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.

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

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OVERVIEW

Plaintiffs have filed an Amended Complaint in response to Mr. Hofer's Motion to Dismiss their original complaint. Mr. Hofer, in his Motion, provided a roadmap of the pleading deficiencies of the complaint for the Plaintiffs to follow. The Amended Complaint again fails to address those numerous shortcomings. Accordingly, Mr. Hofer respectfully submits this memorandum in support of his Motion to Dismiss Plaintiffs' Amended Complaint for failing to state a claim under Fed. R. Civ. P. 12(b)(6) and for failing to comply with the heightened pleading standards required by both Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act ("PSLRA") for pleading securities fraud.

Plaintiffs' Amended Complaint alleges that Mr. Hofer violated Sections 9(a) and 10(b), and Rule 10b-5 of the Securities Exchange Act. They further

allege a violation of the Wisconsin Uniform Securities Act. Plaintiff AnchorBank FSB also claims Mr. Hofer breached a fiduciary duty it claims he owed it.

Plaintiffs have again failed to provide the detailed factual allegations necessary to plead either fraud or scienter as is required to comply with Rule 9(b) and the PSLRA. They fail to answer the fundamental questions of who did what, when and how; they provide no facts which would permit an inference that is "cogent and compelling" that Mr. Hofer intended to defraud investors. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 324, 127 S. Ct. 2499, 2510 (2007).

Each of the Plaintiffs' claims must be dismissed:

- Plaintiffs do not allege facts with particularity to support their claim that Mr. Hofer engaged in market manipulation in violation of Sections 9(a) and 9(e); Plaintiffs do not allege facts with particularity to support the existence of a scheme and have not pleaded facts supporting a strong inference of scienter. Plaintiffs allege Mr. Hofer communicated with two coworkers prior to trading but fail to provide any specifics related to those communications, or any documents, which would support an inference of a scheme. They fail to detail how purchases or sales in the Employees' 401(k) accounts translate into trades of ABCW stock; they have failed to show an impact on the Nasdaq Exchange. Further, Plaintiffs' allegation they purchased ABCW stock in reliance on the integrity of the market fails: they identify no such individual and detail no loss.

- Plaintiffs also fail to allege facts with particularity to support their claim that the Employees, by manipulating the market, made a material statement or omission in violation of Section 10(b) and Rule 10b-5. Because Plaintiffs failed to meet the requirements to plead fraud and scienter with particularity under Section 9(a), and because Plaintiffs' rely on the scheme alleged in Section 9(a) to support their claim under Section 10(b), this claim also fails.

- Similarly, Plaintiffs' claim that Mr. Hofer violated the Wisconsin Uniform Securities Law, Chapter 551 of the Wisconsin Statutes fails to state a claim. The definition of "security" under Wisconsin law expressly excludes from its definition pension plan interests subject to ERISA.

The only "shares" which Mr. Hofer "purchased" or "sold" were Anchor Unit Fund units offered by AnchorBank as part of an ERISA plan. Plaintiffs also failed to meet the requirement under Fed. R. Civ. P. 9(b) to plead facts alleging fraud with particularity.

- AnchorBank's claim for breach of fiduciary duty must also dismissed for failure to plead facts alleging fraud with particularity under Rule 9(b) and because the allegations do not state a claim for breach of any fiduciary duty owed by Mr. Hofer to AnchorBank under Wisconsin law.

The heightened pleading standards in fraud cases are warranted because of the "great harm to the reputation of [an individual]" that results from allegations of fraud; "fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it,…" *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467,469 (7th Cir. 1999)(citations omitted). The PSLRA was enacted to prevent the abuses of the securities law by plaintiffs who file complaints containing only labels and conclusions. *See Helwig v. Vencor*, 251 F.3d 540, 547 (6th Cir. 2001) (en banc). Complaints in securities cases must be pleaded with particularity "to enable a judgment that the claim has enough possible merit to warrant the protracted litigation likely to ensue from denying a motion to dismiss." *Stark Trading v. Falconbridge Ltd.*, 552 F.3d 568, 574 (7th Cir. 2009)(citations omitted). The Plaintiffs' Amended Complaint should be dismissed as it fails to meet the heightened pleading standards for plaintiffs alleging securities fraud under Rule 9(b) or the PSLRA.

STATEMENT OF FACTS

A. The Parties.

AnchorBank, FSB ("AnchorBank") is a federal stock savings association located in Madison, Wisconsin. Am. Complaint, ¶ 1. AnchorBank Unitized Fund ("Fund") is an investment option within AnchorBank's 401(k) retirement plan. Am. Complaint, ¶ 2. The Plaintiffs did not plead the Fund's legal status or authority to bring this action.[1] Defendant Clark Hofer ("Mr. Hofer"), a Wisconsin resident, was employed by Plaintiff AnchorBank during the period at issue. Am. Complaint, ¶¶ 3, 6.

B. The Fund.

AnchorBank provides its employees with the opportunity to invest in a 401(k) retirement plan. Am. Complaint, ¶¶ 2, 8. One of the investment options offered to all employees by AnchorBank is investment in the AnchorBank Unitized Fund ("Fund"). *Id.* at ¶ 8. The Fund is comprised of stock in AnchorBanCorp of Wisconsin, Inc. ("ABCW") and cash. *Id.* at ¶ 9. Participants who invest in the Fund hold "units" in the Fund ("AUF shares" or "AUF units") rather than shares of ABCW stock. (*Id.*). The Fund's cash holdings allow the Fund to settle purchases and sales made by participants during the day, each night among Fund participants. *Id.* at ¶ 10. Fund participants receive the closing price of the Fund on any day they trade regardless of whether the Fund Manager buys or sells ABCW stock on the Exchange. *Id.* at ¶¶ 20, 22, 23.

[1] Indeed it is questionable whether the Fund is the proper party to bring this suit. See *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)(ERISA confers standing on pension plans to sue under ERISA but "does not purport to confer standing to sue under other statutes.")

The Fund, the amount of cash, and all purchases and sales of ABCW stock on the open market are managed by a third party.[2] Am. Complaint, ¶ 10. Participants in the Fund move money into, or out of, the Fund on a daily basis in order to purchase or sell AUF units; when the Fund Manager is unable to offset the trades by Participants within the Fund on a given day the Fund Manager must buy or sell ABCW stock on the open market to maintain the appropriate stock to cash balance in the Fund. *Id*. at ¶¶ 13, 15. The ratio of cash to ABCW stock in the Fund ranged between 5 to 11%. *Id*. at ¶ 11.

