UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ANCHORBANK, FSB, and ANCHORBANK UNITIZED FUND, on behalf of itself and all plan participants,

Plaintiffs,

vs.

CLARK HOFER,

Defendant.

Case No. 09-CV-610

The Hon. Stephen L. Crocker

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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Plaintiffs, AnchorBank, fsb and AnchorBank Unitized Fund (collectively, "AnchorBank"), by and through its attorneys, Michael Best and Friedrich LLP, submit the following Brief in Opposition to Clark Hofer's ("Hofer") Motion to Dismiss the Amended Complaint ("Complaint"). For the reasons set forth below, AnchorBank requests that this Court deny the Motion to Dismiss in its entirety.

INTRODUCTION

AnchorBank alleges in its Complaint:

- That Clark Hofer, former regional lending manager at AnchorBank in Madison, engaged in a collusive trading scheme with two co-conspirators, fellow AnchorBank employees;
- That Hofer's collusive trading scheme involved AnchorBank's unitized fund and affected AnchorBank's stock price;
- That Hofer and his co-conspirators used emails, phone calls and in person meetings to coordinate their collusive trading activity;
- That Hofer knew how the fund operated and how his schemes' massive trades affected the AnchorBank share price;
- A detailed description of the method Hofer and his co-conspirators employed to increase their ownership of units in the AnchorBank fund and thereby necessarily affected the AnchorBank stock price;
- The amount and date of each of the 36 trades subject to Hofer's scheme; and
- The share price, overall trading volumes, ownership interests, and identity of the trading member of the conspiracy for each particular trade.

The Complaint contains all this and more in page after page of detailed allegations, quotes, exhibits, and charts. Trials have been won with less evidence. Under any reading of the applicable standard requiring particularity, AnchorBank meets and exceeds it pleading obligations.

Nevertheless, Hofer has moved to dismiss the Complaint, claiming that AnchorBank has not provided enough information for Hofer to defend himself. Implicitly recognizing his motion is doomed under the actual 9(b) standard, Hofer instead creates his own much higher evidentiary pleading standard. Hofer demands copies of emails, quotes, proof and evidence, none of which is required in a complaint. But even under Hofer's imaginary standard, AnchorBank's Complaint is so thoroughly particularized that it must survive and Hofer's motion must be dismissed.

ARGUMENT

I. MOTION TO DISMISS STANDARD

A motion to dismiss under Rule 12(b)(6) should be granted *only* if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 335 U.S. 41, 48 (1957) (emphasis added); *see also* Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 570 (2007). A motion under Rule 12(b)(6) merely tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff. *Twombly*, 550 U.S. at 556-57. A complaint should never be dismissed because the court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Id*. In cases such as this, which include claims for fraud, Rule 9(b) of the Federal Rules of Civil Procedure requires a more particular standard a complaint must meet, providing that: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Contrary to what is seemingly advocated in Hofer's Motion to Dismiss, Rule 9(b) does *not* raise the pleading standard to the level required to survive a motion for summary judgment or to prevail at trial, requiring AnchorBank to actually prove all material

issues of its case; instead, AnchorBank need only set forth the particular facts of the fraud, which at this stage must be accepted as true, to survive a motion for dismissal the Complaint.

Moreover, Hofer repeatedly states throughout his Motion to Dismiss that the Complaint is vague and lacking in detail. To begin, this is *no* ground for dismissal under Rule 12(b)(6). *See In re Initial Public Offering Sec. Litig*., 241 F. Supp. 2d 281, 333 (S.D.N.Y. 2003). If Hofer truly believed that the clarity of pleadings were deficient, he should have moved to for a more definite statement under Rule 12(e) and requested that AnchorBank set forth more detail. Tellingly, he did not; the Complaint is sufficiently clear and detailed and Hofer's arguments to the contrary must be disregarded.

The Supreme Court recently articulated the appropriate standard a court must follow in deciding a motion to dismiss an action under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). First, a court must accept all factual allegations set forth in the complaint as true. *Tellabs, Inc. v. Makor Issues and Rights, Ltd,* 551 U.S. 308, 322 (2007). Second, the court must consider the complaint in its entirety; "the inquiry . . . is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* Finally, the court must conduct a comparative inquiry: "[a] complaint will survive if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324. The facts as alleged by AnchorBank more than adequately survive such a comparison.

AnchorBank's Complaint particularly states facts that support each element of AnchorBank's claims and thus withstands Hofer's Motion to Dismiss. AnchorBank has set forth detailed allegations that fulfill each and every pleading requirement under 9(b) as suggested by

the Seventh Circuit, answering the "who, what, when, where, and how" of the fraud. *Borsellino v. Goldman Sachs Group, Inc.,* 477 F.3d 502, 507 (7th Cir. 2007). The chart below illustrates how each of these questions are addressed in the Complaint.

