UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs, Case No. 09-C-610-slc

vs.

CLARK HOFER,

Defendant.

Reply Brief in Support of Defendant's Motion to Dismiss the Amended Complaint

---

Introduction

Plaintiffs allege the level of pleading Mr. Hofer is demanding is an "imaginary standard." Pl. Br. p. 2. It is not Defendant who has established the standard set forth by him in his Motion to Dismiss – it is Congress and the courts. Congress enacted the exacting pleading requirements of the PSLRA as a "check against abusive litigation by private parties." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S.308, 313, 127 S. Ct. 2499, 2510 (2007). "The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant's intention 'to deceive, manipulate, or defraud.'" *Id.* (citations omitted). Similarly, Fed. R. Civ. P. 9(b) imposes heightened pleading standards in fraud cases in order to "assure that the charge of fraud is responsible and supported, rather than defamatory

and extortionate." *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cit. 1999).

Plaintiffs' Amended Complaint fails to meet the pleading standards necessary to plead a violation of the securities laws. Plaintiffs' claim that a scheme exists does not make it so. Viewing the Amended Complaint in its entirety reveals that the allegations regarding the existence of a fraudulent scheme are not plead with the particularity required by Rule 9(b) and the PSLRA; nor do Plaintiffs' provide sufficient facts to permit a "cogent and compelling" inference of intent to defraud, an inference that is at least as compelling as other possible inferences. *Tellabs*, 127 S. Ct. at 2504-05. Further, they have failed to sufficiently plead loss causation or reliance with the particularity required to withstand Defendant's Motion to Dismiss.

Similarly, Count III, alleging a breach of the Wisconsin Uniform Securities Law, must be dismissed because the alleged conduct does not fall within the coverage of the law; and, even if it did, Plaintiffs' failure to plead with particularity dooms the claim. Finally, Count IV, alleging defendant breached the fiduciary duty he owed to AnchorBank as his employer, must be dismissed because it fails to plead facts supporting its allegations of fraud with the particularity required by Rule 9(b).

Plaintiffs Amended Complaint must be dismissed with prejudice under Rule 12(b)(6), in its entirety. Plaintiffs have already had an opportunity to re-plead in order to meet the statutory requirements. Plaintiffs' failure to provide the required detail, despite the roadmap provided by Defendant in his initial Motion to

Dismiss, strongly implies that they do not have the facts to do so. Defendant's Motion to Dismiss the Amended Complaint should be granted.

I. Plaintiffs' Claims Under Sections 9(a) and 10(b) of the Securities Exchange Act of 1934 Should be Dismissed with Prejudice.

A. Plaintiffs' allegations of a fraudulent trading scheme are not supported by particularized facts.

Plaintiffs assert that their Amended Complaint details the "who, what, when, where, and how" of the fraud; Plaintiffs assert they need do no more than make broad, general allegations of a fraudulent scheme and "the Court must simply accept [those] allegations as true." Pl. Br. pp. 4, 6-8, 9. Plaintiffs however are required to plead *facts* to support the claims, not simply conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007)("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a motion to dismiss.) Plaintiffs must provide sufficient factual content in their pleading to support the inference that the Employees intentionally engaged in a fraudulent scheme. Plaintiffs' explanation for how their Pleading satisfies the requirements reveals just how deficient their second pleading remains.

Plaintiffs assert the "what" of the alleged "Collusive Trading Scheme" is the intentional coordination of the trades of AUF units by at least two of the three Employees between September 2008 and June 2009 in order to create "artificially enlarged price swings and trading activity." Pl. Br. pp. 4, 6. Plaintiffs maintain that their allegations regarding the number of trades, and "intentional coordination" of the trades, by the Employees provide all the detail necessary to

support the existence of a scheme. Review of their allegations supporting these conclusions reveals just how little information Plaintiffs have provided. The sum and substance of Plaintiffs' assertions regarding communications among the Employees in support of their "scheme" are as follows:

> Prior to or contemporaneously with each of the coordinated transactions listed on Exhibit A Hofer communicated with the other co-conspirators either in person (with co-conspirator A), by telephone (with co-conspirator B), or by email (with co-conspirator B). These communications were typically initiated by Hofer, who would inform the other co-conspirators that he intended to trade that day and instruct or encourage them to do the same.
>
> In fact, on several occasions, Hofer forwarded an electronic copy of the Confirmation of Activity, or trade confirmation, to co-conspirator B via email, or vice versa, in an effort to confirm that the other bought or sold AUF shares that day as well.