C. Trades in the Fund.

Between September 2008 and the end of June 2009, Mr. Hofer purchased and sold AUF units in the Fund in his 401(k) account. Am. Complaint, ¶ 18. Trades by two other employees in their 401(k) accounts between September 2008 and the end of June 2009 of AUF units are also alleged. Id. During this ten month time period Mr. Hofer traded in the Fund in his 401(k) on 36 occasions. *Id*. at ¶¶ 27-28. The other two identified employees traded in the Fund on the same day as Mr. Hofer on 9 occasions. *Id*. at ¶ 28. On 19 occasions Mr. Hofer's trades occurred on the same day as employee A's trades in the Fund, and on eight occasions Mr. Hofer's trades occurred on the same day as employee B's trades in the Fund. Id. The Employees communicated with one another "prior to or contemporaneously with" each days' trade; Mr. Hofer "instructed or encouraged" the two other employees to trade. *Id*. at ¶ 32. Plaintiffs do not

[2] Although not so identified this third party is presumably the Fund Manager and/or Fund Sponsor, also not a party. See Am. Complaint 10.

provide copies of the written communications nor do they quote from the written communications. *Id*.

Plaintiffs contend that the frequency of coordinated trades made by Mr. Hofer and employees A and B (collectively "Employees") during this ten month period and the alleged communications among them establish the trades were not a coincidence, and that these trades could only have been collusive and intentional. Am. Complaint, ¶ 46. Plaintiffs contend these trades reflect a Collusive Trading Scheme by the Employees. *Id*. at ¶¶ 18, 46.

The Employees' purchases and sales of AUF units resulted in these Employees owning an increasing number of AUF units in the Fund over the ten month period. Am. Complaint, ¶ 42. As the Employees bought and sold their increasing numbers of AUF units the Fund Manager was forced to purchase or sell ABCW stock held by the Fund in volumes that allegedly impacted the ABCW price on the open market. *Id*. at ¶¶ 21, 24, 48. The Employees' buying and selling of AUF units "caused the volume of ABCW stock sales to be relatively high as compared to the average daily trading volume of ABCW stock" which caused the price of ABCW stock to increase or decrease. *Id*. at ¶¶ 21, 24, 26. Plaintiffs claim this resulted in the Fund Manager being forced to buy or sell ABCW stock on the Exchange at artificially high or artificially low prices. *Id.* at ¶¶ 26, 45, 55. Other unidentified Fund participants allegedly in reliance on the "artificially high or low AUF share price," traded in ABCW stock at prices that were artificially high or low. *Id.* at ¶¶ 26, 55.

Plaintiffs contend that Exhibits A – C to the Amended Complaint establish a "measurable correlation between" the Employees' purchases and sales of AUF units and a change in ABCW price, and that the Employees' trades increased the trading volume of ABCW stock and affected ABCW price. Am. Complaint ¶ 48.

On June 29, 2009 the Employees purchased 1,943,986 AUF units which Plaintiffs claim represented 782% of the average volume of ABCW stock traded on the open market over the following five days, a period of time artificially selected by Plaintiffs. Am. Complaint, ¶ 47.

Based on the foregoing allegations Plaintiffs summarily allege that the purchases and sales by the Employees of AUF units "indirectly increased the trading volume of ABCW stock and demonstrably affected the ABCW stock price" and resulted in a "measurable decline in the AUF share price relative to the price of ABCW stock," injuring the other Fund participants. Am. Complaint, ¶¶ 48-9.

AnchorBank suspended Mr. Hofer without pay while it investigated allegations relating to securities trading. Am. Complaint, ¶¶ 47,56.

Noticeably absent from Plaintiffs' Amended Complaint is any allegation that Mr. Hofer or either of the other two employees violated the ERISA rules applicable to their purchases or sales of AUF units, or the rules established by the Plaintiffs for trading in the Fund. Also noticeably absent are copies of the rules governing trading in the Fund or of the rules governing how and when the Fund Manager is required to carry out participant trades.

ARGUMENT

Motion to Dismiss Standard

Mr. Hofer submits this memorandum in support of his Fed. R. Civ. P. 12(b)(6) and 9(b) Motion to Dismiss the Complaint. It is appropriate for a Court to grant a motion to dismiss pursuant to Rule 12(b)(6) where it appears beyond doubt that plaintiffs would be unable to prove facts in support of their claim that would entitle them to relief. *Gant v. Wallingford Bd. Of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995). The plaintiff's failure to sufficiently plead the elements of a cause of action is grounds for dismissal. *Id.* (citing *Goldin Assocs., L.L.C. v. Donaldson, Lufkin, Jenrette & Securities Corp.*, No. 00-8688, 2003 U.S. Dist. LEXIS 16798, at *1 (S.D.N.Y. Sept. 25, 2003)).

Plaintiffs assert claims of fraudulent trading under Sections 9(a) and 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.A. §§ 78i, 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5. Plaintiffs also allege violations of the Wisconsin Uniform Securities Law, Chapter 551 of the Wisconsin Statutes and breach of fiduciary duty sounding in fraud.

Plaintiffs' fraud claims are subject to heightened pleading requirements under Fed. R. Civ. P. 9(b) and under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(2). Rule 9(b) requires that a party "state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). This rule requires that the "who, what, when, where and how of the alleged fraud" be plead in detail to survive a motion to dismiss. *Stavros v. Exelon Corp.*, 266 F. Supp. 2d 833, 841 (N.D. Ill. 2003) (citing *DiLeo v. Ernst &*

Young, 901 F.2d 624, 627 (7th Cir. 1990)). The purpose of requiring a plaintiff to allege specifics is to require the plaintiff to perform sufficient precomplaint investigation "to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Ackerman,* 172 F.3d at 469.

The PSLRA was enacted as a check against abusive litigation in private securities actions. Tellabs, 551 U.S. at 313. To satisfy the PSLRA, a plaintiff must "(1) identify each statement alleged to be misleading; (2) specify the reasons why the statement is misleading; (3) state with particularity all facts supporting each allegation made 'on information and belief;' (4) state with particularity sufficient facts to allow a 'strong inference' to be drawn that the defendant acted with scienter, or an intent to deceive. 15 U.S.C. § 78u-4(b)(1)-(2)." *Schultz v. Tomotherapy Inc.*, No. 08-314, 2009 U.S. Dist. LEXIS 58631, at *25-26 (W.D. Wis. July 9, 2009).

Plaintiffs thus must not only plead fraud with particularity they must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78u-4(b)(2). The required state of mind, scienter, "refers to 'a mental state embracing intent to deceive, manipulate or defraud.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, n.12 (1976). A securities fraud complaint will only survive dismissal 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." *Tellabs, Inc.,* 127 S. Ct. at 2504-05.

Plaintiffs have done little more than plead "labels and conclusions," and provide a "formulaic recitation of the elements of a cause of action" which is insufficient to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Where a plaintiff fails to plead sufficient factual content to permit the court to draw the inference that the defendant is liable for the misconduct alleged, the complaint should be dismissed, even in the absence of heightened pleading requirements. *Id*. at 556.

Counts I and II of the Amended Complaint must be dismissed under Rule 12(b)(6) because Plaintiffs have failed to meet the heightened pleading requirements under either Fed. R. Civ. P. 9(b) or the PSLRA. Count III must be dismissed as it fails to state a claim under Wisconsin law. Counts III and IV must also be dismissed for failure to meet the detailed pleading requirements of Rule 9(b) for claims asserting fraud. Plaintiffs Amended Complaint must be dismissed with prejudice under Rule 12(b)(6). Defendant outlined the heightened pleading requirements for the Plaintiffs in his first Motion to Dismiss; Plaintiffs failure to plead with the particularity required by the PSLRA despite the roadmap provided by the Defendant demonstrates that Plaintiffs have no facts which would enable them to state a claim entitling them to relief. Plaintiffs' Amended Complaint should be dismissed in its entirety with prejudice.

