IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY J. BELMONT, ET AL., Plaintiffs, v. MB INVESTMENT PARTNERS, INC., ET AL., Defendants.	Civil Action No. 09-cv-04951

DEFENDANT RONALD L. ALTMAN'S MOTION TO DISMISS THE AMENDED COMPLAINT

Pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, defendant Ronald L. Altman moves to dismiss all of plaintiffs' claims against him for failure to state a claim upon which relief can be granted. The grounds for this motion are set forth in the accompanying memorandum of law, which is incorporated herein by reference.

Respectfully submitted,

/s/ Samuel W. Silver

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Dated: April 13, 2010

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT RONALD L. ALTMAN'S MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant Ronald L. Altman ("Altman"), submits this memorandum in support of his Motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the claims asserted against him in plaintiffs' Amended Complaint.

PRELIMINARY STATEMENT

Despite having now filed a *second* voluminous complaint (as well as a 42-page Opposition to defendants' previously filed motions to dismiss plaintiffs' initial Complaint), plaintiffs still have not asserted a single fact indicating that Altman (i) had any knowledge whatsoever of any fraud or wrongdoing; (ii) had any knowledge or notice that any statements he allegedly made were false; or (iii) benefited in any manner from any alleged fraudulent wrongdoing. Instead, plaintiffs rest their entire purported case against Altman solely on conclusory allegations that he somehow acted recklessly because he did not uncover a co-worker's (Mark Bloom's) covert embezzlement scheme and that such failure is sufficient to satisfy the element of scienter required to plead a claim for securities fraud. However, applicable case law uniformly *rejects* such claims, finding that they do not state a claim for securities fraud:

> "Plaintiffs attempting to satisfy their burden of pleading scienter by alleging facts establishing recklessness must allege a statement 'involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care …"[1]
>
> "By reckless disregard for the truth, we mean 'conscious recklessness – i.e., a state of mind approximating actual intent, and not merely a heightened form of negligence."[2]
>
> "Claims grounded in breach of fiduciary duty or improper management are not actionable under Section 10(b) or Rule 10b-5."[3]
>
> "There is nothing inherently fraudulent about referring customers to an investment adviser for fees, and the complaint does not allege statements or omissions by defendants that are fraudulent absent awareness or notice that [such]

[1] *Alpharma Inc. Securities Litigation,* 372 F.3d 137, 149 (3d Cir. 2004).
[2] *South Cherry Street, LLC v. Hennessee Group LLC,* 573 F.3d 98, 109 (2d Cir. 2009).
[3] *Werner v. Werner,* 267 F.3d 288, 299 (3d Cir. 2001)

> business was a sham." … One who conducts normal business activities while ignorant that those activities are furthering a fraud is not liable for securities fraud."[4]

Plaintiffs' claims against Altman, at best, are nothing more than conclusory allegations that Altman failed to conduct due diligence to uncover another's fraud of which he had no knowledge, in which he did not participate, and from which he did not benefit. As the Third Circuit and other courts have made clear, such allegations do not state a claim for securities fraud as a matter of law.

Plaintiffs' purported claims against Altman are thus precisely the type at which the substantially heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 and the holdings of the United States Supreme Court in *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Tellabs v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) are directed. In short, they are without factual support in the Amended Complaint and are implausible on their face. Instead, supported solely by conclusory allegations and group pleading, they allege, at most, a fraud committed by a single individual, defendant Mark Bloom, and represent, at best, a futile attempt to go beyond the facts and the law to reach an additional defendant. But under the controlling authorities, such claims cannot withstand this motion to dismiss.

Indeed, a review of the Amended Complaint reveals that despite paragraph upon paragraph of allegations concerning Bloom's alleged embezzlement and fraud, his control over the allegedly fraudulent fund, the criminal proceedings brought against him, and the benefits he reaped from his fraud, there is not, and could not be, a single allegation that Altman participated in the fraud, had knowledge of any fraud, benefited in any way from such fraud, had any

[4] *Securities and Exchange Commission v. Cohmad Securities Corp.,* 2010 WL 363844 (S.D.N.Y. 2010).

knowledge or notice that any statement he allegedly made was in any way false or misleading, or was in any manner implicated, let alone mentioned, in any criminal proceedings against Bloom.[5]

What is more, Altman is the *only* defendant that plaintiffs do *not* charge with a failure to supervise Bloom.[6] Indeed, in amending their complaint with respect to Altman, plaintiffs simply reiterate that Altman allegedly repeated Bloom's statements about the North Hills fund, albeit to only one of the named plaintiffs,[7] and add a series of allegations containing legal conclusions concerning the duties that allegedly were owed by Altman. But plaintiffs add nothing in the way of additional factual allegations that would even begin to satisfy the required standard for pleading scienter under the federal securities laws, nor do they remedy the numerous other infirmities evident in their initial complaint with respect to each of the claims they purport to assert against Altman.

As a result, under the controlling authorities set forth in detail below, plaintiffs have failed to state a claim against Altman under Section 10(b) and Rule 10b-5 for securities fraud (Count I); under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL")(Count II); or for breach of fiduciary duty (Count IV),[8] and all such claims should be dismissed as a matter of law.