Who?	Clark Hofer and fellow employees, Participant A and Participant B;	Complaint ¶ 19
What?	Devised a Collusive Trading Scheme, as defined in the Complaint, whereby they would jointly purchase and sell AnchorBank Unitized Fund ("AUF" or "Fund") shares to create artificially enlarged price swings and trading activity in the AUF and Anchor BanCorp Wisconsin ("ABCW") stock;	Complaint ¶¶ 20-23
When?	Beginning in September 2008 and ending in June 2009, with the dates of each and every specific purchase and sale set forth in Exhibit A of the Complaint;	Complaint ¶ 18
Where?	In the AUF, which indirectly affected the ABCW nationally-traded stock;	Complaint ¶¶ 13-18
How?	Hofer and A and B closely watched the Fund and ABCW stock, knowingly and intentionally coordinating their purchases and sales of AUF shares in such substantial amounts, which required the Fund Manager, as defined in the Complaint, to purchase or sell ABCW stock on the national market and indirectly affecting the price of this thinly-traded stock, all for the purpose of manipulating the stock prices to create illicit personal gains.	Complaint ¶ 33-34

These allegations establish the essential elements for each count in the Complaint. Because AnchorBank has met the pleading requirements articulated in Rule 9(b) and the PSLRA, Hofer's Motion to Dismiss must be denied.

II. ANCHORBANK'S CLAIMS UNDER SECTION 9(A) AND 10(B) OF THE SECURITIES AND EXCHANGE ACT OF 1934 WITHSTAND A MOTION TO DISMISS.[1]

A. AnchorBank Adequately Pleads With Particularity The Elements Of A Claim Under Section 9(a).

To allege a violation of 15 U.S.C. § 78i(a)(2), which prohibits manipulation of security prices, plaintiffs must plead that a series of transactions in a security created actual or apparent

[1] AnchorBank's argument headings parallel Hofer's exactly to aid the Court in its analysis and to demonstrate AnchorBank's refutation of each of Hofer's arguments.

trading in that security or raised or depressed the price of that security; that transactions were carried out with scienter, for purpose of inducing securities sales or purchases by others; that transactions were relied upon by plaintiffs; and that transactions affected plaintiffs' purchase or selling price. *See, e.g., Ray v. Lehman Bros. Kuhn Loeb, Inc.,* 624 F. Supp. 16, 19 (N.D. Ga. 1984).

AnchorBank has properly alleged each of these elements. At paragraphs 57-63 of the Complaint, AnchorBank sets forth the following: (1) that Hofer, acting by himself and in concert with others, deliberately engaged in a Collusive Trading Scheme, as defined in the Complaint, effecting a series of transactions in the Fund; (2) these transactions were of sufficiently high volume to indirectly cause the purchase or sale of securities traded on a national exchange by the Fund Manager; (3) this Collusive Trading Scheme created actual or apparent trading in the ABCW stock, which in turn raised and lowered the price of the ABCW stock; and (4) AUF plan participants, on whose behalf the AnchorBank Unitized Fund has filed suit, relied upon the artificially inflated or deflated price of the AUF shares and ABCW stock, in making purchase or sales decisions.

Using the standard set forth in *Tellabs*, it is clear that AnchorBank has satisfied the pleading requirements of both Rule 9(b) and the PSLRA. Taking all of the facts alleged as true, there is sufficient detail in the Complaint and accompanying exhibits to give rise to a clear inference of scienter. Moreover, the Complaint paints a clear and cogent story that is far more compelling than any of the reasons Hofer suggests for why the conduct occurred. Because *Tellabs* requires a court to "compare" both theories and decide if AnchorBank's theory of its case is "at least as compelling," as Hofer's theory, this Court should deny Hofer's Motion to Dismiss. *Tellabs*, 551 U.S. at 324.

1. AnchorBank pleads sufficient facts with particularity to support the existence of a scheme to defraud.

AnchorBank has adequately alleged the "who, what, where, when and how" of the Collusive Trading Scheme. First, the Complaint clearly alleges "who" was involved in the fraudulent Collusive Trading Scheme. As identified in the Complaint at ¶ 20, the Collusive Trading Scheme involved the coordinated purchase and sale of AUF shares by Hofer and at least one of the two-conspirators.[2] These co-conspirators are identified as AnchorBank employees A and B, and their identities are well-known to Hofer. Complaint ¶ 18.

Second, the Complaint answers the "what?" question regarding the Collusive Trading Scheme by alleging that the scheme involved Hofer and at least one of the other co-conspirators intentionally coordinating the purchase and sale of AUF shares from September 2008 through June 2009. Complaint ¶ 18. As detailed in Exhibit A, there were 36 trades in which Hofer coordinated with A or B or both in the purchase or sale of AUF shares. Complaint ¶ 28.

The Complaint further alleges, in detail, how the Collusive Trading Scheme was effected, alleging that the first step in the Collusive Trading Scheme involved the intentionally coordinated sale of AUF shares by Hofer and either A or B or both. Complaint ¶ 20. The volume of trading resulting from the deliberately coordinated sale caused two things to occur: first, the sales triggered a cash payout from the Fund of such a volume that required the Fund Manager to sell ABCW stock held in the Fund on the open market in the following day(s) to replenish the cash portion of the Fund; and second, the sale of ABCW stock by the Fund

[2] The names of the co-conspirators are not included in the Complaint due to a confidentiality provision in the settlement agreements reached with between AnchorBank and these individuals. However, naming of A and B is sufficient to satisfy the pleading with particularity requirement of Rule 9(b). *See, e.g., Amorosa v. Ernst & Young LLP*, 2009 WL 4434943 at *19 (S.D.N.Y. 2009) (noting that a Complaint may include anonymous individuals and witnesses, so long as there is sufficient detail for the court to infer that the individuals acted as they were alleged to or possess the information necessary to support the allegations in the Complaint). The Complaint sets forth that the co-conspirators worked with Hofer and clearly describes their actions and conduct with Hofer.