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

A. Plaintiffs Again Failed to Adequately Plead with Particularity the Elements for an Action under Section 9(a).

Plaintiffs in Count I assert a claim under Section 9(a) of the Exchange Act of 1934 which provides in pertinent part:

> **(a) Transaction relating to purchase or sale of security**
>
> It shall be unlawful for any person, directly or indirectly, . ..
>
> **(2)** To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

15 U.S.C.A. § 78i.

Thus, Plaintiffs in asserting a market manipulation theory under Section 9(a) must allege: "(1) a series of transactions in a security creating actual or apparent trading in that security or raising or depressing the price of that security, (2) carried out with scienter, (3) for the purpose of inducing the security's sale or purchase by others, (4) was relied on by the plaintiff, (5) and affected plaintiff's purchase or selling price." *Fezzani v. Bear, Stearns & Co, Inc.*, 384 F. Supp. 2d 618, 637 (S.D.N.Y. 2004).

1. Plaintiffs fail to plead sufficient facts with particularity to support the existence of a scheme to defraud.

Plaintiffs allege Mr. Hofer and two co-workers (collectively "Employees") devised a "Collusive Trading Scheme" beginning in September 2008 which continued until June 2009; they allege the Employees schemed to trade their AUF units in their respective 401(k) accounts in order to manipulate the price of ABCW stock price on the open market. Plaintiffs do not allege any conduct such

as wash sales, matched orders or rigged prices, conduct which is recognized as manipulative. *See SEC v. Masri and Sutton,* 523 F. Supp. 2d 361, 367 (S.D.N.Y. 2007). Plaintiffs instead assert they concluded there was a Collusive Trading Scheme for two reasons: 1) because of communications between the Employees "prior to" trading; and 2) because of the "frequency of coordinated trading activity" in the Fund. Am. Complaint, ¶ 46. Plaintiffs fail to allege either factor with the particularity required by law.

(a) Plaintiffs fail to detail any communications in support of a scheme.

Plaintiffs allege in their Amended Complaint that the Employees communicated with each other prior to trading on each trade date; they allege Mr. Hofer "instruct[ed] and encourage[d]" the Employees to trade on the same date he traded. Am. Complaint ¶ 32. Plaintiffs again however fail to provide more than "label and conclusions" in making their claims. They do not provide copies of the emails they allege establish the scheme. They do not quote any statements from the emails which they allege establish the scheme. They do not allege that the communications included any discussion of the particulars of the scheme. They do not allege the Employees ever discussed a strategy for implementing the scheme, such as what ABCW price would trigger a trade of AUF units in their respective accounts or what volume of AUF units should be traded in order to affect the price of ABCW stock on the Exchange. Most importantly, they do not allege that the communications establish that *the Employees ever reached agreement* to participate in a scheme to manipulate the stock market.

Plaintiffs also do not explain what they mean when asserting the communications were "prior to or contemporaneous with" trading. Were the communications one week before? One day before? Plaintiffs merely allege the existence of verbal or email communications. Plaintiffs failure to plead the who, what, why, when and where of the facts which they rely on to accuse Mr. Hofer of a fraudulent scheme is insufficient under the law. *Stavros, supra*; *Twombly, supra.*

(b) Plaintiffs inadequately detail the frequency of trades.

The Plaintiffs also rely on the alleged frequency of trades to support their allegation of a "fraudulent scheme." Plaintiffs allege Mr. Hofer traded with one or more of his two co-workers on 36 times over a 10 month period. Am. Complaint ¶¶ 28, 46. During the 10 months of alleged collusive trading there were approximately 207 trading days. The Employees allegedly traded on the same day *only 9 times* during those 207 days. Where is the scheme? And, Plaintiffs fail to explain why Mr. Hofer's trading on the same day as one or two other employees, even if the Employees discussed the trades "prior to" trading, turns these trades into a scheme. Plaintiffs also fail to explain how the Employees would be aware of when, or in what volume, the Fund Manager traded on the open market as a result the of Employees transfer of money into, or out of, the Fund. Without detail on the volume of shares that the Fund Manager traded as a result of the Employees' trades in the Fund, and without detail on when or whether a trade on the Exchange actually occurred, Plaintiffs' allegations and

conclusions that these trades reflect a scheme to affect the ABCW share price is nothing short of irresponsible.

Significantly, Plaintiffs fail to provide the entire picture of the trades by Mr. Hofer and employees A and B. Plaintiffs include Exhibit A to show the number of allegedly coordinated trades. However, they do not show the number of times, or in what volume, that Mr. Hofer may have traded alone, or how many times, or in what volume employees A and B may have traded alone. Certainly, any independent trades by these individuals would further undercut Plaintiffs' claims of a "Collusive Scheme."

Moreover, frequent, large scale trading is neither evidence of market manipulation nor prohibited by Section 9(a). *Trane v. O'Connor Securities,* 561 F. Supp. 301, 304-05 (S.D.N.Y 1983), *appeal dismissed as moot*, 718 F. 2d 26 (2d Cir. 1983). The *Trane* defendants engaged in active trading in Trane stock during a nine month period, changing their position from holding zero shares, to holding approximately 1.5 million shares, of Trane stock. The court rejected the plaintiffs' argument that this trading violated the securities laws even though the court found that the trading affected price and induced purchases by others. The court noted that the "purpose of section 9(a) is not to prohibit market transactions which may raise or lower the price of securities, but to keep an open and free market where the natural forces of supply and demand determine a security's price. *Id*. at 304 (*citing Chris-Craft v. Piper Aircraft*, 480 F.2d 341,383 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973)). Accordingly, Plaintiffs' conclusion that the

alleged frequency and volume of the Employees' trades evidence a fraudulent scheme in violation of the securities laws is meritless.

Unlike in the usual securities action alleging market manipulation, here it is the Plaintiffs, not the Defendant, who are in possession of facts which would support the alleged "scheme." *See Fezzani*, 384 F. Supp. 2d at 642 (In the typical market manipulation case where it is the defendant, *rather than the plaintiff*, who is in possession of facts supporting manipulation, less detail may be required.). Yet, the Plaintiffs have apparently made a strategic decision to limit the facts they offer as evidence of a fraudulent scheme. The Plaintiffs' allegations reference multiple documents which they fail to provide: 1) email communications among the Employees; 2) detail on *all* trades made by the Employees, not just those listed in Exhibit A, during the relevant time period; 3) detail on the dates the Fund Manager was actually "required" to buy or sell ABCW stock on the Exchange, and in what amounts, allegedly as a result of the Employees' trades; 4) the Rules governing trading by participants; and 5) documents detailing the mechanics of the Fund.