Am. Complt., ¶¶ 32, 33. The only facts alleged are 1) the Employees communicated with one another "prior to or contemporaneously with" the trades identified by the Plaintiffs on Exhibit A; 2) Mr. Hofer "typically" initiated the communications; 3) Mr. Hofer informed his co-workers he planned to trade and "instruct[ed] or encourage[d]" them to trade; 4) Mr. Hofer and Employee B sometimes exchanged trade confirmations, after they traded.[1]

These "facts" are insufficient to permit an inference that the Employees' trades were in furtherance of a fraudulent scheme. The Employees were all employed by AnchorBank; all were participants in AnchorBank's 401(k) plan, and

[1] Plaintiffs allege that all "conversations between Hofer and the [Employees] took place at AnchorBank's Madison office, located at 25 West Main Street," citing paragraph 1 of the Am. Complt. Pl. Br. p. 7. The referenced paragraph only states that AnchorBank is located at that address; it does not state there, or anywhere else in the pleading that all communications between the Employees occurred at that location. AnchorBank has multiple branches.

participated in the AUF, which was invested in ABCW stock.[2] The financial markets in general, and AnchorBank in particular, has been the subject of multiple articles in the press as a result of its financial troubles during the time period of the alleged "scheme." News articles discussed its receipt of TARP funds; its inability to meet debt payments; its very significant losses, exceeding the share price; commentators theorized it might be merged out of existence; the price of ABCW stock declined from a high of $9.27/share in September 2008 to $0.38/share in March 2009. (*See* Defendant's Op. Br. pp. 20-21; p. 16-17, *infra*.) The Employees' communications as alleged by Plaintiffs, more plausibly support the inference that the Employees were communicating about the risks inherent in investing in the AUF, and thus in ABCW stock, about the price fluctuations of ABCW stock, about AnchorBank's debt, or AnchorBank's continued viability. Such communications among co-workers invested in their troubled employer's stock are to be expected, not regarded as suspicious.

Plaintiffs' Amended Complaint simply does not provide detail which would support an inference to the contrary. They do not describe the substance of the conversations; they quote no statements outlining the strategy behind a "scheme;" they do not allege the Employees reached agreement on a scheme, discussed the specifics of how to implement the "scheme" – such as the price or volumes triggering trades - or the "scheme's" objectives. Plaintiffs' conclusion that the Employees were engaged in fraud based on the limited information alleged – that these co-workers communicated with one another via phone, email

[2] The three Employees participation in the AUF did not just begin on September 3, the first trade date reflected on Exhibit A; since Exhibit A reflects a *sale* on that date each must have purchased at least once prior to September 3, 2008.

or in person – does not provide the detail required by the PSLRA or Rule 9(b). See *Novak v. Kasaks*, 216 F.3d 300, 306 (2nd Cir. 1999)(A complaint alleging fraudulent conduct or statements must specify the allegedly fraudulent statements, when and where the allegedly fraudulent statements were made, by whom, and explain why the statements were fraudulent.)

Plaintiffs are similarly indefinite in their use of the phrase "prior to or contemporaneously with." Plaintiffs' *imply* the Employees communicated shortly before or concurrent with every single trade; but, since Plaintiffs have provided no context to their claim of "prior to" one cannot conclude that the Employees *in fact* communicated shortly before every trade. Nor do Plaintiffs allege that the communications among the Employees related to actually making purchases or sales in the AUF "prior to or contemporaneously with" every single trade.

The only hint in the quoted language suggesting coordination by the Employees is Plaintiffs' conclusory allegation that Mr. Hofer "instruct[ed] or encourage[d]" the others to trade. Not only do Plaintiffs fail to detail the statements which led to this conclusion, but, the few trades by the three Employees on the same date undermines Plaintiffs' reliance on Mr. Hofer's statement to demonstrate a scheme. In order for the scheme envisioned by Plaintiffs to work, it was important that the Employees trade on the same dates to enable them to affect ABCW price. Pl. Br. pp. 1,10. The fact that the Employees allegedly coordinated their trades to maximize the impact only nine times during 10 months, refutes Plaintiffs' conclusion that this communication evidences a coordinated scheme.

Plaintiffs reference emails allegedly sent between Mr. Hofer and Employee B confirming earlier trades. But, Plaintiffs do not explain why emails sent *after* the day's trading is over are relevant to show the alleged scheme. And, if these were somehow important to the scheme, why are there none including Employee A? They claim these were sent in "an effort to confirm" trading activity of the others. Plaintiffs however fail to explain what was said that led them to conclude the Employees were intending to "confirm" prior trades.

