furtherance of the litigation. *In re: BP p.l.c. Sec. Litig.*., at *7.

V. ISSUE PRECLUSION NOT APPLICABLE TO MOTION TO DISMISS

Plaintiff's entire Opposition is replete with arguments that fundamentally misconstrue the inapplicable doctrine issue preclusion in an attempt to prejudice Representative Defendants. *See* Opp. at pp. 3, 5-7, 11-16. In fact, the Summary of the Argument is premised on such assumption.[12] *Cf.* Memorandum at p. 1 fn. 1 (disclosing Waveland Order, but noting that "there was no briefing, in particular, of the meaning of an 'express assignment.'"). Contrary to Plaintiff's statement's otherwise, "[i]ssue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). But, "[a] person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit." *Id*.

CONCLUSION

For the foregoing reasons and those previously provided in the Memorandum,

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[11] In *Sprint*, the assignor-payphone service providers ("PSPs") had an ongoing business relationship with the assignee-aggregators to facilitate billing, payment and debt collection to the PSPs.

[12] *See* Opp. at 3 ("This Court has already held that the Investors' assignments of their securities fraud claims to the PAT were voluntary and express, and that they did not implicate any evidentiary concerns. Defendants' arguments here merely recast arguments this Court has already denied. The only difference is that Defendants have contorted the facts and the operative documents in an attempt to suit their arguments. Plaintiff respectfully submits that the Court should not be misled. These are the same assignments this Court has already sanctioned. They include all claims held by Investors against Defendants, including securities fraud claims, and they do not raise evidentiary concerns or prejudice Defendants. Moreover, the supposed anti-assignment provisions Defendants point to have no bearing on the Investors' assignments of their causes of action.").

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: June 10, 2016

[redacted]

-and-

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2016, I electronically filed the foregoing Representative Defendants' Reply Brief in Support of the Motion to Dismiss for Lack of Standing, supporting declaration and exhibits with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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