Plaintiffs, instead of providing the facts in their possession, would rather accuse Mr. Hofer based on speculation and implication. Plaintiffs' repeated failure to plead the details of the alleged "scheme" with particularity is fatal to their securities fraud claims. *See Twombly,* 550 U.S. at 545 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a motion to dismiss.) Mr. Hofer's Motion

should be granted as Plaintiffs have failed to plead facts sufficient to support a manipulative scheme. *Fezzanni, supra*.

2. Plaintiffs also failed to plead facts with particularity to establish the Employees' trades affected price of ABCW stock on the Exchange.

The PSLRA also includes a requirement that a private plaintiff claiming securities fraud adequately allege both economic loss and a causal connection between the loss and the fraud. 15 USC § 78u-4(b)(4). *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-43, 125 S. Ct. 1627 (2005). In other words, Plaintiffs' pleading must "provide[] Mr. Hofer with notice of what the relevant economic loss" is and detail the causal connection between the alleged loss and the Employees' "scheme." *Id*. at 347.

a. Plaintiffs have not adequately plead loss or loss causation.

Plaintiffs allege only that the Employees coordinated their trading activity "in order to create actual or apparent active trading in ABCW stock" which affected the ABCW stock price. Am. Complaint, ¶ 60. But Plaintiffs fail to detail *how* the Employees' trades of AUF units in the Fund could have affected the price of ABCW stock on the Exchange, they fail to detail *when* such trades were made, and they fail to identify *who* suffered losses.

Plaintiffs' omissions are especially significant because of how the Fund operates. Fund participants do not purchase ABCW stock; they do not own shares of ABCW stock in the Fund. They own *units* in the Fund, comprised of shares of ABCW stock and cash. Am. Complaint, ¶ 9. The Fund Manager accomplishes trades in ABCW stock once money is transferred into, or out of, the

Fund. However, trading in the Fund does not necessarily result in the Fund Manager making trades of ABCW stock on the Exchange.

Plaintiffs acknowledge that the Fund Manager "settle[s] purchases and [sales] each night with Fund participants" based on daily trading activity by all AUF participants. Am. Complaint, ¶ 10. They further acknowledge that the Fund Manager buys or sells on the open market where necessary over the "next trading day(s)…" Am. Complaint, ¶ 20. But, Plaintiffs do not identify for any of the alleged 36 collusive trades the actual number of ABCW shares which the Fund Manager was, in fact, required to trade on the open market, as opposed to settling within the AUF, nor do they identify the number of days over which the Fund Manager was required to makes trades for any of those 36 instances.

Thus, Plaintiffs' allegation that the Employees purchased approximately 1,943,986 AUF units on June 29, which "represent[ed] 782% of … the daily trading activity of the ABCW stock by the end of June," is meaningless to show impact. Am. Complaint ¶¶ 44, 56. Defendant, and this Court, are provided no detail about 1) the actual number of shares of ABCW the AUF units translated into; 2) the number of shares of ABCW that the Fund Manager was allegedly required to trade on the open market after settling trades in the Fund among AUF participants; 3) the number of days it took for the Fund Manager to actually trade these shares; or 4) the volume of ABCW stock traded on each of those days on the Exchange. *See e.g. Abbott v. Lockheed Martin Corp.*, 2009 U.S. Dist. LEXIS 26878, *32 (S.D.Ill. Mar. 31, 2009) (The structure of the unitized fund meant that

the Plan administrator could "batch" trades among participants over several days, so that 3.5 million shares, rather than 23.38 million shares, were traded.).

Plaintiffs' assertion that the Employees' purchase on Monday, June 29, 2009 impacted the trading volume of ABCW stock on the Exchange "by the end of June" is also disingenuous. Plaintiffs omit that on Friday, June 26, 2009, when Anchor BanCorp Wisconsin, Inc. announced continuing losses, more than three million shares of ABCW stock were traded. See Exhibit B to Morris Declaration.[3] Again, Plaintiffs cannot show loss causation.

b. Plaintiffs' Exhibits do not provide the required detail.

Plaintiffs have attached several exhibits to their Amended Complaint presumably to address criticisms made by Mr. Hofer in his initial Motion to Dismiss regarding the lack of detail on trades. Exhibit A lists the number of AUF units allegedly traded on specified trade dates and for each of those trade dates, the volume of ABCW stock traded. This exhibit is, however, meaningless to show the impact of the Employees' trades on the Exchange. Most importantly, since, as Plaintiffs acknowledge, trades by Fund participants are not reflected in transactions of ABCW stock *on the day* the participant traded AUF units, but on *the day(s) following* the day the participant trades – and only if the Fund Manager buys or sells – an exhibit detailing the volume of ABCW stock traded on the same day the Employees trade is meaningless. Am. Complaint ¶¶ 20, 23.

Inferences based on Exhibit A are meaningless for additional reasons: Plaintiffs do not identify for any trade dates whether the Employees' trades

[3] This Court may take judicial notice of public records, such as these news articles, attached to the Morris Declaration, submitted with Mr. Hofer's original Motion. *See United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir.1991).

cancelled each other out on successive days, or were set off by trades of other participants. In either of these situations, the Fund Manager would not be required to trade on the Exchange, or would trade in a lesser amount. Further, Exhibit A's comparison of AUF unit volume to ABCW stock volume is a comparison of apples and oranges. Plaintiffs do not explain how AUF units equate in number to the number of ABCW shares traded on a given trade date. Thus, Plaintiffs' reliance on Exhibit A to show that the Employees' trades in the AUF affected ABCW volume, and thus price, is misplaced.

Exhibit B to Plaintiffs' Amended Complaint reflects ABCW trade volume for the relevant period and indicates for each date whether the Employees transferred money into or out of the Fund. Plaintiffs assert this chart demonstrates the increase in ABCW trading volume and change in ABCW price on the days following the Employees' trades. Am. Complaint ¶¶ 30, 48. However, Exhibit B reflects the same deficiencies identified above for Exhibit A; Plaintiffs do not specify the actual number of shares of ABCW stock that the Fund Manager was required to buy or sell on the Exchange – if at all - as a result of the Employees' trades, nor do they specify the dates of the Fund Manager's trades. It is impossible to draw any conclusions about volume or price given Plaintiffs' omissions.

Moreover, Exhibit B reflects multiple dates where the Employees' trades would cancel each other out. For example, beginning in January, 2009, Exhibit B reflects that the Employees first bought, then sold, (or vice versa) either on consecutive dates - or one trade date apart - on eight occasions. Buying AUF

units on one day and selling AUF units within a day – or vice versa – would have minimal impact on the volume of ABCW stock and thus on ABCW stock price under Plaintiffs' theory since these trades would largely offset each other and the Fund Manager would not be required to trade on the Exchange.[4] And, as Plaintiffs have failed to adequately plead impact, they certainly have failed to show any connection to alleged losses.

Similarly, Exhibit C, which details trades of AUF units in the Fund, is meaningless to show that any participants either traded, or lost money, as a result of trades on the Exchange. Plaintiffs have again failed to detail a correlation between AUF units traded and shares of ABCW stock bought or sold. And the exhibit certainly does not identify any Fund participant who purchased ABCW stock in reliance on artificial prices created by Mr. Hofer.

c. The meltdown of the financial markets over the last year impacted the ABCW share price, not the Employees' trades.