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[5] The Court may consider the Criminal Information filed against Bloom on this Motion to Dismiss since such documentation was specifically referenced and relied upon in the Amended Complaint (Amended Complaint ¶ 47). *See Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co.,* 652 F.Supp.2d 576, 584 (E.D. Pa. 2009)(allowing consideration in deciding a motion under Rule 12(b)(6) of matters incorporated by reference in the complaint, items subject to judicial notice, and items appearing in the public record).

[6] See Amended Complaint, Counts III and IV.

[7] While not relevant or necessary to this motion, Altman vigorously denies even these allegations that are, in all events, entirely false.

[8] The remaining counts of the Amended Complaint are not asserted against Altman.

THE AMENDED COMPLAINT

The Amended Complaint again includes voluminous allegations against defendant Bloom, alleging that he committed a fraud against plaintiffs. The Amended Complaint, however, once again fails to allege any specific facts justifying the assertion of any claim against Altman, let alone for securities fraud, a violation of the UTPCPL, or for breach of a fiduciary duty to these plaintiffs.

Despite again charging Altman with securities fraud, the Amended Complaint does not have a single factual allegation indicating that Altman had any knowledge of Bloom's wrongdoing, that he had any control or involvement with North Hills, that he was involved in any embezzlement or fraud of any kind, that he made any allegedly false representation to plaintiffs about North Hills with the required scienter, that he benefited in any way from any of Bloom's wrongdoing, that he had control over or involvement in any North Hills' investment, that he ever even met or communicated with most of the plaintiffs, let alone made any representations to them, that there was any connection, substantively or temporally between any alleged misrepresentation by Altman and all but one of the plaintiffs' alleged investments in North Hills, and most revealingly, that Altman was in any way implicated, referenced or even mentioned in any criminal proceedings, against Bloom or otherwise.

Indeed, in amending their complaint, plaintiffs simply reiterate that Altman purportedly recommended the North Hills fund in a single meeting with two of the plaintiffs[9] (Amended Complaint ¶ 25) and otherwise add several conclusory allegations concerning Altman's alleged duties and responsibilities in his capacity at MB (Amended Complaint ¶¶ 28 and 61), and that he failed to conduct due diligence or make disclosures within MB necessary to uncover Bloom's

[9] One of whom, John Wallace, is alleged to have been the representative of plaintiff Philadelphia Financial Services, LLC, ("PFS") although there is no allegation that PFS was even mentioned or discussed or that PFS made any investments as a result of the single meeting alleged to have occurred.

(not Altman's) covert fraud. (Amended Complaint ¶¶ 61, 65, 113). Even if true, such allegations simply do not constitute securities fraud under the controlling authorities and certainly do not plead a plausible claim under any theory. Indeed, even after filing over 92 pages of pleadings and memoranda in this case, the plaintiffs still have not provided any factual allegation indicating that Altman:

- Was involved in any fraud;
- Knew of any fraud;
- Was aware of any information or placed on notice that Bloom was committing fraud;
- Had any knowledge or notice that any representation he allegedly made was false or misleading;
- Had any responsibility for overseeing or supervising Bloom;
- Benefited from any fraud or from any representation he allegedly made;
- Had any control or involvement in North Hills; or
- Was implicated in any way in any criminal proceeding.

As detailed below, not only do the allegations of the now Amended Complaint not satisfy the well-settled pleading requirements for a securities fraud claim, but they do not in any manner pass the plausibility standard necessary to survive a motion to dismiss.

ARGUMENT

POINT I

THE APPLICABLE STANDARD OF REVIEW

The United States Supreme Court has established that "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face." *Ashcroft v. Iqbal,* 129 S.Ct. at 1949, *quoting, Bell Atlantic Corp. v.*

Twombly, 550 U.S. at 570; *see also Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co.*, 652 F. Supp.2d 576, 583 (E.D.Pa. 2009); *Beck v. Arcadia Capital Group, Inc.*, 2009 WL 3152184 (E.D.Pa. 2009).

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal,* 129 S.Ct. at 1949; *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 555. The plausibility standard established by the United States Supreme Court "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal,* 129 S.Ct. at 1949; *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 557; *Beck v. Arcadia Capital Group, Inc.,* 2009 WL 3152184 (E.D.Pa. 2009). "To meet this standard, plaintiffs must nudge their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 570.

The Supreme Court has emphasized two principles directly applicable here. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 129 S.Ct. at 1949; *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 555; *see also Morse v. Lower Merion Sch.Dist.*, 132 F.3d 902, 906 (3d Cir. 1997); *Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co.*, 652 F. Supp.2d at 583-584. "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal,* 129 S.Ct. at 1950; *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 556. The mere "possibility of misconduct" is insufficient to withstand such a motion. *Id.*

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully; a claim has

> facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, ---U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), *citing Twombly*, 550 U.S. at 556, 570; *Miles v. Township of Barnegal*, No. 08-1387, 2009 U.S.App. LEXIS 20004 at *9 (3d Cir. Sept. 4, 2009). Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal, supra, quoting Twombly*, 550 U.S. at 557.

Beck v. Arcadia Capital Group, Inc., 2009 WL 3152184 (E.D.Pa. 2009).