The other basis alleged by the Plaintiffs to support their conclusion that the Employees were engaged in a "scheme" is the allegation that Mr. Hofer traded with one or both of Employees A and B 36 times in ten months. Plaintiffs assert Mr. Hofer's challenge of the sufficiency of the trade detail on Exhibit A to the Amended Complaint is "disingenuous," claiming it adequately details the 36 trades Plaintiffs assert form a scheme. Pl. Br. p. 9. Significantly, however, Plaintiffs have failed to respond to almost every argument made by the Defendant challenging their reliance on trading frequency to show a "scheme." Plaintiffs do not answer:

- How a scheme based on trading volume is established when the Employees traded together only nine out of the 36 total alleged trades;
- Why Exhibit A does not list all independent trades by Mr. Hofer, and by Employees A and B, during the period of the alleged scheme; certainly, evidence that Mr. Hofer traded on dates Employees A and B did not trade, and vice versa, undermines Plaintiffs' conclusion of a coordinated scheme to impact the Exchange, instead indicating the Employees were pursuing three different trading philosophies;
- Why the Employees' trades as reflected on Exhibit A were often less than 100% of their holdings if, as Plaintiffs claim, the alleged purpose was to coordinate trades in order to increase the trade volume and impact the

> Exchange. And, trades by the Employees at different percentages also reflect different trading philosophies.

Plaintiffs respond to Defendant's demand for more detail by asserting that their allegations must be accepted as true. Pl. Br. p. 9. They assert that they could have provided detail, but that it is not necessary that they do so. Plaintiffs mis-read the law. The heightened pleading requirements of the PSLRA and Rule 9(b) mandate that the Plaintiffs provide sufficient factual background in their complaint to support their inference that Mr. Hofer is liable for the misconduct alleged.[3] *Fezzani v. Bear Stearns & Co.*, 384 F. Supp. 618, 642 (S.D.N.Y. 2004); *Novak v. Kasaks*, 216 F.3d 300, 306 (2nd Cir. 1999) Plaintiffs failure to quote statements that discuss a scheme, or to detail communications in relation to the trades, or, alternatively, to provide documents supporting their claims, requires that their pleading be dismissed.[4]

Accordingly, Defendant's Motion to Dismiss Plaintiffs' Amended Complaint should be granted; Plaintiffs have failed to adequately allege facts sufficient to permit the inference of a manipulative "scheme" as required by the PSLRA. *Fezzani, supra*.

B. Plaintiffs Fail to Plead Scienter with Particularity

Plaintiffs are also required under the PSLRA to plead the facts evidencing "the defendant's intention 'to deceive, manipulate, or defraud'" with particularity.

---

[3] Plaintiffs' confusion over the application of the pleading standard under the PSLRA is demonstrated by their reference to pleading requirements in breach of contract cases. Pl. Br. p. 9, fn 3.

[4] Plaintiffs criticize Defendant's citation to *Trane v. O'Connor Securities*, 561 F. Supp. 301 (S.D.N.Y. 1983), claiming it is irrelevant to pleading standards under the PSLRA. Pl. Br. p. 9-10. Defendant cites *Trane* not for that purpose, but for the proposition that frequent, large scale trading resulting in a significant increase in stock holdings, is neither illegal nor prohibited by law. See Def. Op. Br. p. 14-15.

Tellabs, 127 S. Ct. at 2504 (citations omitted). It is not enough that it is possible for a reasonable factfinder to infer scienter from the pleadings; rather, a court must engage in a comparative evaluation, considering the inferences suggested by a plaintiff and comparing those with competing inferences that may be drawn from the alleged facts. *Id*. In order for a "strong inference" of scienter to be found, the inference must be "more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent. *Id* at 2504-05.

Plaintiffs not only fail to explain how an inference of fraudulent intent is more compelling than the inference that the Employees were legitimate investors trying to stay ahead in a volatile market, they misstate the standard for pleading scienter. Plaintiffs assert that scienter may be inferred by sufficiently alleging that the defendants: 1) benefited in a concrete and personal way from the fraud; or 2) engaged in deliberate behavior, citing *Novak v. Kasaks*, 216 F.3d 300, 310-11 (2nd Cir. 2000). Pl. Br. p. 15. Plaintiffs assert their Amended Complaint supplies both alternatives, that the Employees achieved enormous financial benefits from the "scheme" and that the communications and coordination of trades among the Employees demonstrate deliberate conduct. Id. First, taking these in the reverse order, Plaintiffs inaccurately cite *Novak; Novak* states the pleading must allege that the defendants engaged in deliberate **illegal** conduct. *Novak,* 216 F.3d at 308. Plaintiffs omit the requirement that any deliberate conduct be illegal.