Moreover, Plaintiffs' assertion that it was the Employees' trades that caused the price of ABCW stock to fluctuate is incredible given the time period at issue. For example, a few public news articles relating to Anchor BanCorp Wisconsin, Inc. and ABCW stock prices in this period provide:

- On February 2, 2009 AnchorBank reported that it received $110 million in TARP funds.
- February 17, 2009 AnchorBank reported a net loss of $167.3 million for the 4th quarter 2008, equaling $7.96/share;
- Anchor BanCorp Wisconsin Inc. reported in SEC filings on or about February 19, 2009 that if it is unable to refinance debt to U.S. Bank by

[4] These offsetting trades were on February 6/10; February 12/13; March 23/24; March 26/27; April 14/16; April 22/24; May 12/14; June 22/23, in 2009.

March 2, 2009 its "ability to continue as a going concern" would be threatened.

- On June 22, 2009 Anchor BanCorp Wisconsin Inc. announced a new CEO of AnchorBank.

- On June 26, 2009 Anchor BanCorp Wisconsin Inc. announced a $43.3 million loss for the 1st quarter 2009.

See Exhibit A to Morris Declaration.

The numerous events affecting the financial markets across the board, and AnchorBank in particular, highlight the folly of Plaintiffs' complaint, and underscore the importance of the requirement that Plaintiffs, in bringing a securities action, plead with particularity. *See Helwig*, 251 F.3d at 547 (The PSLRA was adopted for the purpose of creating particularized pleading standards in securities actions in order to reduce the number of frivolous suits.).

The Plaintiffs have utterly failed to show that Mr. Hofer's trades with one or two other employees artificially affected the market. Indeed the most reasonable inference from the few factual allegations in the Amended Complaint is that the Employees' trades did not make the market, but were in reaction to it.

3. Plaintiffs failed to plead facts raising a strong inference of scienter.

Plaintiffs again fail to allege facts that give rise to a strong inference that the Employees intended to manipulate the market. Plaintiffs broadly allege that the Employees "knowingly engaged in the Collusive Trading Scheme with the intent [to affect the stock price so] that others would purchase or sell ABCW stock" to the Employees' benefit. Am. Complaint, ¶¶ 50, 61. Plaintiffs' rely on the same allegations to establish intent as to show existence of a "Scheme:"

first, that the Employees communicated "prior to and contemporaneously with" each transaction; and second, that the Employees engaged in frequent coordinated trading. Plaintiffs conclude based on these two allegations that the Employees' trades could not have been coincidental, but were "collusive and intentional." Am. Complaint ¶ 46.

As is discussed above, the Plaintiffs' allege that the Employees communicated, but they do not provide the particulars. They assert the Employees communicated "prior to" trading, but conveniently fail to explain "prior" – did they communicate the week prior? The day prior? Plaintiffs' explanation for "contemporaneous with" is just as non-existent. Further, they provide no detail about the substance of the communications: they detail no discussions, no strategy, no objective and reference no agreement. Plaintiffs allege they possess emails – certainly, if the written communications supported Plaintiffs' allegations of intent to manipulate the market these emails would be included as exhibits. Plaintiffs' omissions support the inference that they have no facts which permit an inference of scienter. *Tellabs*, 127 S. Ct. at 2511 (A plaintiff's "omissions and ambiguities count against inferring scienter…").

Plaintiffs' assertion that intent can be inferred from the Employees' trading frequency is similarly misguided. Trades by all three Employees occurred on the same day only *nine times during 207 trading days*. Plaintiffs provide no facts to explain why the fact that the Employees may have traded on the same day – even if they discussed trading on that day - implies a fraudulent purpose. Plaintiffs miss the obvious: the Employees' strategy was that of every other

legitimate investor – buy low and sell high. Plaintiffs assert not just that Mr. Hofer traded frequently, but that he monitored the price of ABCW stock daily – this is a wise move for an investor trading in a volatile stock, in a volatile market, not evidence of a manipulative scheme. That the Employees would have discussed whether their investments were prudent in this market would be expected.

Plaintiffs' allegations fail for another reason: how could the Employees have intentionally planned to impact the market when they could not know the particulars of when, whether, or in what amounts, their purchases of AUF units would in fact be reflected by trading on the market? The Employees' trading consisted of transferring money into and out of the Fund, not buying or selling ABCW stock on the Exchange. Plaintiffs admit that the trades of all participants are first settled with in the Fund and that it is not until the day(s) following a trade that the Fund Manager will – if required – trade on the Exchange. The mechanics of how the Fund operates thus establish that the Employees did not have the ability to scheme to defraud the market, even had they wanted to.

Plaintiffs did claim Mr. Hofer had knowledge the trading "had the ability to and in fact was intended to" affect price, alleging that Mr. Hofer told a co-worker not to trade on a day that Mr. Hofer traded because it would "affect his price." Am. Complaint ¶¶ 36, 37. But, this assertion has no merit: because fund participants receive the closing price for the Fund on any day that they trade, whether another employee traded on the same day would have no impact whatsoever on their price.[5]

[5] Moreover, Plaintiffs' assertion in ¶ 37 that Mr. Hofer did not want an employee to trade on the same day because it would affect his price directly contradicts the basis for the scheme alleged

Plaintiffs have failed to state with particularity sufficient facts to permit a "strong inference" to be drawn that Mr. Hofer acted with intent to defraud. *Tellabs, supra*. Any inference of intent must be more than merely "reasonable" or "permissible" – it must be cogent and at least as compelling as any opposite inference of non-fraudulent intent. *Tellabs*, 127 S. Ct. at 2504-05. Plaintiffs draw their conclusion in a vacuum and expect this Court to do the same. Plaintiffs have not met the requirement under the PSLRA to plead sufficient facts to support a strong inference that Mr. Hofer traded in the Fund with the intent to defraud investors. *Tellabs, supra*.

4. Plaintiffs are unable to prove reliance.

Plaintiffs' complaint also fails because they have failed to plead facts establishing that they relied on the price of ABCW stock when making their decisions to purchase, to their detriment. "A claim of fraud fails if there is no proof that the plaintiff relied to his detriment on the defendant's misrepresentations or misleading omissions." *Stark Trading v. Falconbridge Ltd.*, 552 F.3d at 569 (*citing Dura Pharmaceuticals, Inc.*, 544 U.S. at 341-42). A defendant can only be liable under Sections 9(a) and 9(e) to a purchaser who buys stock on the Exchange believing that the price was not manipulated. *Fezzani*, 384 F. Supp. 2d at 637. The Fund is not such a purchaser. The Fund admits that it was required to trade when participants traded to maintain the "appropriate stock to cash balance." Am. Complaint, ¶¶ 13, 15. Thus, the Fund cannot show it relied on "artificial prices" in making purchasing decision. And,

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by the Plaintiffs throughout: Plaintiffs assert repeatedly that the Employees wanted same day trades inorder to affect the price! See e.g. Am. Complaint ¶32.

the Fund can show no reliance for another reason: all trades by the Employees were carried out by it – the Fund cannot claim that it was deceived.