Manager increased trading volume of the thinly-traded ABCW, causing the price of the stock to decline. Complaint ¶¶ 20-22. The Complaint further alleges how, following the coordinated sale of AUF shares by Hofer and the co-conspirators and the thoroughly anticipated drop in the ABCW share price their coordinated, large-volume sales created, Hofer and the co-conspirators would then coordinate a large purchase of AUF shares. Complaint ¶¶ 20-25. The Complaint and accompanying exhibits allege the details of the Collusive Trading Scheme with specificity. Complaint ¶ 23.

Third, the Complaint provides abundant details with regard to "when" the misconduct occurred. The allegations in the Complaint generally provide that the Collusive Trading Scheme took place between September 2008 and June 2009. Complaint ¶ 27. The Complaint further alleges that Hofer and the other co-conspirators engaged in coordinated trading activity on 36 separate occasions during this limited time period. Complaint ¶ 28. Unbelievably, in the face of a detailed chart that provides the exact *dates* and *amounts* of the trading activity, Hofer argues that AnchorBank fails to supply the frequency of the trades. Complaint, Exhibit A. It is difficult to imagine what more detail AnchorBank could have included with regard to the Collusive Trading Activity to satisfy Hofer's unsupportably high pleading standard.

Fourth, the Complaint adequately alleges the location or "where" of the misconduct. All conversations between Hofer and the co-conspirators took place at AnchorBank's Madison office, located at 25 West Main Street in Madison, Wisconsin. Complaint ¶ 1. The Complaint details how Hofer and the co-conspirators purchased and sold AUF shares in their 401(k) accounts, which, in turn, caused the Fund Manager to purchase or sell ABCW stock on the Nasdaq national market. Complaint ¶ 13. The Complaint further alleges that Hofer and the other co-conspirators were aware of the cash requirements of the Fund and knew that if they could

trade AUF shares in sufficient volume within the Fund, they could and, in fact, did affect the price of ABCW stock on the national market. Complaint ¶ 12.

Finally, the Complaint details "how" this occurred. In addition to the detailed explanation of the Collusive Trading Scheme and the exhibits providing exacting detail with regard to the dates and volume of trading, the Complaint also provides ample allegations with regard to the structure and function of the Fund and the mechanics of how Hofer's activity indirectly affected the ABCW stock price. Complaint ¶ 24. Further, the Complaint alleges how the trading was coordinated, and specifically details that this coordination occurred through email, telephone, and face-to-face conversations.

a. AnchorBank properly details communications in support of a scheme.

Hofer argues that AnchorBank has failed to detail the communications Hofer had with the co-conspirators or attach the email correspondence referenced in the Complaint, which provide further evidence of scienter. This is simply not true, but even if it were, it is not the relevant standard on a motion to dismiss. As AnchorBank set forth in the Complaint, Hofer timed and coordinated his trades with both of the co-conspirators through communications that took place prior to or contemporaneous with placing the trades. *See* Complaint ¶¶ 32-33. As alleged in the Complaint, Hofer would communicate in person with co-conspirator A, and typically by email or telephone with co-conspirator B, coordinating with them to either purchase or sell a certain percentage of their AUF shares. Complaint ¶ 32.

The Complaint further alleges that the Fund sent out automatic "confirmation of activity" email messages whenever a participant bought or sold shares in the Fund and that Hofer and co-conspirator B would forward these emails to one another, often including information about what percentage of their holdings they bought or sold. Complaint ¶ 33.

Although it certainly could have done so, AnchorBank is not required to supply each and every shred of evidence it may have to support these allegations in order to comply with Rule 9(b) or the PSLRA; the Court must simply accept its allegations as true. *See In re Stone & Webster*, Inc., 414 F.3d. 187, 195 (1st. Cir. 2005) (noting that a "plaintiff need not, however, go so far as to "plead evidence."). AnchorBank has alleged a compelling theory of fraud and scienter, which defeats Hofer's Motion to Dismiss. Hofer cannot point to a lack of evidence because at this stage of the litigation, all facts in AnchorBank's Complaint must be accepted as true.[3]

b. AnchorBank adequately details the frequency of the trades.

The Complaint alleges that Hofer and the other co-conspirators engaged in coordinated trading activity on 36 separate occasions during this limited time period. Additionally, AnchorBank provides Hofer with a detailed Exhibit A that lists every trade the co-conspirators made in conjunction with each other during the time period of the Collusive Trading Scheme. In light of this information it is disingenuous at best for Hofer to claim more detail is required at this stage; AnchorBank explicitly sets forth the dates and amounts of each of his trades and includes information about the co-conspirators as well.

Moreover, Hofer's reliance on *Trane v. O'Connor Securities,* 561 F. Supp. 301 (S.D.N.Y. 1993), is wholly misplaced and does not support his argument that the conduct alleged cannot violate Section 9(a). To begin, *Trane* involved a lower court's opinion on a party's request for *injunctive* relief after an evidentiary hearing involving examination of witnesses and presentation

[3] Indeed, the fallacy of Hofer's argument is clear when one considers that it is not grounds for dismissal where a complaint for a breach of contract does not attach the contract. *See United Guar. Mortg. Indem. Co. v. Countrywide Fin Corp*., 2009 WL 3199844 at *5 (C.D. Cal. 2009) (suggesting that a court may take judicial notice of the existence of a contract in a breach of contract claim if the contract or portions thereof were not attached to the complaint).

of evidence – *Trane* has absolutely nothing to do with pleading standards under the PSLRA. Additionally, it is black-letter securities law that "if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation" that is actionable under Section 9(a). *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007). The, "timing, size, or repetition of a transaction" can give rise to an inference of manipulative intent that supplies the necessary elements for a § 9(a) violation. *See id.* at 369. Even assuming the purchase and sale of shares in one's 401(k) plan does not constitute a securities violation, when one knowingly, intentionally and repeatedly colludes with others in his purchase and sales of shares such that it creates artificial price swings in the stock, this conduct constitutes a Section 9(a) securities violation. *Id.*

2. AnchorBank pleads facts with particularity and establishes that the co-conspirators' trades affected the price of ABCW stock on the Nasdaq exchange.