As demonstrated herein, the allegations in the Amended Complaint do not plausibly implicate wrongdoing by Altman and, therefore, are insufficient as a matter of law to state a viable claim. Indeed, the idea that Altman would jeopardize his own career and standing to protect Bloom's embezzlement scheme, in which Altman admittedly had no part and from which he did not benefit, is entirely implausible. Under the applicable standard of review as established by the United States Supreme Court, plaintiffs' claims against Altman therefore must be dismissed.

POINT II

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 10(b) AND RULE 10b-5

To state a claim under section 10(b) and Rule 10b-5, a plaintiff must prove: (i) a material misrepresentation or omission by the defendant; (ii) scienter; (iii) a connection between the misrepresentation or omission and the purchase or sale of a security; (iv) reliance upon the misrepresentation or omission; (v) economic loss; and (vi) loss causation. *Beck v. Arcadia Capital Group. Inc.*, 2009 WL 3152184 (E.D. Pa. 2009), *quoting, Stoneridge Investment Partners, LLC v. Scientic-Atlanta, Inc.,* 552 U.S. 148, 128 S.Ct. 761, 768, 169 L.Ed.2d 627 (2008).

Here, plaintiffs have not pled, and cannot plead, facts sufficient to satisfy the required elements of such a claim against Altman and, consistent with repeated recent decisions of the courts of this District, Count I of the Amended Complaint must be dismissed as against Altman as a result. *See, e.g., Beck v. Arcadia Capital Group. Inc.*, 2009 WL 3152184 (E.D. Pa. 2009); *Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co*., 652 F.Supp.2d 576, 584 (E.D.Pa. 2009); *In Re Nutrisystem, Inc. Securities Litigation*, 653 F.Supp.2d 563 (E.D. Pa. 2009).

A. Plaintiffs' Securities Fraud Claim Must Satisfy The Heightened Pleading Requirements Of FRCP 9(b) And The Private Securities Litigation Reform Act - - And Fails To Do So

To survive a motion to dismiss, in addition to having to plead a "plausible" claim to satisfy the requirements set forth by the United States Supreme Court in *Twombly*:

> Plaintiffs' securities fraud claim must also satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. §78u-4. *See, In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276 (3d Cir.2006) (noting that plaintiffs alleging fraud under the Exchange Act must comply with the heightened pleading requirements of both Rule 9(b) and the PSLRA); *Clark v. Comcast Corp*., 582 F.Supp.2d 692, 703 (E.D.Pa 2008) (noting same) (*citing In re Rockefeller Ctr. Props., Inc., Sec. Litig.*, 311 F.3d 198, 217 (3d Cir.2002)).

Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co., 652 F. Supp. 2d 576, 584 (E.D.Pa. 2009).

The requirements of Rule 9(b) are to be rigorously applied to plaintiffs' securities fraud claims:

> Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Id.* The Third Circuit has repeatedly noted that "this particularity requirement has been rigorously applied in securities fraud cases." *In re Rockefeller Ctr.*, 311 F. 3d at 216 (citation omitted).

Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co., 652 F.Supp. 2d at 584.

In addition, plaintiffs' claims must satisfy the more stringent standards of the Private Securities Litigation Reform Act:

> In addition to Rule 9(b), the PSLRA "imposes another layer of factual particularity to allegations of securities fraud." *In re Rockefeller Ctr.*, 311 F.3d at 217; *see also Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir.2004)(noting that securities fraud plaintiffs "must also comply with the heightened pleading requirements of the PSLRA"); *Majer v. Sonex Research, Inc.*, 541 F. Supp.2d 693, 703 (E.D.Pa. 2008) ("The PSLRA heightened the pleading requirements in private securities actions.").

Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co., 652 F.Supp.2d at 584-585.

The PSLRA specifically provides that:

> The complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). *Winer Family Trust v. Queens*, 503 F.3d 319, 326 (3d Cir. 2007).

As the Third Circuit has concluded:

> Importantly, the PSLRA requires the applicable mental state be pleaded with particularity. *See Id*. ("[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.").

Winer Family Trust v. Queens, 503 F.3d at 326; *see also In re NAHC, Inc. Securities Litigation*, 306 F.3d 1314, 1328 (3d Cir. 2002) (noting that securities fraud plaintiffs must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading" (*quoting In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 530 (3d Cir. 1999)).

> The Third Circuit "has held repeatedly that the intent of Congress was to 'substantially heighten the existing pleading requirements' in securities fraud actions." *Clark,* 582 F. Supp.2d at 704 (*quoting In re Rockefeller Ctr*., 311 F.3d at 217).

Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co., 652 F. Supp.2d at 585 ("If this particularity requirement is not met, 'the court shall … dismiss the complaint.' 15 U.S.C. §78u-4(b)(3)(A)").

What is more, and particularly decisive here, all such allegations must be separately and specifically alleged as to each defendant:

> Where Rule 10b-5 claims are brought against multiple defendants, a pleading must specify the role of each defendant and their connection to the misstatements or omissions.