Plaintiffs now, in their Amended Complaint, allege that Fund participants bought, or sold, in reliance on the allegedly manipulated market. Id. at 62. Even if Plaintiffs have standing to file this claim on behalf of the Fund participants, which Mr. Hofer challenges,[6] Plaintiffs must identify a Fund participant who suffered as a result of his/her reliance on the artificial market. No Fund participant has stepped forward to allege that he/she elected to either buy or sell AUF units in reliance on artificial prices caused by the Employees' "scheme." They identify no date that a Fund Participant traded in reliance, and identify no loss.[7] "[W]ithout reliance, fraud is harmless." *Stark Trading*, 552 F.3d at 569 (*citation omitted*).

Thus, Plaintiffs have established by virtue of their pleading that they are unable to prove that any Plaintiff purchased ABCW stock on the Exchange in reliance on the integrity of the market. Plaintiffs have thus failed to plead, and as they admit in their complaint, are unable to plead, one of the elements necessary to state a claim for a violation of Sections 9(a) & (e). Accordingly, Count I of Plaintiffs' Complaint should be dismissed under Rule 12(b)(6) with prejudice. *Stark Trading*, 552 F.3d at 569.

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[6] Plaintiffs allege the Fund is "an investment option within AnchorBank's 401(k) retirement plan." Am. Complaint ¶ 2. It may have standing to sue under ERISA but ERISA does not invest it with the standing to sue under the securities laws. See *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983).

[7] Under Plaintiffs' theory, certainly other purchasers would have bought when the stock price was artificially high, not just when it was artificially low; Plaintiffs fail to distinguish between these transactions when alleging loss.

B. Plaintiffs' Claims Under Section 10b and Rule 10b-5 of the Exchange Act Are Not Pleaded With Particularity and Should be Dismissed with Prejudice.

Plaintiffs also assert a claim (Count II) under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and its implementing regulation, Rule 10b-5, 17 C.F.R. § 240.10b-5. To state a claim under Section 10(b), Plaintiffs must allege a (1) material misrepresentation or omission by the defendant; (2) made with scienter; (3) a connection between the misrepresentation or omission in the purchase or sale of a security; (4) reliance on the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

Plaintiffs rely on their theory of market manipulation to prove their Section 10(b) and Rule 10b-5 claim. Thus, just as with their Section 9(a) claim, they must plead with particularity (1) the manipulative scheme; (2) intent to defraud the investing public; (3) purchase in reliance on the integrity of the market; and (4) resulting damages. *Fezzani at* 637.

1. The Complaint Does Not Adequately Plead A Fraudulent Scheme.

Plaintiffs rely on the alleged market manipulation caused by the Employees' fraudulent trading scheme to support not only their claims of a violation of Section 9(a) but also of Section 10(b) and Rule 10b-5. Plaintiffs assert that Mr. Hofer employed a scheme to defraud and deliberately manipulated the price of ABCW stock, which resulted in material misrepresentations or omissions, and which operated as a fraud and deceit on the Fund and its participants. Am. Complaint, ¶ 70.

Significantly, this Court need go no further before dismissing Plaintiffs' claims under Rule 10b-5: Because Plaintiffs' have failed to adequately plead a fraudulent scheme of market manipulation under Section 9(a) they are unable to state a Rule 10b-5 claim which relies on that fraudulent scheme to state a claim. *See e.g. Trane*, at 306 ("Since plaintiff relies on its proof of market manipulation to establish its claimed violation of Section 10(b), that claim must also fail."). Thus, Count II of Plaintiffs' Amended Complaint should be dismissed by the Court without further consideration of the remaining shortcomings of Plaintiffs' pleading.

a. Plaintiffs failed to plead sufficient facts with particularity to support the existence of a scheme to defraud.

Plaintiffs allege that Mr. Hofer "employed a scheme to defraud." Am. Complaint, ¶ 70. The Amended Complaint is devoid of factual data to support Plaintiffs' contention that the alleged "coordinated trades" were collusive. Plaintiffs allege the Employees communicated before trading, but no more than that; they allege no discussions between the Employees that establish agreement for, or the details of, a strategy; they provide no detail on how the trading volume in AUF units equates to trades in ABCW stock; they fail to correlate the Employees' money transfers into and out of the Fund with actual purchases of ABCW stock by the Fund on the Exchange – they do not even detail when, whether or in what amounts the Fund Manager was in fact required to trade on the Exchange. Even more significantly, they do not explain how the Employees would have had knowledge of the trading detail necessary for them to pursue their "scheme." *See* discussion at pp. 11-15, 22 *supra*.

Plaintiffs' failure to plead details about the alleged scheme with particularity is telling; it also fails to satisfy Rule 9(b) or the PSLRA. *See Twombly,* 550 U.S. at 545. ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a motion to dismiss.*); Stark Trading v. Falconbridge Ltd.,* 552 F.3d 568, 574 (7th Cir. 2009).

b. Plaintiffs' claim that the alleged fraudulent manipulative scheme resulted in material misrepresentations or omissions also fails.

Plaintiffs do not claim that Mr. Hofer made any misleading statements or omissions apart from engaging in the alleged manipulative scheme. Plaintiffs only allege that Mr. Hofer, as a result of his "deliberate manipulation of the AUF [units], and, consequently the ABCW stock, prices,[] made untrue statements of material facts or omitted to state material facts necessary" to prevent the statements made from being misleading. Am. Complaint, ¶ 70. This allegation fails under Rule 9(b) and the PSLRA since Plaintiffs have not met the heightened requirements for pleading a manipulative scheme. *Fezzani, supra; Stark Trading, supra. See* discussion at pp. 11-15 *supra.*

c. Plaintiffs have failed to plead facts with particularity to support their allegations of fraudulent acts, practices or course of business.

Plaintiffs allege Mr. Hofer "engaged in acts, transactions, practices and a course of business which involved manipulative or deceptive devices in connection with the purchase and sale of AUF shares, and consequently of ABCW stock and operated as securities fraud." Am. Complaint, ¶¶ 68,70.

Plaintiffs' do not state a claim for fraud under this prong of Rule 10b-5 either. Plaintiffs have failed to identify any "manipulative or deceptive devices" allegedly used by the Employees in connection with their trades other than the Collusive Trading Scheme discussed above. See *pp*. 11-15 *supra.* Because there is no market manipulation under Section 9(a) there is none under Section 10(b) and this Complaint should be dismissed. *Trane, supra*. Count II of Plaintiffs' complaint must also be dismissed under Rule 9(b) and the PSLRA for failing to plead falsity with particularity. *Stark Trading*, *supra*.