Hofer's purchases and sales, particularly when coordinated with the co-conspirators', created enormous swings in the AUF share price and, in turn, indirectly affected the ABCW stock price when the Fund Manager was forced to purchase or sell ABCW shares on the Nasdaq market. The Collusive Trading Scheme also gave the appearance of increased trading activity, both in the AUF and of the ABCW stock, when, in fact, it was a small number of individuals trading together to create that appearance.

This is evidenced in at least two ways. First, the very fact that Hofer and the co-conspirators deliberately coordinated their trading activity demonstrates an intent to influence the ABCW share price. If Hofer and the other co-conspirators were seeking only to follow closely the ABCW and AUF share price and attempt to profit by timing the trading activity according to

market conditions, then there is no legitimate reason for their consistent communications before every trade, which allowed them to coordinate the timing and amount being traded. Instead, however, the facts alleged in the Complaint provide ample support for AnchorBank's theory that Hofer and the other co-conspirators were not seeking to profit from participation in an honest market, but rather through knowing and intentional manipulation of that market.

Second, the trading patterns by Hofer and the other co-conspirators demonstrate their intent to create an artificial appearance of trading activity in the Fund and, in turn, ABCW stock. Exhibit A demonstrates that the large purchases were often closely followed by large sales, and vice-versa. This would appear to an outside observer to be high market activity, yet in reality it was merely meticulously coordinated trades by a small number of individuals knowingly and deliberately intended to drive the ABCW stock price up and down to those individuals' benefit.

Moreover, the Complaint and accompanying exhibits provide ample support for the allegations that the Collusive Trading Scheme affected the ABCW stock price. Exhibit B shows how the ABCW stock price rose and/or fell in the days following the large, coordinated trades made by Hofer and the other co-conspirators in the AUF, as the Fund Manager was forced to purchase or sell large blocks of ABCW stock on the open market. The allegations and exhibits are sufficiently detailed to survive a motion to dismiss – at this stage, AnchorBank need not allege the specifics as to how the Fund Manager purchased or sold ABCW stock following the collusive trades in the AUF.

a. AnchorBank adequately pleads loss and loss causation.

The Complaint alleges in detail how the coordinated trading activity by Hofer and the other co-conspirators in the AUF indirectly affected the ABCW stock price as the Fund Manager was forced to purchase or sell ABCW stock on the open market to rebalance the Fund following

the large, coordinated trades. Complaint ¶¶ 15-18. The Complaint also alleges how these large purchases and sales by the Fund Manager not only created additional trading activity in ABCW stock, but also was sufficient to affect the market price of the thinly-traded stock. Complaint ¶ 21. The Complaint further alleges that other AUF Fund investors, on whose behalf the AnchorBank Unitized Fund has sued, relied upon the artificially inflated trading volume and stock price in making purchase or sales decisions. Complaint ¶ 26.

It is clear from the fact that the AUF share price has fallen far below that of the ABCW stock price that the Collusive Trading Scheme had a detrimental affect on all other AUF investors. It is also clear that purchasers or sellers of a stock that has been manipulated consequently pay more to purchase or get less when they sell their stock. At this stage, the allegations contained in the Complaint are sufficient to show that the plaintiffs – meaning both the Fund itself and the participants in the Fund – relied on the artificial appearance of trading activity and the artificially inflated/deflated ABCW stock price in making purchase and sales decisions to their detriment. Moreover, AnchorBank is only required to plead causation and does not have to detail and prove reliance and causation at this stage. *In re Initial Public Offering Sec. Litig.,* 544 F. Supp. 2d 277, 295 (S.D.N.Y. 2008) (noting that a defendant's intent to manipulate and "drive up the price of securities, knowing that they were causing the securities to be overvalued and that the stock prices would eventually recede to reflect the actual value of the securities, thereby injuring innocent investors. That is loss causation."). The Court must infer that the cause described by AnchorBank is true.

b. AnchorBank's exhibits provide the requisite detail.

The exhibits attached to the Complaint provide far more detail than is required to defeat a motion to dismiss. When taken together with the facts set forth in the Complaint, the exhibits

clearly illustrate the trading activity, trading days, price fluctuation of the ABCW stock price, and the volume of trading in both the AUF Fund and ABCW stock. For example, when Exhibit A, which details all of the trades Hofer and the co-conspirators made, is compared with Exhibit B, which details the price and volume of the ABCW stock, there is a strong correlation between the Collusive Trading Scheme's activity and stock prices.