In Re Nutrisystem, Inc. Securities Litigation, 653 F.Supp.2d 563 (E.D. Pa. 2009); *Winer Family Trust v. Queen*, 503 F.3d 319, 336 (3d Cir. 2007) ("The PSLRA requires plaintiffs to specify the role of each defendant, demonstrating each defendant's involvement in misstatements and omissions").

> Rule 9(b) requires that a plaintiff show that the person responsible for the misstatement or omission alleged had knowledge of its false or misleading character at the time. *Id.* at 216. The PSLRA's particularity requirement applies to all allegations and covers both scienter and allegations of a statement's falsity. *Avaya,* 564 F.3d at 263.

In re Nutrisystem, Inc. Securities Litigation, 653 F.Supp.2d 563 (E.D.Pa.2009).

B. <u>Plaintiffs Have Not, And Cannot, Plead The Requisite Scienter With Respect To Altman</u>

In accordance with the holding of the United States Supreme Court in *Tellabs v. Makor Issues & Rights., Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007), this Court has made clear that the PSLRA specifically raised the requirements for pleading the requisite element of scienter in a securities fraud case:

> The PSLRA also heightened the standard for pleading scienter. 15 U.S.C. §78u-4(b)(2). With respect to each act or omission, a plaintiff must: 1) specify each statement alleged to have been misleading and the reasons why it is misleading; and 2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. *Id., Tellabs v. Makor Issues &*

> *Rts., Ltd.*, --- U.S. ----, ----, 127 S.Ct. 2499, 2508, 168 L.Ed.2d 179 (2007). According to the *Tellabs* Court, the strong inference standard unequivocally raised the bar for pleading scienter. The inference must be more than merely reasonable or permissible. The Court held that a complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference that could be drawn from the facts alleged. *Id* .at 2509.

Majer v. Sonex Research, Inc., 541 F.Supp.2d 693, 704 (E.D.Pa. 2008).

> To survive a motion to dismiss, the inference of scienter must be cogent and at least as compelling as any competing nonculpable inference plausibly drawn from the facts alleged and taken as a whole.

In re Nutrisystem, Inc. Securities Litigation, 653 F.Supp.2d 563 (E.D.Pa. 2009), *citing Tellabs v. Makor Issues & Rights, Ltd.*, 127 S.Ct. at 2508.

In evaluating the sufficiency of a securities fraud claim, the court must take into account plausible nonculpable opposing inferences in determining whether the plaintiff's proposed inference of scienter is "strong" within the meaning of the PSLRA, i.e., whether 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. *Tellabs v. Makor Issues & Rights, Ltd.*, 127 S.Ct. at 2507-08; *see also In re Nutrisystem, Inc. Securities Litigation*, 653 F.Supp.2d 563 (E.D.Pa. 2009).

Allegations that the defendant "knew" or "must have known" that statements were fraudulent are insufficient. *Majer v. Sonex Research, Inc.*, 541 F.Supp.2d 693, 708 (E.D.Pa. 2008), *quoting GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004).

Similarly, facts establishing motive and opportunity to commit fraud no longer serve to establish scienter. *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 276-277 (3d Cir. 2009); *Luminent Mortgage Capital, inc. v. Merrill Lynch & Co.*, 652 F.Supp.2d 576, 586 (E.D.Pa. 2009), In re *Nutrisystem, Inc. Securities Litigation*, 653 F.Supp.2d 563 (E.D.Pa. 2009).

The PSLRA also requires that plaintiffs specify the role of each defendant, demonstrating each defendant's involvement in the alleged misstatements and omissions. Any 10b-5 claim must be pleaded with the specificity required by the PSLRA with respect to each defendant. *Winer Family Trust v. Queen*, 503 F. 3d 319, 335-337 (3d Cir. 2007); *Luminent Mortgage Capital, inc. v. Merrill Lynch & Co.*, 652 F.Supp.2d 576, 586 (E.D.Pa. 2009).

Here, plaintiffs do not offer factual allegations sufficient to support the necessary element of scienter as to Altman. There is no allegation that Altman knew of Bloom's wrongdoing, that he knew or had notice that any representations he allegedly made were false, that he participated in Bloom's wrongdoing in any way, or that he had any participation in or control over the operations of North Hills. In fact, the specific allegations of the Amended Complaint confirm the exact opposite, indicating that the fund was formed, owned, operated and controlled entirely by Bloom (Amended Complaint ¶¶32, 33, 34, 44); that Bloom alone committed embezzlement, self-dealing and other wrongdoing with respect to the fund (Amended Complaint ¶¶34, 35, 36, 37, 39, 41); that Bloom alone benefited from his fraud (Amended Complaint ¶¶42, 43, 44); and that Bloom and Bloom alone was charged and pleaded guilty to such fraud and misconduct (Complaint ¶47). As a result, the Amended Complaint itself is replete with specific facts that not only make any cogent inference of scienter as to Altman impossible, but render plaintiffs' securities fraud claims completely implausible as well.

C. <u>Plaintiffs' Attempt to Plead Scienter Based on Recklessness Is Likewise Unavailing</u>

The standard for alleging a securities fraud claim based on recklessness is as follows:

> Plaintiffs attempting to satisfy their burden of pleading scienter by alleging facts establishing recklessness *must allege a statement 'involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care*, and which presents a danger of misleading buyers or sellers that is *either known to the defendant or is so obvious that the actor must have been aware of it.*' *In re Advanta*, 180 F.3d at 535.