Novak describes the nature of conduct meeting the deliberate and illegal standard as "securities trading by insiders privy to undisclosed and material information…" *Id*. Plaintiffs do not allege comparable illegal conduct. The facts alleged by the Plaintiffs - that the Employees communicated about trading, and traded on the same day nine times during a ten month period - do not suggest illegal conduct. The Employees' trades were carried out in the open, by the Fund Manager, with full knowledge of the Fund Manager, AnchorBank's agent. Moreover, the pleading contains no suggestion that the Employees, when trading in the AUF, even violated the trading rules of the Fund.

Plaintiffs assert that Mr. Hofer had "intimate familiarity with the Fund" implying Mr. Hofer's alleged detailed knowledge gave him the motive and opportunity to implement the "scheme." Pl. Br. p. 15. However, Plaintiffs' premise that familiarity with Fund mechanics establishes intent is a non-starter. Plaintiffs do not allege that the Employees were privy to information unavailable to everyone else in the Fund. And, presumably employees investing in the AUF would have some knowledge of how the Fund operates before putting their money at risk.

Further, Plaintiffs overstate the extent of information possessed by the Employees. Plaintiffs state they posted information on AnchorBank's intranet allegedly disclosing that the Fund maintains a ratio of cash to stock and "other information regarding how the Fund operates;" but, they do not state when this information was posted.[5] They do say Mr. Hofer was informed by a March 2,

[5] Curiously, Plaintiffs first state the intranet postings pegged the cash requirement at between 5% and 11%; they then assert Mr. Hofer received a March 2009 email stating that the percentage of cash in the fund varied between 1% and 3%. Am. Complt. ¶ 11, 12. Not only are these allegations internally inconsistent, they never explain the relevance of these numbers, or how the

2009 email of "this information" – but this was six months after the scheme allegedly began. And, they never detail what this "other information" is.

Importantly, Plaintiffs never allege that the Employees possessed the knowledge critical to carrying out the "scheme." How could the Employees devise a scheme to affect the price of ABCW stock when they did not know when, whether, or in what quantities the Fund Manager would actually trade in ABCW stock on the Exchange? Further, the Employees did not know the number of days the Fund Manager would take to trade since trades by the Employees would be first offset by trades of other participants, and by their own trades on successive days.[6] See Def. Op. Br. pp. 16-18. Thus, an employee's transfer of money into the Fund does not necessarily result in the Fund Manager making a purchase of ABCW stock on the Exchange because of how the fund operates. The Employees had neither the knowledge of, nor the control over, the key decisions which would even remotely permit their actions to affect the ABCW price; Plaintiffs do not show otherwise.[7] Plaintiffs' failure to allege the Employees had the detailed knowledge necessary to carry out a "scheme" establishes that Plaintiffs' unsupported allegations of an illegal motive are meritless. See *Novak,*

Employees allegedly used this information; nor do they allege that the Employees knew the total asset value of the Fund or the cash balance on any given date.

[6] Plaintiffs imply in their brief, when they detail that the price of ABCW stock declined over a 10 day period, that trades occur over as many as 10 days. Pl. Br. p. 14. But, Plaintiffs never specify in their pleading the number of days over which the Fund Manager may trade, and never allege that the Employees knew this information. Indeed, if the Fund Manager takes 10 or more days to execute any required trades on the Exchange, that would both dilute any impact of the Employees trades, and interfere with their ability to scheme to impact the market.

[7] Plaintiffs did claim in their brief (pp. 7-8) that the Employees knew if they traded in sufficient volume in the Fund they could affect the price of ABCW stock, citing ¶ 12 of the Amended Complaint. However, Plaintiffs' assertion is not contained in that or any other paragraph of the Amended Complaint and should be struck.

216 F.3d at 308 (No intent can be inferred where the means and the likelihood of achieving benefits from an alleged scheme are not shown.)

Plaintiffs also assert the Employees received "enormous financial benefits" as a result of the "scheme." Pl. Br. p. 15. Plaintiffs suggest that the fact the Employees intended to make money by trading in their 401(k) accounts supports the inference of an illegal scheme. It does not. A "pecuniary benefit is the underlying motive in most every action undertaken by a capitalistic business" and will not without more create an inference of fraud. *Stark Trading v. Falconbridge Ltd.*, 2008 U.S.Dist. LEXIS 2677, *9 (E.D. Wis. 2008), *aff'd*, 2009 U.S. App. LEXIS 10 (7th Cir.). Where the "stronger inference is that the defendants were motivated by innocent and ordinary capitalistic motives rather than fraud" plaintiffs fail to meet their burden of proving scienter. *Id.*