In addition, Exhibit A provides a clear picture and pattern of a Collusive Trading Scheme that began somewhat small but quickly grew in size and frequency. For example, the co-conspirators' trading volume began at 14,979 shares and in nine months grew to 1,943,984. Such particularized facts support the reasonable inference that Hofer and the co-conspirators were deliberately manipulating the market. *See* Complaint, Exhibit A. Moreover, as alleged in the Complaint, as the volume of trading by the co-conspirators increased in size, the effectiveness of the Collusive Trading Scheme also increased. The increase in trading frequency evidences that the co-conspirators knew the effect of their trading activities and further supports that this was knowing and intentional conduct. Complaint ¶ 12.

Exhibit B paints a compelling picture of the trading activity and affect on ABCW stock from September 3, 2008 through June 30, 2009. The chart illustrates the marked increase in trading volumes in the days following the Collusive Trading Scheme trades, particularly as the co-conspirators' holdings began to show substantial growth. *See* Complaint, Exhibit B. The chart also illustrates swings in price on the days following the co-conspirators' trades.

Finally, Exhibit C also supports AnchorBank's Complaint and theory of the Collusive Trading Scheme. AnchorBank's fraud theory is amply supported by the activity levels and amounts Hofer and the co-conspirators were trading. This theory is compellingly supported by

the fact, as illustrated in Exhibit C, that these three individuals would often represent 100% of the trading activity in the AUF Fund. *See* Complaint, Exhibit C.

Each of these exhibits contain minute detail and, when combined with the allegations of the Complaint, make the particular facts of fraud and causation abundantly clear. Indeed, much of the information contained therein are considered evidentiary items, which AnchorBank need not even provide at this stage in the pleadings; the fact that such information has been pled only demonstrates the weakness of Hofer's arguments. Again, all of AnchorBank's allegations must be construed in its favor, and the Court should draw the inference that AnchorBank's theory is accurate and compelling. *See Tellabs,* 551 U.S. at 322.

c. AnchorBank has demonstrated that it was Hofer and the other co-conspirators' trading activity that impacted the ABCW share price.

AnchorBank's Complaint, and most notably Exhibit B attached thereto, carefully details the visible correlation between the co-conspirators' trading and the ABCW stock. A review of Exhibit B, particularly near the end of the Collusive Trading Scheme, illustrates a marked interplay between the trading activity of the co-conspirators and the ABCW share prices. For example, a June 8, 2009 sale of the co-conspirators (*See* Exhibit A) corresponds with a several-day drop in closing price of ABCW stock. Exhibit B (detailing a June 9, 2009 through June 19, 2009 continual drop from 1.43 to 1.07).

Contrary to AnchorBank's compelling theory of causation, Hofer's sets forth an implausible theory of causation and argues that the co-conspirators were simply responding to the market news. The Court should disregard this theory as many of the articles Hofer references relate to market news from February 2009; whereas much of the co-conspirators' substantial trading activity occurred much later, in March through June 2009.

Again, AnchorBank is not required to *prove* causation in its Complaint. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). A complaint only has to *allege* causation to survive dismissal. Nevertheless, AnchorBank has set forth detailed allegations and evidence as to the direct cause and effect of the trading activity on the ABCW stock prices. That is far more than is required at this early stage.

3. AnchorBank properly pleads facts raising a strong inference of scienter.

The Complaint adequately alleges facts to support the requisite scienter under the PLSRA. This requirement may be satisfied in one of two ways: the plaintiffs may plead "motive and opportunity to commit fraud" or "strong circumstantial evidence of conscious misbehavior or recklessness." *Novak v. Kasaks,* 216 F.3d 300, 310-11 (2nd Cir. 2000). The inference of scienter arises where the complaint sufficiently alleges that the defendants: (1) benefited in a concrete and personal way from the purported fraud, or (2) engaged in deliberate behavior. *Id.* Here, the Complaint supplies both: Hofer and the co-conspirators achieved enormous financial benefits as a result of the Collusive Trading Scheme, and it is readily apparent from the communications, volume, and frequency of trading that the this was unquestionably deliberate conduct. The Complaint also alleges Hofer's intimate familiarity with the Fund, the stock and the affect of his trades. *See* Complaint ¶ 12. The Complaint lacks no detail in regards to the scienter requirement and should withstand dismissal.

Indeed, the Complaint provides compelling details in support of a showing of scienter, including the allegation that Hofer and the other co-conspirators knew and intended the ultimate effect of their conduct. The Complaint alleges that Hofer communicated with each of the co-conspirators prior to or contemporaneous with engaging in trading activity in the Fund. The Complaint further alleges it is no coincidence that Hofer traded in concert with at least one of the

co-conspirators 36 times over the course of a relatively short period of time. As set forth in *Tellabs*, despite Hofer's attempts to impose a higher burden on AnchorBank, at this stage AnchorBank must merely demonstrate that "the inference of scienter is cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. 324. Hofer's alternative explanation of "coincidence" is insufficient to negate AnchorBank's cogent and compelling inference of scienter. Thus, the Complaint must survive a motion to dismiss under 12(b)(6). Simply put, AnchorBank survives the *Tellabs* standard by a showing that there was a scheme, the facts in the Complaint suggest that this was carried out with scienter, and this explanation is at least as plausible as any theory Hofer sets forth. *See id.*

4. While AnchorBank need not prove reliance at this stage, it can and has.

Once again, Hofer misunderstands the purpose and pleading standard of a motion to dismiss. At this stage, AnchorBank is not required to *prove* any of the elements of the causes of action alleged; it is merely required to plead each of the elements with sufficient detail to withstand a motion to dismiss under Rule 9(b) and the PSLRA.