Alpharma Inc. Securities Litigation, 372 F.3d 137, 149 (3d Cir. 2004)(emphasis added); *Key Equity Investors Inc. v. Sel-Leb Marketing Inc.,* 2007 WL 2510385 (3d Cir. 2007).

The explicit requirement of an "extreme departure from the standard of ordinary care" simply is not, and cannot be, satisfied by plaintiffs' claims against Altman, let alone by the conclusory assertion that Altman should have known of the fraud. "General allegations that defendants knew or recklessly disregarded the false nature of the statements at issue are insufficient." *Alpharma Inc. Securities Litigation,* 372 F.3d at 149; *Key Equity Investors Inc. v. Sel-Leb Marketing Inc.,* 2007 WL 2510385. "'Generalized imputations of knowledge' do not satisfy the scienter requirement 'regardless of the defendants' positions within the company.'" *Alpharma Inc. Securities Litigation,* 372 F.3d at 149.

> The mere fact of a misstatement is not evidence of recklessness, and [plaintiff] provides no detail to support a stronger conclusion than: there must have been fraud. We have previously rejected such conclusory pleading as precisely what the PSLRA was intended to weed out.

Key Equity Investors Inc. v. Sel-Leb Marketing Inc., 2007 WL 2510385.

Indeed, the pleading requirements for alleging scienter under the PSLRA and the Supreme Court's decision in *Tellabs* apply equally to allegations of recklessness. Plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." *Alpharma Inc. Securities Litigation,* 372 F.3d at 148. "Inferences of scienter do not survive if they are merely reasonable … Rather, inferences of scienter survive a motion to dismiss only if they are both reasonable and 'strong' inferences." *Id*. at 150. As the Third Circuit found, "at worst, the Complaint alleges little more than mismanagement. As we have previously held, such claims 'are not cognizable under federal law.'" *Id.* at 151. "The mere fact that the information was sent to … headquarters and therefore was available for review

by the individual defendants is insufficient to 'give rise to a strong inference that [defendants] acted with the required state of mind.'"…"Fraud cannot be inferred simply because [defendant] might have been more curious." *Id.* at 151.

The notion that Altman is chargeable with fraud because he did not uncover a covert scheme committed solely by a co-worker is not only contrary to the law and the facts, but is particularly unavailing under circumstances where plaintiff offers no particularized factual allegations that Altman knew, or was on notice, of such wrongdoing or benefited from such wrongdoing in any way. As one court recently found in dismissing securities fraud claims under Rule 12(b)(6) in the face of the most notorious securities fraud of our time:

> There is nothing inherently fraudulent about referring customers to an investment adviser for fees, and the complaint does not allege statements or omissions by defendants that are fraudulent absent awareness or notice that Madoff's investment advisory business was a sham. . . In other words, one who conducts normal business activities while ignorant that those activities are furthering a fraud is not liable for securities fraud.

Securities and Exchange Commission v. Cohmad Securities Corp., 2010 WL 363844 (S.D.N.Y. 2010).

As the Third Circuit concluded in language equally applicable here:

> Looked at as a whole, plaintiffs' allegations rest on nothing more than a 'series of inferences … too tenuous to amount to one of those highly unreasonable omissions or misrepresentations that involve not merely simple or inexcusable negligence, but an extreme departure from the standards of ordinary care.

Alpharma Inc. Securities Litigation, 372 F.3d at 151.

In *Werner v. Werner*, 267 F.3d 288, 299 (3d Cir. 2001), the Court likewise found that:

> Claims grounded in breach of fiduciary duty or improper management are not actionable under Section 10(b) or Rule 10b-5. *See In re Craftmatic Securities Litigation*, 890 F.2d 628-39 (3d Cir. 1990) (citations omitted). Moreover, "a plaintiff may not 'bootstrap' a claim of breach of fiduciary duty into a federal securities claim by alleging that directors failed to disclose the breach of fiduciary

> duty." Kas, 796 F.2d at 513. Accord, Lewis v. Chrysler Corp., 949 F.2d 644, 652 (3d Cir. 1991).

* * *

> "When the incremental value of disclosure is solely to place potential investors on notice that management is culpable of a breach of faith or incompetence, the failure to disclose does not violate the securities laws." Craftmatic, 890 F.2d at 640.

Indeed, allegations such as those in the Amended Complaint were rejected in the recent case of *South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009). In that case, plaintiff alleged that defendants failed to conduct basic due diligence and disregarded red flags with the result that its representations and opinions were given without basis and in reckless disregard of their limits or falsity as to their suitability as an investment for plaintiff. The Second Circuit, however, found that such allegations were insufficient to create the required strong inference of scienter that is at least as compelling as any opposing inference of nonfraudulent and non reckless intent. As the Court made clear in the context of securities fraud claims:

> By reckless disregard for the truth, we mean "conscious recklessness-*i.e.*, a state of mind approximating actual intent, and *not merely a heightened form of negligence*,"

Id. at 109.