A review of the Exhibits provided by the Plaintiffs establishes just such an innocent and ordinary motive. Exhibit B reflects that the Employees bought on days when the price of ABCW stock dropped, and sold on days when the stock price increased. For instance, Mr. Hofer and Employee B purchased on 9/17/08, at $7.79/share, the lowest price reflected during the initial 11 trading days on Exhibit B; Mr. Hofer alone sold on 9/18/08, when the price jumped by $1.48/share.[8] Mr. Hofer bought on 9/23/08 after a $0.76 price drop to $8.55/share. The price however, did not increase as Plaintiffs' theory suggests would occur, but continued dropping; Mr. Hofer bought more stock on 10/23/08 when the price was at $4.98/share, but the price continued to drop for three days,

[8] Because Mr. Hofer's trades were on successive days, the trades likely offset one another, meaning no trades by the Fund Manager on the Exchange were required, and no possible market impact.

again contrary to Plaintiffs' theory of a scheme. Mr. Hofer sold on 12/19/08 at $3.01/share and bought on 12/21/08, the next trading day, at $2.32; he bought more on 12/29/08 at $2.09/share and sold two days later at $2.76/share.[9] This pattern is apparent from a review of these trades. Further, the intermittent pattern of the trades – sometimes a day apart, sometimes weeks apart – reflects that the Employees trades are attempting to track price, not impact price. ABCW stock was extremely volatile through this period, making it possible for all active traders to capitalize on the swings for their benefit. But, Plaintiffs' pleading asserting that the Employees intended their trades to cause this volatility cannot be inferred from the facts plead. The inference of fraudulent intent is neither plausible nor reasonable; Plaintiffs' Amended Complaint must be dismissed. *Tellabs, supra*.

C. Plaintiffs fail to adequately plead loss or loss causation.

Plaintiffs assert that they need only *allege* causation to survive dismissal of their Amended Complaint. Pl. Br. p. 15. Plaintiffs incorrectly cite the law. Plaintiffs must allege both the economic loss they claim they suffered as well as the causal connection between the loss and the fraud. And, they are required to plead sufficient detail to put the defendant on notice of the substance of the claim and the grounds upon which it is based. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005).

Plaintiffs simply do not detail either of these elements. Plaintiffs allege that the Fund and other Fund participants purchased or sold in reliance on artificially

[9] The Exhibit also reflects that the Employees transactions are not optimally timed with the market fluctuations. If they had the ability to impact the market through this "scheme", one would expect their track record to be better.

high or low ABCW prices. (Am. Complt. ¶¶ 26, 55, 62, 66, 67) However, Plaintiffs do not identify or plead a specific loss.[10] They do not detail any date when the price was artificially high that a purchase was made – and later sold at a loss – nor do they identify a sale on a date when the price was artificially low that resulted in a loss. The inference that a purchaser bought when ABCW price was artificially low and sold when it was artificially high – a scenario in which there would be no loss – is at least as reasonable as any contrary inference.

Plaintiffs assert that 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." Pl Br. p. 21. However, *Dura Pharmaceuticals* expressly rejected this assertion as an inadequate allegation of loss and loss causation. The Court explained that the "logical link between the inflated share purchase price and any later economic loss is not invariably strong," since a quick sale does not lead to loss and a loss after a delayed sale might be due to other factors. *Id*. at 342-43.

Plaintiffs' allegation that the Exhibits show that their purported losses are causally related to the "scheme" also does not withstand scrutiny. Plaintiffs allege that "Exhibit B paints a compelling picture of the trading activity and affect (sic) on ABCW stock from September 3, 2008 through June 30, 2009," asserting it "illustrates the marked increase in trading volumes in the days following" the Employees' trades. Pl. Br. p. 13. A review of Plaintiffs' Exhibit B reflects no such thing. First, no such conclusions can be drawn from Plaintiffs' exhibits because they have refused to detail how, and whether, the Employees' trades in fact

[10] We note that no fund participants are parties to this lawsuit and the Fund Manager has no standing to sue on their behalf. See discussion in Defendant's Opening Brief p.25 & fn 6.

resulted in trades of ABCW stock.[11] Plaintiffs: 1) do not specify whether or to what extent, the Employees' trades were offset by their own trades on successive dates,[12] or by the trades of other participants, making trades on the Exchange unnecessary; 2) do not state the date(s) on which the Fund Manager was required to trade, following the Employees' trades – we don't know whether the Fund Manager traded 2 days later, a week later, or every day for 7 days; 3) do not explain how AUF units translate into ABCW shares – is an AUF unit worth 1/3 of the price of a share of ABCW stock? Or, is it worth more than a share of ABCW stock?[13] Because Plaintiffs do not specify even one occasion where the Employees' purchase or sale of AUF units in fact resulted in a trade on the Exchange, or specify the quantities traded, or the date(s) trades occurred, they fail to allege a causal connection. Without trades by the Fund Manager there is no impact on ABCW stock. Plaintiffs' failure to provide sufficient detail to permit the inference that a causal connection between the alleged fraud and any loss exists, defeats their claim. *Dura Pharmaceuticals, supra.*