AnchorBank has alleged in the Complaint that Hofer and the co-conspirators knew that any sale of shares in the Fund, which exceeded the amount of cash in the Fund, required the Fund Manager to sell ABCW stock on the open market to rebalance the stock/cash ratio of the Fund. *See* Complaint ¶ 12. Conversely, Hofer and the co-conspirators also knew that any purchases of shares in the Fund that would cause the Fund to hold more cash than the target percentage required the Fund Manager to in turn purchase ABCW stock on the open market to achieve the required cash/stock balance of the Fund. These requirements were explicitly set forth in documents posted on the company intranet and disclosed in an email sent to Hofer on March 2, 2009. Complaint ¶ 12. In fact, AnchorBank can provide evidence that Hofer and the

co-conspirators communicated via email, telephone, and in person with regard to how the Fund Manager rebalanced the Fund following their buys and sells. Most importantly, however, as alleged in the Complaint, Hofer and the other co-conspirators knew that their large-volume, coordinated trading affected not only the AUF share price, but also the ABCW stock price. Indeed, they intended that result to achieve greater gains when the ABCW, and in turn AUF, share price rose higher and fell lower due to their coordinated trading activity.

In sum, the allegations in the Complaint provide ample support for a violation of Section 9(a), even when considered under the heightened pleading standards of Rule 9(b) and the PSLRA. AnchorBank details each element of a Section 9(a) violation with the requisite facts and details and pleads facts sufficient for a showing of scienter. Accordingly, Hofer's Motion to Dismiss should be denied.

B. AnchorBank Has Pled Each of the Elements of a Cause of Action Under Section 10(b) With Sufficient Particularity.

AnchorBank has brought a claim under Section 10(b), as implemented by 17 C.F.R. § 240.10b-5, under the theory that a deliberate scheme to manipulate the market works as a fraud on those who invest in that market. Similar to its allegations relating to Section 9(a), AnchorBank can demonstrate (1) a manipulative scheme; (2) an intent to defraud; (3); a purchase in reliance on the market; and (4) damages. *See Fezzani v. Bear, Stearns & Co., Inc.*, 384 F. Supp. 2d 618, 634 (S.D.N.Y. 2004). Considering the facts and conduct set forth above, AnchorBank's Section 10(b) claim also withstands the Motion to Dismiss. Because Hofer engaged in a manipulative scheme, evidenced by an intent to defraud, that caused the other Fund participants on whose behalf AnchorBank has sued to purchase or sell stock in reliance on that fraud and suffer damages, the Court must not dismiss Count II of the Complaint.

AnchorBank has alleged that Hofer and the other co-conspirators engaged in a Collusive Trading Scheme from September 2008 through June 2009, which involved the coordinated purchase and sales of shares in the AUF. The allegations in the Complaint make the requisite showing of an intent to defraud, evidenced by the deliberately coordinated timing of the purchases and sales, the communications among the co-conspirators prior to and/or contemporaneous with those trades, and relative volume of shares being traded. The allegations in the Complaint fully support AnchorBank's theory that Hofer and the other co-conspirators' coordinated trading activity, which often involved their entire AUF holdings, was no coincidence and was intended to manipulate the market and defraud other investors. At a minimum, this Court should deny the Motion to Dismiss because the question of whether a plaintiff has established the requisite intent for a Section 10(b) violation is a factual question "appropriate for resolution by the trier of fact." *Press v. Chem. Inv. Servs. Corp*., 166 F.3d 529, 538 (2d Cir. 1999). Because AnchorBank has set forth a detailed and plausible theory of intent in its Complaint, it has satisfied its pleading burden. *See Tellabs*, 551 U.S. at 326.

1. The Complaint adequately pleads a fraudulent scheme.

a. AnchorBank pleads sufficient facts with particularity to support the existence of a scheme to defraud.

The Complaint adequately supports AnchorBank's market manipulation theory and the scheme to defraud is set forth with particularity. The scheme to defraud involved an agreement between Hofer and the co-conspirators to engage in a Collusive Trading Scheme whereby they would discuss and coordinate their trading activity in the AUF. The Collusive Trading Scheme involved meticulously coordinated purchases and sales of AUF shares, which in turn increased trading and created artificially enlarged price swings in the AUF and with ABCW stock. The Collusive Trading Scheme was successful due to the fact that the co-conspirators together were

able to essentially control trading in the small AUF and consequently affect the prices of the thinly-traded ABCW stock. That the scheme to defraud was carried out with scienter is evidenced by the conversations, telephone calls, and emails exchanged between the co-conspirators, which demonstrate an intent to manipulate the AUF and ABCW stock prices by carefully timing and coordinating their AUF trading activity.

b. AnchorBank's claim that the fraudulent manipulative scheme resulted in material misrepresentations or omissions is properly pled.