The Court further noted that the failure to investigate even extremely positive results (an allegation tried by plaintiffs here (Amended Complaint ¶ 65)), does not amount to recklessness:

> In Novak, we also noted that "there are limits to the scope of liability for failure adequately to monitor the allegedly fraudulent behavior of others." Id. at 309. In Chill, for example, we held that the allegation that a parent company had failed to interpret its subsidiary's "unprecedented and dramatically increasing profitability" in a particular form of trading as a sign of problems, and thus had failed to investigate further, did not adequately plead recklessness amounting to scienter. *See* 101 F.3d at 269-70.

Id. at 110; *see also In re Alpharma Inc. Securities Litigation,* 372 F.3d 137, 150 (3d Cir. 2004) (allegations that "financial statements overrepresented the company's true earnings" were insufficient to state a claim absent specific facts indicating that defendants knew such financial statements were false).

The Court in *South Cherry Street* thus concluded that the failure to conduct due diligence or investigate the conduct of others - - as alleged here - - fails to amount to securities fraud.

> Nowhere in the Complaint is there any allegation that Hennessee Group had knowledge that any representation it made as to the records or circumstances of Bayou Accredited, or its predecessor Bayou Fund, was untrue. Instead, the Complaint is replete with allegations that HG "would" have learned the truth as to those aspects of the Bayou funds if HG had performed the "due diligence" it promised. (E.g., Complaint ¶¶ 7,18, 26, 27, 28, 30.)
>
> Nor, to the extent that South Cherry sought to allege recklessness, does the Complaint contain an allegation of any fact relating to Bayou Accredited that (a) was known to Hennessee Group and (b) created a strong inference that HG had a state of mind approximating an actual intent either to relay false or misleading information about Bayou Accredited or to aid in the fraud being perpetrated by the Bayou Accredited principals. Although the Complaint alleged that, "[i]n breach of its agreement with South Cherry," Hennessee Group "failed to take obvious investigative steps and ignored clear red flags" (id. ¶ 30), it did not allege that Hennessee Group did not believe that the various Bayou funds' representations, including their records and financial statements, were accurate.

South Cherry Street, LLC v. Hennessee Group LLC, 573 F.3d at 112.

Indeed, the notion that a defendant (or Altman) would jeopardize his standing to protect a fraud in which he had no part and from which he did not benefit is implausible: "It is far less plausible to infer that an industry leader that … values and advertised its credibility in the industry … would deliberately jeopardize its standing and reliability, and the viability of its business, by" acting in the reckless manner alleged. *Id.* at 113.

The Court thus reached the same conclusion applicable here:

> The factual allegations in the Complaint do not give rise to a strong inference that the alleged failure to conduct due diligence was indicative of an intent to defraud.

Id. at 113.

D. Plaintiffs Have Failed To Adequately Allege An Actionable Misrepresentation By Altman

Under the PSLRA, with respect to each act or omission, plaintiffs must (1) identify each statement alleged to have been misleading and (2) specify the reasons why it was misleading. *Beck v. Arcadia Capital Group, Inc.,* 2009 WL 3152184 (E.D. Pa. 2009); *Mill Bridge V, Inc. v. Benton*, 2009 WL 4639641 (E.D.Pa. 2009); *In re NAHC, Inc. Securities Litigation*, 2001 WL 1241007 (E.D.Pa. 2001), *aff'd* 306 F.3d 1314 (3d Cir. 2002).

Plaintiffs also must "identify the source of the allegedly fraudulent misrepresentation or omission." *Mill Bridge V, Inc. v. Benton*, 2009 WL 4639641 (E.D.Pa. 2009), *quoting In re Suprema Specialties, Inc. Securities Litigation,* 438 F.3d 256, 276 (3d Cir. 2006).

What is more, a securities fraud claim cannot rest on the failure to disclose future events, particularly when such events are solely within the control of a third party, in this case Bloom. "To be actionable, a statement or omission must have been misleading at the time it was made; liability cannot be imposed on the basis of subsequent events." *In re NAHC, Inc. Securities Litigation,* 2001 WL 1241007 (E.D. Pa. 2001), *aff'd* 306 F.3d 1314 (3d Cir. 2002), *citing Zucker v. Ouasha,* 891 F.Supp. 1010, 1017 (D. N.J. 1995), *aff'd,* 82 F.3d 408 (3d Cir. 1996).

> 'Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them.' *Nice Systems,* 135 F.Supp.2d at 586. The plaintiffs have alleged no particularized facts to support the conclusory statement that the [Defendants] knew or anticipated that these events would occur.

In re NAHC, Inc. Securities Litigation, 2001 WL 1241007; *see also Majer v. Sonex Research, Inc.,* 541 F.Supp.2d 693, 706 (E.D. Pa. 2008)("representations about possible future events that are contingent on the actions of a third party are immaterial").

Unspecified references to a written document such as alleged by plaintiffs (Amended Complaint ¶ 25) likewise cannot satisfy the pleading requirements for a securities fraud claim:

> A plaintiff relying on internal reports must 'specify the internal reports, who prepared them and when, how firm the numbers were or which company officers reviewed them' … plaintiffs' barebones sketch of this internal memo utterly fails to meet this standard [under 9(b) and the PSLRA] in any respect.