2. The Complaint Does Not Adequately Plead Facts Raising a Strong Inference of Scienter.

Plaintiffs have again with respect to their 10(b) claim failed to plead any facts with sufficient particularity to permit a "strong inference" to be drawn that Mr. Hofer acted with scienter, or intent to deceive. *Tellabs, Inc,* 551 U.S. at 324. As discussed above, Plaintiffs only basis for asserting that Mr. Hofer's actions were "collusive and intentional" are the existence of "communications" and the frequency of trades. Am. Complaint, ¶ 46. Plaintiffs provide no detail about the substance of the communications that would permit an inference of fraud; they fail to provide evidence of any agreement, strategy or purpose giving rise to a "scheme." Further, Plaintiffs provide no facts to suggest why the fact that the Employees may have traded on the same day implies a fraudulent purpose. Plaintiffs only assert the trades could not have been coincidental.

Plaintiffs' allegations do not rise beyond the level of pure speculation. The only reasonable inference to be drawn from the complaint is that Mr. Hofer, just as every other legitimate investor in the market, intended to make money by

"buying low and selling high." *See* discussion pp. 21-23, *supra*. Plaintiffs have failed to plead any fact which would even permit a reasonable inference of fraudulent intent. This Count of Plaintiffs' Complaint must be dismissed for failing to plead facts with particularity which give rise to a strong inference of scienter. *Tellabs, Inc., supra*.

3. Plaintiffs Cannot Show that the Alleged Fraud Caused the Injury Claimed.

Plaintiffs must demonstrate both economic loss and loss causation; the Complaint must specify each misleading statement and identify how that statement caused the alleged loss. *Dura Pharmaceuticals, Inc.*, 544 U.S. at 342-43. The Plaintiffs have failed to show that Mr. Hofer's trades in the Fund were the causal factor for any change in AnchorBank's stock prices. *See* discussion at pp. 15-17 *supra.*

Moreover, it is not reasonable to infer, as suggested by Plaintiffs, that it was the Employees' trades in the Fund that caused the price of ABCW stock to fluctuate rather than outside factors such as the economy. Causation does not exist where the company had financial problems that may have affected the stock value. *See Tricontinental Indus. v. PricewaterCoopers, LLP*, 475 F. 3d 824 (7th Cir. 2007) (holding that no causation existed where the drop in value of the stock came after the public's knowledge of the misstatements and the company's bankruptcy filing).

A review of ABCW stock price from September of 2008, when the alleged "scheme" began, shows a steady decline in price until the stock reached a low of $0.38 in March, 2009; it also reflected an upward trend for weeks *after*

AnchorBank suspended Mr. Hofer's ability to trade in the AUF. See Exhibit B to Morris Declaration. Plaintiffs cannot establish a causal connection between Mr. Hofer's transactions in the Fund and the changing price of ABCW stock. Plaintiffs' Complaint fails to sufficiently put the Defendant on notice of facts supporting their claims of either causation or loss and should be dismissed. *Dura Pharmaceuticals, Inc.*, 544 U.S. at 346 (A plaintiff even under Fed. R. Civ. P. 8(a)(2) must at least provide the defendant with "fair notice of what the Plaintiff's claim is and the grounds upon which it rests.").[8]

4. Plaintiffs are unable to prove reliance.

Plaintiffs' must also be able to prove that they relied on misrepresentations or omissions by Mr. Hofer – here, the Collusive Trading Scheme - to their detriment to state a claim. *Stark Trading,* 552 F 3d at 569 ("A claim of fraud fails if there is no proof that the plaintiff relied to his detriment on the [defendant's] misrepresentations…")(*citing Dura Pharmaceuticals, Inc.*, 544 U.S. at 341-42).

Despite Plaintiffs' numerous acknowledgements that the Fund is "required" or "forced" to buy or sell ABCW stock on the Exchange as a result of the fund participants' purchase or sale of AUF units, Plaintiffs do an about face and allege that the Fund was "induced" to "purchase ABCW securities on a national exchange at artificially deflated an inflated prices." Am. Complaint, ¶ 66. Plaintiffs then assert that the Fund and its participants "relied to their detriment" on the artificial prices in making trading decisions. Am. Complaint, ¶ 67. The

[8] We further note it is curious that in Counts I – III it is AnchorBank, not the Fund, that incorporates all preceding paragraphs – yet AnchorBank has not pleaded a loss even though the complaint alleges it is AnchorBank stock that was manipulated. The complaint seeks judgment in favor of the Fund only. See Am. Complaint ¶¶ 57, 64, 71.

Fund's claims of reliance are contradicted by its earlier statements that its transactions were required in order to maintain an appropriate balance of cash and stock in the Fund. Am. Complaint, ¶¶ 13, 14, 15,16, 17, 20, 22, 23, 40, 52, 55, 59, 63. Plaintiffs' repeated assertions that the Fund Manager was required to trade on the Exchange cannot be a mistake. Rather, they are examples supporting the adoption of the PSLRA. *See Helwig*, 251 F.3d at 547. They are also examples of pleading which the Supreme Court in *Twombly* identified as insufficient even under the liberal pleading standard of Rule 12(b)(6). 551 U.S. at 555.

Moreover, Plaintiffs' assertion that the Fund would not have traded had it known of the "scheme" is meritless for another reason. Plaintiffs admit that it is the Fund Manager who manages the Fund, settles daily with participants in the Fund, and makes all trades on the Exchange. The Fund Manager was thus aware of all trades made by the Employees in the Fund, and aware each time it was required to purchase ABCW stock on the Exchange in management of the Fund. Thus, the Fund in making trades was not induced, or deceived, by the Employees' trades. The Fund cannot state a claim for reliance. *Stark Trading*, 552 F.3d at 573. (Plaintiffs have no 10b-5 claim "[under] any securities law requiring proof of reliance, because they were never deceived.") Mr. Hofer is entitled to dismissal of this claim with prejudice.

II. Plaintiff's Third Cause of Action Alleging a Violation of Wisconsin's Securities Law Must Also be Dismissed.

Plaintiffs' third claim asserting that Mr. Hofer's alleged "scheme," as detailed in their claims under the federal securities laws, also violated the Wisconsin

Uniform Securities Law set forth in Chapter 551 of the Wisconsin Statutes must also be dismissed, for the reasons below. Am. Complaint, ¶¶ 71 - 77.

A. Wisconsin Securities Law is Inapplicable to Mr. Hofer's Alleged Actions.

Plaintiffs also allege that Mr. Hofer's trades in the AUF violate Wis. Stat. 551.501(1)-(3) of the Wisconsin Securities Law. This section states in pertinent part:

> **551.501 General Fraud**. It is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly, to do any of the following:
> (1) To employ a device, scheme, or artifice to defraud.
> (2) 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.
> (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

This statute does not apply to the conduct in which Plaintiffs allege Mr. Hofer engaged. Wisconsin Law prohibits a person *in connection with the purchase or sale of securities* from engaging in deceptive conduct. However, Plaintiffs accuse Mr. Hofer of "the collusive purchase and sale of AUF [units] within the Fund." Am. Complaint ¶ 73. Mr. Hofer's trades in his 401(k) account, including the purchase or sale of AUF units, are excluded from the definition of "security" under Wis. Stat. § 551.102(28). The definition of "security" set forth in Wis. Stat. 551.102 reads in relevant part:

> (28) … The term [security]:
> …
> (c) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974…