In fact, Defendant maintains that a review of Exhibit B demonstrates that the Employees trades had no impact whatsoever on the price of ABCW stock, contrary to Plaintiffs' assertions. Rather, it reflects the volatility of ABCW stock. First, the price of ABCW stock went from a high of $9.38 per share on 9/8/08 to a low of $0.38/share on 3/3/09, a period of almost six months; the three Employees

[11] The absence of specific detail about specific trades in ABCW stock by the Fund Manager is incomprehensible unless, of course, these details fail to support their theory.
[12] See Def. Op. Br. pp. 19-20 & fn 4.
[13] Plaintiffs continually refer to swings in the AUF price, and the impact the Employees' trades had on the AUF price. We do not address allegations related to the AUF as plaintiffs claiming manipulation must show an impact on a national exchange; a plaintiff's purchases must also have occurred on the Exchange.

traded on the same date only four times during that period, and the last trade was 10 days earlier. Certainly Plaintiffs can't be claiming that that price drop was caused by the Employees. The ABCW price on 01/05/09, when Exhibit B reflects a purchase by two Employees, is $2.35/share. The Employees don't trade again until 2/06/09; in that one month period, the price dropped as low as $1.64 and increased as high as $2.77/share – without any activity by the Employees. The Employees purchased on 5/14/09 at $1.60/share; the price increased as high as $1.68/share and dropped as low as $1.29/share during the 16 trading days before the Employees sold at a loss – without any activity by the Employees. The price continued on an upward trend from $1.10/share for six weeks following June 29, 2009, the date AnchorBank prevented the employees from trading in their AUF accounts, reaching $1.60/share on 8/14/09, and then, over the following nine weeks, declined to $0.92 -- all without any trading activity by the Employees. See also Morris Declaration, Exhibit B. Plaintiffs' suggestion that the Employees' trades are responsible for volatility in the price of ABCW stock during the period at issue cannot be inferred from the fact alleged. Pl Br. p. 14.

Plaintiffs are dismissive of Defendant's suggestion that the meltdown of the financial markets impacted the ABCW share price. *Id*. However, that is precisely the reason given by AnchorBank for its fiscal problems. In an interview published December 5, 2009 online, the CEO of Anchor BanCorp Wisconsin, AnchorBank's parent company, reported that AnchorBank made poor management decisions and was "over-concentrated in commercial real estate development,….before we had a chance to correct it, the market collapsed." It listed numerous problems

contributing to its financial woes, including a growing portfolio of unpaid consumer and commercial loans, missed payments on a $116 million loan from U.S. Bank and on a $110 million loan from TARP; and increasing quarterly losses, totaling $135 million for the first six months of its fiscal year. It reported its non-performing loans at $415.1 million as of September 30, 2009, almost double the amount reported six months earlier. See Second Morris Declaration, Exhibit 1.[14]

Moreover, the *Dura Pharmaceuticals* court expressly recognized the impact that external factors such as news reports and corporate announcements have on the price of stock in holding that plaintiffs must do more than merely allege a loss. 544 U.S. at 343 (a "lower price may reflect changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.") Nevertheless, Plaintiffs assert this Court should disregard examples of external factors cited by Mr. Hofer, asserting the February 2009 news articles were outdated. Pl. Br. p. 14. Plaintiffs ignore the news articles dated June 22 and 26, 2009 cited by Mr. Hofer. Def. Op. Br. pp. 20-21. Significantly, on June 26, 2009, the date of the second article which reported AnchorBanks' first quarter loss, 3,116,030 shares of ABCW stock were traded on the Exchange – by far, the largest volume on any day during the period covered by the Amended Complaint.[15] Plaintiffs' failure to reference this three million share volume is conspicuous by its absence from the Amended Complaint

[14] Not surprisingly, it does not attribute its losses, or the decline in stock price, to the Employees' trades.

[15] The Employees did not trade on June 26, 2009.

and from Plaintiffs' brief, especially given their focus on Mr. Hofer's June trades. See Am. Complt. ¶¶ 41-44, 47.

Accordingly, Plaintiffs failure to adequately plead economic loss by any Plaintiff, or to plead that the alleged loss bears a causal relationship to the Employees' "scheme," requires that their Amended Complaint be dismissed.