California Public Employees' Retirement System v. Chubb Corp., 394 F.3d 126, 147-148 (3d Cir. 2004); *Clark v. Comcast Corp.,* 582 F.Supp.2d 692, 705 (E.D. Pa. 2008)("Reliance upon alleged documents which are undated, unquoted, undescribed, and unattached amounts to nonspecific allegations at best"); *Mill Bridge V, Inc. v. Benton*, 2009 WL 4639641 (E.D.Pa. 2009):

> [T]he complaint "fails to allege what, if any, [Defendant's] precise participation was in the Info Memo's production and/or how [Defendant] could be considered the source of any statements within the Info Memo. Indeed, nothing in this document suggests either that [Defendant] wrote or proposed the inclusion of these two statements or that she exercised control over the preparation of the document … As Plaintiff has failed to attribute either of these alleged misstatements directly to [Defendant], they cannot serve as the basis for Rule 10b-5 liability.

Id.

Here, plaintiffs' claims based on the alleged written "asset allocation" suffer from an additional and more basic infirmity, since they fail to attach the report and do not even attempt to identify what statements were actually contained in the document, let alone how they were false or misleading or what role Altman had in preparing such statements.

In short, the complete absence of any factual allegations in the Amended Complaint demonstrating what Altman said to each plaintiff or how what he allegedly said was in any way fraudulent likewise requires the dismissal of plaintiffs' securities fraud claims against Altman.

E. Plaintiffs Also Have Failed To Adequately Allege Any Plausible Connection Between Any Act By Altman And The Purchase Or Sale Of A Security Or Any Loss Arising Therefrom

In addition to failing to even allege any facts plausibly demonstrating the requisite scienter on the part of Altman or that he made any misrepresentations actionable under 10b-5, the Amended Complaint fails to allege a plausible connection between any alleged misrepresentation by Altman and the plaintiffs' purchase of securities or their alleged loss resulting therefrom.

First, the Amended Complaint does not offer any allegation that Altman made any representations to plaintiffs Perez, Francis Kelly, or Thomas Kelly.

Second, with respect to plaintiff PFS, the only contact alleged is a single meeting sometime in June, 2006 with John Wallace, who is elsewhere alleged to be the sole member of PFS (Amended Complaint ¶ 26). However, there is no allegation that Wallace was representing PFS in that meeting or that PFS was even mentioned or discussed. Even more to the point, the Amended Complaint later explicitly and necessarily admits that the only purchases by PFS occurred in September and November of 2008, over two (2) years after the alleged meeting with Wallace. It is implausible that anything said by Altman in 2006 could have lead to the purchases by PFS over two (2) years later, particularly in light of plaintiffs' allegations that in the interim, "throughout 2008, Mark Bloom solicited John Wallace … to make an investment in North Hills out of funds belonging to PFS." (Amended Complaint ¶ 30).

Third, it is absolutely clear from plaintiffs' own allegations and the criminal Information and guilty plea to which plaintiffs refer in their pleading (Amended Complaint at ¶ 47) that the cause of their loss was the embezzlement and criminal fraud perpetrated by Bloom. This intervening cause had nothing inherently to do with the North Hills fund itself, or its investment

philosophy, or anything else that even theoretically could have been the subject of any discussion involving Altman. And, there is not a single allegation either in plaintiffs' Amended Complaint or in the Criminal Information referred to therein that Altman was in any way, shape or form involved in such wrongdoing, benefited thereby, or had any knowledge or notice thereof.

Under such circumstances, plaintiffs claims that they purchased securities in reliance on the misrepresentations of Altman and suffered a loss as a result thereof is entirely implausible and, under the controlling authorities, likewise requires that such claims must be dismissed.

POINT III

PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST ALTMAN UNDER THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Plaintiffs' purported claim against Altman under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") suffers from many of the same infirmities as their securities fraud claim. In short, the Amended Complaint fails to specifically allege any false representation or deceptive conduct by Altman on which plaintiffs relied and suffered a loss as a result thereof.

> This Court has held that plaintiffs still must demonstrate the requirements of *any* claim brought under UTP/CPL, as espoused by the Pennsylvania Supreme Court: (1) that the Defendant made a false misrepresentation or engaged in deceptive conduct; (2) which the Plaintiffs justifiably relied upon; and (3) suffered loss as a result of such reliance.

Grimm v. Discover Financial Services, 2008 WL 4821695 (W.D.Pa. 2008). These are the requisite elements of a claim under the UTPCPL and plaintiffs' failure to allege facts plausibly supporting such a claim requires its dismissal as well. *Id.*

As demonstrated above, plaintiffs have not alleged, and cannot allege, any facts to support a claim against Altman based on a fraudulent misrepresentation. In order to state a claim

for a deceptive act, plaintiffs must allege "the act of *intentionally* giving a false impression" or "a tort arising from a false representation made *knowingly* or *recklessly* with the *intent* that another person should detrimentally rely on it." *Seldon v. Home Loan Services, Inc.,* 647 F.Supp.2d 451, 469 (E.D. Pa. 2009). Here, as detailed above, there is no plausible allegation that Altman made any such misrepresentation, knew anything about Bloom's wrongdoing, in any manner intended to mislead plaintiffs, or that plaintiffs relied, justifiably or otherwise, on any misrepresentations made by Altman.