Chapter 551 of the Wisconsin Statutes was repealed and recreated in its entirety by 2007 Wisconsin Act 196, effective 1/1/09. The legislature adopted the Uniform Securities Act (2002) with limited modifications. Wisconsin Legislative Council Act Memo, 2007 Wisconsin Act 196, 4/9/08. One of the modifications made by the Wisconsin legislature was to the definition of "security" that the statute regulates. *See*, Wisconsin Legislative Council Amendment Memo, 2007 Senate Bill 483, Senate Amendment 1.[9] The definition of security was modified to expressly *exclude pension plan interests subject to ERISA* from the definition of security under Wisconsin law. Id.[10]

The AUF shares at issue here are offered by AnchorBank as part of an ERISA 401K plan. Am. Complaint, ¶¶ 2, 8. Accordingly, because Plaintiffs assert Mr. Hofer's scheme arises from the purchase and sale of AUF units, and because these AUF units are expressly excluded from the definition of "security" under Chapter 551 of the Wisconsin statutes, Plaintiffs cannot state a claim for violation of the Wisconsin securities laws. This third cause of action must also be dismissed.[11]

B. Plaintiffs Have Failed to Plead With Sufficient Particularity.

Even if Plaintiffs' cause of action alleging a violation of the Wisconsin Securities Law was covered by Chapter 551, it must be dismissed for failure to

[9] See Exhibit C to Morris Declaration.

[10] This Amendment broadened the exclusion to the definition of security, providing that in addition to excluding plans subject to ERISA, governmental benefit plans and trust or funds managed by SWIB are also excluded.

[11] Plaintiffs have alleged a Collusive Trading Scheme extending back to September of 2008. Am. Complaint, ¶18. However because Plaintiffs do not separately identify alleged violations during the applicability of the prior statute, and because Plaintiff's fail to meet the pleading requirements of Fed. R. Civ. P. 9(b), see section B. infra, Plaintiffs' complaint should be dismissed as to the time period subject to the prior statute also.

satisfy the pleading requirements of Fed.R.Civ.P. Rule 9(b). Rule 9(b) provides: "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "In other words, the who, what, when, where and how of the alleged fraud must be plead in detail." *Stavros*, 266 F. Supp. 2d at 841 (citing *DeLeo v. Ernst & Young*, 901 F.2d 624,627 (7th Cir. 1990)).

Just as in pleading their federal claims, Plaintiffs have failed to plead fraud under their state law claim with the specificity required by the law. Plaintiffs allege that the "Collusive Trading Scheme" began in September 2008, but Plaintiffs fail to state the basis for the scheme with particularity. They assert the Employees communicated before each trade date, but do not detail the substance of the communications – or how long before the trade date the communications occurred. They attach no documents and do not even allege that the Employees ever reached agreement regarding a trading strategy or its purpose. Plaintiffs assert the Employees traded frequently, but fail to explain why those trades establish a scheme.

Furthermore, there is another fallacy to Plaintiffs' conclusion that the Employees trades establish a scheme: the allegations made by the Plaintiffs in their Amended Complaint establish that the Employees had no ability to affect the price of ABCW stock on the market. The Employees had no knowledge, or control, over when or how much trading by the Fund Manager would actually occur. Plaintiffs' Amended Complaint never details how the volume in AUF units translates to volume in ABCW shares; they never identify the dates on which the Fund Manager in fact was required to trade, or in what amounts. Plaintiffs failure

to detail the "who, what, when, why, when and how" of the key facts necessary to support their allegations of a grand scheme doom their pleading. For all the reasons stated above, (*see* pps. 11 – 15) Count III of Plaintiffs' Amended Complaint must be dismissed. *Fezzani, supra.*

III. Plaintiffs' Fourth Cause of Action Must Also be Dismissed

In the fourth cause of action AnchorBank alleges Mr. Hofer's involvement in a "scheme to defraud the Fund and its participants", and "his violations of Federal and Wisconsin state [sic] securities laws" were a breach of his fiduciary duty to AnchorBank. Am. Complaint, ¶¶ 79-82. Count IV must also be dismissed under Fed. R. Civ. P. 12 (b)(6).

A. AnchorBank Fails to Plead the Elements of Breach of Fiduciary Duty.

First, AnchorBank has failed to plead the elements for its claim that Mr. Hofer breached his fiduciary duty to it. AnchorBank must plead 1) that Mr. Hofer owed it a fiduciary duty; 2) that he breached that duty; 3) that it was damaged by the breach. *Berner Cheese Corp. v. Krug,* 2008 WI 95, ¶ 40, 312 Wis. 2d 251, 752 N.W.2d 800. Any duties that Mr. Hofer had to AnchorBank were as an *employee*; AnchorBank has not alleged that Mr. Hofer had any employment responsibilities with regard to management of the 401(k); nor has it alleged that Mr. Hofer owed other employees any fiduciary duty arising from his duties as an employee. Nor has AnchorBank ever alleged that Mr. Hofer violated any rules in the 401(k) Plan Document applicable to all employees regarding investing in their 401(k) accounts, or in the Fund. AnchorBank has not identified a fiduciary duty owed to it by Mr. Hofer that his alleged scheme would breach. Further,

AnchorBank's pleading does not support its contention that it has been damaged; it has maintained throughout the Amended Complaint that the Fund, and its participants were damaged; AnchorBank has not alleged it falls into either category.

B. AnchorBank Fails to Plead with Particularity

AnchorBank's allegations that Mr. Hofer breached his fiduciary duty to it are premised on allegations of fraudulent activity by Mr. Hofer. AnchorBank is thus required to meet the more rigorous pleading requirements set forth in Fed. R. Civ. P. 9(b). *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir., 2007) (A claim premised upon a course of fraudulent conduct implicates Rule 9(b)'s heightened pleading requirements; "Rule 9(b) applies to 'averments of fraud,' not claims of fraud.") The heightened pleading requirements under Rule 9(b) are further applicable to all fraud cases brought in federal courts, regardless of whether state law would require it. *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 470 (7th Cir. 1999).

AnchorBank has failed to plead the circumstances which it alleges constitute fraud with particularity. AnchorBank has failed to provide "the who, what, when, where, and how" (*Stavros*, 266 F. Supp. 2d at 841) behind the fraud allegations incorporated into this cause of action just as it failed to provide the detail in earlier claims, as discussed *supra*.

Accordingly, since AnchorBank does not meet the pleading requirements of Rule 9(b), Count IV of its Amended Complaint must also be dismissed.

Conclusion

Plaintiffs' allegations fail on every level to meet the pleading requirements of applicable laws. This is Plaintiffs second attempt to meet the heightened pleading standards of the PSLRA and Rule (9). Even after being provided a roadmap to the requirements, and despite being in possession of virtually all facts that exist, Plaintiffs' second attempt to state their claims with particularity fails. The deficiencies which Mr. Hofer has identified establish that Plaintiffs are unable to state a claim, now or in the future. Defendant respectfully requests that this Complaint be dismissed in its entirety, with prejudice.

Dated this 24th day of November, 2009.

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