D. Plaintiffs' Amended Complaint Establishes They Are Unable to Prove Reliance.

Plaintiffs repeated assertions that they are merely required to plead, not prove, the elements of their claim miss the mark. Plaintiffs, in order maintain a claim for fraud, must adequately allege in their pleading they will be able to establish that they relied to their detriment on the Defendant's "scheme." *Stark Trading v. Falconbridge Ltd.*, 552 F.3d 568, 569; *Dura Pharmaceuticals, Inc.*, 544 U.S. at 341-42, 346.

Defendant, in his Opening Brief, challenged Plaintiffs' assertions that the Fund Managers' purchases were *made in reliance* on the Employees' trades, identifying the multitude of times that Plaintiffs' Amended Complaint alleges that the Fund Manager was *required* to trade on the Exchange as a result of the Employees' trades. See Def. Op. Br. pp. 31-32. The Plaintiffs blithely ignore this argument; Plaintiffs simply repeat that the Fund Manager was required to buy or sell on the open market and that the Employees had knowledge of the Fund mechanics. Pl. Br. pp. 16-17, 21-22. Plaintiffs' repetition of these allegations fails to address the issue of reliance. *Id.* at p. 17.[16]

[16] Plaintiffs also assert they can provide evidence that the Employees discussed rebalancing of the Fund; (Pl. Br. p. 16-17) in addition to being unrelated to a claim of reliance, this assertion is

Plaintiffs also allege that other Fund participants purchased AUF units in reliance on the artificial prices created by the Employees. *Id*. They do not address Defendant's assertions that the Fund Manager has no standing to bring this claim behalf of other participants, or that they have failed to identify any investor who purchased ABCW stock on the Exchange in reliance on "artificial prices." See Def. Op. Br., pp. 24-25; 31-32.

Plaintiffs argue reliance should be presumed based on their fraud on the market theory, citing *Basic, Inc. v Levinson*, 485 U.S. 224, 242-43 (1998). The presumption, however, is rebuttable; it does not save their pleading. The presumption is not applied in a vacuum. First, Plaintiffs would have to show that the fraud *affected* the market – which they have not, and cannot, show. *Id* at 245. Further, they must show that they traded shares "in reliance on the integrity of the price set by the market." But, the Fund Manager's trades were not "in reliance" on the market price; rather, as Plaintiffs have repeatedly admitted, the Fund Manager was *required* to trade on the market in accordance with AUF rules, in response to the Employees' money transfers into and out of the AUF. As stated by the *Basic* Court, a plaintiff who trades for reasons other than the market price cannot be said to have relied on the integrity of the market. *Id*. at 249. Moreover, because the Fund Manager carried out the Employees' trades and had full knowledge of the alleged basis for any impact on the market, the Fund Manager cannot claim it was deceived. *Id*. at 248; *Gurary v. Winehouse*, 190 F.3d 37, 45 (2nd Cir. 1999)("[A] private plaintiff… must establish that he or

---

not contained in their Amended Complaint and should be struck. Similarly, the Amended Complaint dies not discuss "rebalancing."

she engaged in a securities trade in ignorance of the fact that the price was affected by the alleged manipulation."); *Stark Trading*, 552 F. 3d at 573 (Plaintiffs have no claim if they cannot show they were deceived.) Plaintiffs have no claim.

Similarly, there are no individuals on whose behalf Plaintiffs may pursue this claim; Plaintiffs identify no individuals who purchased ABCW stock on the Exchange in reliance on the integrity of the market.

II. Plaintiffs Have no Claim for Violation of Wisconsin's Securities Laws

A. The Wisconsin Securities Law is inapplicable to the alleged transactions.

Plaintiffs correctly state that Wis. Stat. § 551.501 makes it unlawful for a person in connection with the purchase or sale of a security, to directly or indirectly engage in a fraudulent scheme that affects the Exchange. Pl. Br. p. 23. However, Plaintiffs incorrectly claim that the definition of "security" under Wisconsin law is irrelevant. Mr. Hofer is not accused of trading securities on the Exchange; Plaintiffs only accuse him of the trading of "AUF [units] within the Fund." Am. Complt. ¶ 73. And, the AUF units are excluded from the definition of "security" under Wis. Stat. § 551.102(28). See Def. Op. Br. p. 33-34. Thus, Mr. Hofer's money transfers into and out of his 401(k) account – the only "sale[s] and purchase[s]" the Amended Complaint claims he made – were not the "sale or purchase of a security" under Wisconsin law. Accordingly, the conduct Plaintiffs accuse Mr. Hofer of in the Amended Complaint does not fall within this statute; Plaintiffs' third cause of action must also be dismissed.