Under these circumstances, this court has dismissed claims under the UTPCPL:

> Plaintiff does not specify any material misrepresentation made by [Defendant]. Plaintiff does not allege that [Defendant] made a false representation with knowledge of its falsity. Plaintiff does not allege that he relied on any [such] false statement. Indeed, Plaintiff fails to allege any underlying financial scheme or practice or that Defendant benefited in any way from such practice. … Because Plaintiff has failed to adequately plead the necessary elements to state a claim under the UTPCPL, the Complaint must be dismissed.

Arnold v. Stein Roe & Farnham, 2006 WL 851303 (E.D. Pa. 2006); *see also Wenglicki v. Tribeca Lending Corp.,* 2009 WL 2195221 (E.D. Pa. 2009).

> [Plaintiff] fails to state a UTPCPL claim because he has not alleged 'with particularity the elements necessary to support a violation … as to a particular Defendant.' *Morilus,* 2007 WL 1810676, 5. No actions by defendants that would result in a UTPCPL violation are alleged.

Id.

The same reasoning applies to plaintiffs' alleged claims against Altman under the UTPCPL. There simply are no facts alleged that would plausibly support such a claim, which therefore must be dismissed.

POINT IV

PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST ALTMAN FOR BREACH OF FIDUCIARY DUTY

To state a claim for breach of fiduciary duty, plaintiffs must allege:

> (1) the existence of a confidential or fiduciary relationship; (2) the defendant's failure to act in good faith and solely for the benefit of the plaintiff with respect to matters within the scope of the confidential or fiduciary relationship; and (3) an injury to the plaintiff proximately caused by the defendant's failure to act.

Grimm v. Discover Financial Services, 2008 WL 4821695 (W.D. Pa. 2008), *citing Baker v. Family Credit Counseling Corp.,* 440 F.Supp.2d 392, 414-415 (E.D. Pa. 2006).

What is more, "it is not enough to show that the plaintiff reposed its trust in the defendant [an allegation likewise absent in plaintiffs' Complaint]; the latter must also have accepted the fiduciary relationship." Id.; *see also City of Harrisburg v. Bradford Trust Co.*, 621 F.Supp. 463, 473 (M.D. Pa. 1985).

> Plaintiffs fail to allege, however, that Defendant Shinfeld ever manifested assent to a fiduciary or agency relationship.
>
> * * *
>
> In the absence of an allegation that Defendant assented to a direct fiduciary or agency relationship with Plaintiffs, Plaintiffs' allegation of a breach of fiduciary duty cannot stand. Count Six must therefore be dismissed.

Leder v. Shinfeld, 609 F.Supp.2d 386, 400 (E.D. Pa. 2009).

Plaintiffs' purported claim for breach of fiduciary duty against Altman thus fails as a matter of law for at least the following reasons:

1. There is no allegation whatsoever of any contact or relationship between Altman and plaintiffs PFS, Thomas Kelly, Frances Kelly or Gary Perez, let alone a fiduciary one, at or before the time of the alleged investments or of any facts constituting a breach of such a

relationship between these parties. As a result, there is no basis in the Amended Complaint for any breach of fiduciary duty claim against Altman by these plaintiffs;

2. There is no factual allegation of any actions by Altman that would constitute a breach of any duty owed to plaintiffs; and finally

3. The factual allegations that are contained in the Amended Complaint make it absolutely clear that the cause of plaintiffs' alleged losses was the intervening and independent wrongdoing of defendant Bloom in embezzling funds from North Hills and was not, and could not be, any alleged breach of any duty by Altman.

For at least these reasons, plaintiffs' breach of fiduciary duty claims against Altman likewise must be dismissed. *Grimm v. Discover Financial Services,* 2008 WL 4821695 (W.D. Pa. 2008); *Slotsky v. Roffman Miller Associates, Inc.,* 1995 WL 612592 (E.D. Pa. 1995).

CONCLUSION

Based on the arguments and authorities set forth above, it is respectfully submitted that plaintiffs' claims against defendant Ronald L. Altman should be dismissed with prejudice in their entirety.

Dated: April 13, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Joseph J. Langkamer, hereby certify that on this 13th day of April, 2010, I caused a true and correct copy of the foregoing Defendant Ronald L. Altman's Motion to Dismiss the Amended Complaint and accompanying Memorandum of Law to be served on the following persons via ECF (with the exceptions of Mark E. Bloom, Anthony Albanese, Esq., John B. Strasburger, Esq., and Michael Firestone, Esq.) and first-class mail:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY J. BELMONT, ET AL., Plaintiffs, v. MB INVESTMENT PARTNERS, INC., ET AL., Defendants.	Civil Action No. 09-cv-04951

ORDER

AND NOW, this ____ day of _____, 2010, it is hereby ORDERED that Defendant Ronald L. Altman's Motion to Dismiss the Amended Complaint is GRANTED and Plaintiffs' Amended Complaint is DISMISSED WITH PREJUDICE.

BY THE COURT:

_____
Schiller, J.