AnchorBank has properly set forth that Hofer and the co-conspirators engaged in a scheme that was, as defined by the Securities Exchange Act, market manipulation. Where a plaintiff appropriately alleges fraudulent conduct, even in the absence of a particular misrepresentation or omission, a plaintiff's complaint is still properly pled because it can establish that the fraudulent conduct caused reliance and therefore causation. *See In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 302-03 (S.D.N.Y. 2005) (noting that "plaintiffs contend that defendants' fraud artificially inflated the price of Parmalat securities and that they would not have bought Parmalat stock or bonds had they known of its true financial condition. While they do not claim to have relied on particular misstatements or omissions, they argue that the complaint adequately alleges transaction causation for two reasons. They are correct."). Here, because AnchorBank and the plan participants have adequately pled a fraudulent scheme that affected ABCW stock prices, this in turn supplies the "misrepresentation or omission" for a 10(b) violation.

c. AnchorBank properly pled facts with particularity to support their allegations of fraudulent acts, practices or course of business.

The fraudulent acts, practices, and course of business are clearly laid out in the Complaint. The Collusive Trading Scheme, as defined in the Complaint, *is* the course of business and fraudulent act and practice. Contrary to Hofer's argument, AnchorBank has properly alleged a violation of Section 9(a), which can provide the basis for a violation of Section 10(b). As detailed above, AnchorBank has laid out a detailed explanation of the scheme to defraud: (1) Hofer, acting by himself and in concert with others, deliberately engaged in a Collusive Trading Scheme effecting a series of transactions in the Fund; (2) these transactions were of sufficiently high volume to indirectly cause the purchase or sale of securities traded on a national exchange by the Fund Manager; (3) this Collusive Trading Scheme created actual or apparent trading in the ABCW stock, which in turn raised and lowered the price of the ABCW stock; and (4) the artificially inflated or deflated price of the AUF shares and ABCW stock was relied upon by AUF plan participants, on whose behalf the AnchorBank Unitized Fund has filed suit, in making purchase or sales decisions to their detriment.

2. AnchorBank adequately pleads facts raising a strong inference of scienter.

AnchorBank also plead scienter with particularity. Simply put, scienter is the intent to deceive, manipulate or defraud. *Ganino v. Citizens Utilities Co*., 228 F.3d 154, 168 (2d Cir. 2000). The Complaint makes a compelling case that Hofer was acting with the requisite scienter. The Complaint alleges that Hofer and the co-conspirators deliberately and knowingly coordinated their efforts in a manner that would manipulate the AUF Fund and, in turn, the ABCW stock prices. Complaint ¶¶ 20-25. There is simply no other explanation for an investor knowingly and deliberately coordinating his trading activity with two other individuals,

particularly when that activity often involved selling 100% of his shares one day, only to purchase them back shortly thereafter. The Complaint provides a strong inference of scienter.

3. AnchorBank shows that the alleged fraud caused the injury claimed.

The Complaint alleges in detail how the coordinated trading activity by Hofer and the other co-conspirators in the AUF indirectly affected the ABCW stock price as the Fund Manager was forced to purchase or sell ABCW stock on the open market to rebalance the Fund following the large, coordinated trades. The Complaint also alleges how these large purchases and sales by the Fund Manager not only created additional trading activity in ABCW stock, but also was sufficient to affect the market price of the thinly-traded stock. The Complaint further alleges that other AUF Fund investors, on whose behalf the AnchorBank Unitized Fund has sued, relied upon the artificially-inflated trading volume and stock price in making purchase or sales decisions to their detriment.

It is clear from the fact that the AUF share price has fallen far below that of the ABCW stock price that the Collusive Trading Scheme had a detrimental affect on all other AUF investors. It is also clear that purchasers or sellers of a stock that has been manipulated consequently pay more to purchase or get less when they sell their stock. At this stage the allegations contained in the Complaint are sufficient to show that the plaintiffs – both the Fund itself and the participants in the Fund – relied on the artificial appearance of trading activity and the artificially inflated/deflated ABCW stock price in making purchase and sales decisions to their detriment.

4. AnchorBank does not need to, but can, prove reliance.

Although AnchorBank is under no burden to *prove* reliance; however, the facts and allegations set forth in the Complaint demonstrate reliance. The volume of trading resulting

from the deliberately coordinated sale caused two things to occur: first, the sales triggered a cash payout from the Fund of such a volume that required the Fund Manager to sell ABCW stock held in the Fund on the open market in the following day(s) to replenish the cash portion of the Fund; and second, the sale of ABCW stock by the Fund Manager increased trading volume of the thinly-traded ABCW, causing the price of the stock to decline. Complaint ¶ 13. But for Hofer's Collusive Trading Scheme, the Fund Manager would not have had to buy or sell ABCW stock to offset the imbalances the trading cause. *See* Complaint ¶¶ 20-25. Additionally, the Complaint alleges how these large purchases and sales by the Fund Manager not only created additional trading activity in ABCW stock, but also was sufficient to affect the market price of the thinly-traded stock. The Complaint further alleges that other AUF Fund investors, on whose behalf the AUF has sued, relied upon the artificially-inflated trading volume and stock price in making purchase or sales decisions. Complaint ¶ 26. Although there is no evidentiary burden in regards to reliance at the pleading stage, the facts set forth in the Complaint, taken as true, and construed in AnchorBank's favor, do prove that there was reliance upon Hofer's fraudulent acts.

Moreover, it is well-settled that the law in the securities fraud context recognizes the fraud on the market theory of reliance, which creates a presumption of reliance when material misstatements are introduced into the market. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 242-43 (1988). Because the Collusive Trading Scheme acted as a fraud on the market – creating a false price and false level of trading activity of the ABCW stock – it should be *presumed* that any purchasers or sellers of ABCW stock, including the Fund and the other Fund investors upon whose behalf the Fund has sued, relied on the fraudulent "statements."