B. Plaintiffs Also Failed to Plead with Particularity.

Plaintiffs have failed to plead the details of the alleged fraudulent scheme with the particularity required by Fed. R. Civ. P. 9(b) to state a claim for violation of Wisconsin's Securities Law, just as they failed to adequately plead a violation of federal law. Plaintiffs further failed to show loss or loss causation. Plaintiffs merely allege that "the Fund and its participants have suffered damages as a result of [Mr.] Hofer's violation" of Wisconsin law. Am. Complt. ¶ 76. They do not identify any plaintiff who suffered a loss nor do they provide a nexus between Defendant's trades in the Fund and activity on the Exchange. Further, they do not allege reliance. For all the reasons stated above, see pp.3 - 20 *supra,* Plaintiffs have failed to adequately plead a violation of the Wisconsin Securities Act, and this claim must be dismissed.

III. AnchorBank Cannot State a Claim for Breach of A Fiduciary Duty.

Plaintiffs assert their pleading of a breach of a fiduciary duty is not subject to the heightened pleading requirements necessary when a claim sounds in fraud. Pl. Br. p. 24. Plaintiffs do not cite to any case to support their position nor do they address the cases upon which Defendant relies. However, Plaintiffs do allege Mr. Hofer breached his fiduciary duty by "engage[ing] … in a scheme to defraud…" Am. Complt. ¶ 80. Plaintiffs repeat in their brief that their claim that Mr. Hofer breached his fiduciary duties to AnchorBank is based on alleged actions to engage in the "scheme." Pl. Br. p. 25.

Plaintiffs' assertion their claim for breach of fiduciary duty does not sound in fraud is indefensible. Further, because, the allegations on which their claim is

based sound in fraud, the heightened pleading requirements of Rule 9(b) are applicable. *Borsellino v. Goldman Sachs Group, Inc.* 477 F.3d 502, 507 (7th Cir. 2007) (The heightened pleading requirements of Rule 9(b) apply where the claim is premised on an alleged course of fraudulent conduct.)

The discussion by the Court in *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467 (7th Cir. 1999) regarding the purpose of the heightened pleading standards is instructive:

> The purpose (the defensible purpose, anyway) of the heightened pleading requirement in fraud cases is to force the plaintiff to do more than the usual investigation before filing his complaint. Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual), because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it, …

172 F.3d at 469 (citations omitted).

Plaintiffs' assertion in their brief that theirs is not a claim based on fraud, and that they may thus ignore the heightened pleading requirements of Rule 9(b), reflects just the hubris targeted by the *Ackerman* court in explaining the necessity for detailed pleading requirements. Plaintiffs' failure to satisfy these requirements in alleging a breach of fiduciary duty requires that this claim also be dismissed.

Conclusion

Plaintiffs' Amended Complaint is nothing more than a blatant attempt to have Mr. Hofer insure them for alleged losses affecting a multitude of investors in the markets. Plaintiffs conclude that because Mr. Hofer's holdings in the AUF increased between September 2008 and June 2009, and because the value of a

unit in the AUF has declined during the same period, that Mr. Hofer and two other employees must have engaged in a fraudulent trading scheme to manipulate the market. Plaintiffs premise ignores that every ABCW stock investor who simply held his or her ABCW stock lost money. The fact that the price of ABCW stock dropped from more than $9.00/share in September to $0.38/share in March, conclusively reflects this loss. Mr. Hofer's holdings in the AUF increased in value not because of a scheme, but because he traded in his account, buying when ABCW was low and selling when it was high. Plaintiffs' attempt to blame him for its mismanagement of AnchorBank and of the Fund is unconscionable.

Defendant respectfully requests that his Motion to Dismiss the Amended Complaint be granted, and that the dismissal be with prejudice. Plaintiffs have failed to meet the requirements of the PSLRA and Rule 9(b) to plead the circumstances constituting fraud and scienter with particularity. They further have failed to provide the detail required to demonstrate that the scheme they envision had an impact on the Exchange. Additionally, Plaintiffs have not identified any purchaser who suffered a loss as a result of purchasing ABCW stock on the Exchange in reliance on the integrity of the market.

Plaintiffs cannot state a claim for violation of the Wisconsin Securities Laws; and, they have failed to plead this claim and their breach of fiduciary claim with the particularity required by Rule 9(b). Counts III and IV must also be dismissed.

Dated this 28th day of December, 2009.

Respectfully submitted,

__/s/_____
Lauri D. Morris
Attorney for Defendant

__/s/_____
Lawrence Bensky
Attorney for Defendant

L.D. Morris Law S.C.
10 E. Doty St. Ste. 800
Madison, WI 53703
608.441.5151
Lauri@LDMorrislaw.com

Law Office of Lawrence Bensky, LLC
10 E. Doty St. Ste. 800
Madison, WI 53703
608.204.5969
lbensky@benskylaw.com