Taking all of these facts and allegations together, the Complaint provides ample support for a violation of Section 10(b), even when considered under the heightened pleading standards

of Rule 9(b) and the PSLRA. AnchorBank details each element of a Section 10(b) violation with the requisite facts and details and pleads facts sufficient for a showing of scienter. Consequently, Hofer's Motion to Dismiss should be denied.

III. ANCHORBANK'S CLAIMS UNDER WISCONSIN SECURITIES LAWS ABLY WITHSTAND THE MOTION TO DISMISS.

A. Wisconsin Securities Laws Apply To Hofer's Actions.

AnchorBank's Complaint also demonstrates that Hofer has violated Wisconsin securities laws. Contrary to Hofer's statement, Wis. Stat. § 551.501 makes it unlawful, in connection with a purchase or sale of a security, to "directly or *indirectly*" engage in s scheme to defraud; to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person. Wis. Stat. § 551.501(1-3).

Hofer's arguments about the definition of "security" under Wisconsin's statute are irrelevant. Moreover, it is wholly irrelevant that the statute does not include ERISA. As AnchorBank alleged in the federal securities violations, Hofer's scheme of fraud that *indirectly* influenced the purchase and sale of securities on a national market defines the relevant inquiry. While the impetus for these trades originated in a 401(k) fund, Hofer and the co-conspirators' trading activity caused trades to occur on a national exchange, which falls within Chapter 551.

B. AnchorBank Properly Pleads a Violation of Wisconsin Securities Laws with Sufficient Particularity.

Because the Wisconsin securities fraud statute closely mirrors the federal securities actions, the conduct forming the basis for Hofer's violations of Section 9(a) and 10(b) also forms the basis for Hofer's violations of Wisconsin's securities laws. Moreover, as detailed above,

AnchorBank has adequately set forth the level of details necessary to satisfy Rule 9(b) pleading requirements, and its allegations with regards to violations of Wisconsin securities laws similarly meet this heightened pleading requirement.

IV. ANCHORBANK HAS ADEQUATELY PLED A CLAIM FOR BREACH OF FIDUCIARY DUTY.

A. Although It Was Not Required To, AnchorBank Pled Its Breach of Fiduciary Duty Claim With Particularity.

Hofer misapprehends the pleading standard that must be applied to AnchorBank's claim for breach of fiduciary duty. This cause of action concerns Hofer's position and his employment relationship with AnchorBank and is not based in fraud. Therefore, AnchorBank need only satisfy the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. When the Court applies the correct law, facts, and pleading standard, it is abundantly clear that this claim is properly pled and cannot be dismissed.

Wisconsin courts have long recognized that when an employee is in a position of management and conducts the business of an employer, he owes that employer a fiduciary duty. *Gen. Automotive Mfg. Co. v. Singer*, 19 Wis. 2d 528, 530, 120 N.W.2d 659 (1963); *see also Modern Materials, Inc. v. Advanced Tooling Specialists, Inc*., 206 Wis. 2d 435, 444, 557 N.W.2d 835, 839 (Ct. App. 1996) (holding that employees "vested with policy-making authority [with] the ability to make decisions which bind the company" owe a fiduciary duty). This fiduciary duty encompasses a duty of care, loyalty, and good faith. *See Hartford Elevator, Inc. v. Lauer*, 94 Wis. 2d 571, 580, 289 N.W.2d 280, 284 (1980); *Burbank Grease Services, Inc. v. Sokolowski*, 2005 WI App 28, ¶ 39, 278 Wis. 2d 698, 725, 693 N.W.2d 89, 102 (2005). Here, AnchorBank has demonstrated that Hofer, by virtue of his employment and position with AnchorBank, as a Vice President and Regional Lending Manager, did in fact owe a fiduciary duty to AnchorBank;

he breached this duty by engaging in self-serving activities that harmed AnchorBank and its AUF; and that AnchorBank was damaged by his conduct, both due to monetary loss and the loss of the benefit of his service when he was being paid to do his job but was instead effecting the Collusive Trading Scheme.

As alleged in the Complaint, during the relevant time period, Hofer was employed as a Vice President and Regional Lending Manager at AnchorBank. Complaint ¶ 6. He supervised a number of employees and conducted the business of AnchorBank. Accordingly, by nature of his position and his job capacity, Hofer owed AnchorBank the common law fiduciary duties of care, loyalty, and good faith. The conduct set forth in the Complaint, which includes utilizing work time to continually monitor stock prices, converse with the fellow co-conspirators about the Collusive Trading Scheme, affirmatively engage in the Collusive Trading Scheme, and bilk the Fund and AnchorBank out of monetary value, clearly constitute a breach of his fiduciary duties. An employee who focuses his time and energy into self-interested dealings such as these is disloyal, conducts his employment duties in bad faith, and breaches a duty of care. *See General Auto*, 19 Wis. 2d at 530-35. The Complaint clearly establishes this breach and Hofer's arguments to the contrary only demonstrate a misunderstanding of the law and pleading standard. AnchorBank brought this cause of action due to the nature of Hofer's employment relationship and duties as a Vice President and Regional Lending Manager; it is irrelevant that he did not have a fiduciary duty to the Fund itself.

CONCLUSION

For all reasons set forth above, AnchorBank respectfully requests that this Court deny Hofer's Motion to Dismiss the Amended Complaint in its entirety.

Dated this 15th day of December, 2009.

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