IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

Lead Case No. 02-C-5893
(Consolidated)

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

APPENDIX OF UNPUBLISHED AUTHORITIES

TABLE OF UNREPORTED CASES

TAB 1

Westlaw.

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 3019173 (N.D.Ill.), Fed. Sec. L. Rep. P 93,093
(Cite as: 2004 WL 3019173 (N.D.Ill.))

Motions, Pleadings and Filings

United States District Court,
N.D. Illinois, Eastern Division.
Avery J. STONE, as trust of the Anita M. Stone Family Trust and Avery J. Stone Trust, Plaintiff,
v.
David DOERGE, David Doerge d/b/a Doerge Capital Management, and Balis, Lewittes & Coleman, Inc., Defendants.
No. 02 C 1450.

Dec. 28, 2004.

Juris Kins, Floyd H. Abramson, Hillary A. Victor, Joseph C. Grayson, Abramson & Fox, Chicago, IL, for Plaintiffs.

Nicholas P. Iavarone, Christopher L. Gallinari, Bellows & Bellows, Ronald Anthony Stearney, Jr., Meckler, Bulger & Tilson, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

ST. EVE, J.

***1** Plaintiff Avery J. Stone, as trustee of the Anita M. Stone Family Trust and the Avery J. Stone Trust, brought this securities fraud action against Defendants David Doerge, individually and d/b/a Doerge Capital Management, and Balis, Lewittes & Coleman, Inc. Defendants have moved for summary judgment. As discussed in detail below, Defendants' motion is granted in part and denied in part.

FACTUAL BACKGROUND

Plaintiff Avery Stone is the trustee of the Avery J. Stone Trust and the Anita M. Stone Family Trust. (R. 72-1, Defs. Stmt. Facts ¶ 1.) Defendant David Doerge ("Doerge") was formerly a registered representative with Defendant Balis, Lewittes & Coleman, Inc. ("Balis"), a broker-dealer. (*Id.* ¶ ¶ 2,3.) Defendant Doerge Capital Management is the name of a former unincorporated division of Balis, of which David Doerge served as the head. (*Id.* ¶ 4.) Stone made multiple investments on behalf of the Anita M. Stone Family Trust and the Avery J. Stone Trust that Doerge had introduced and recommended to him. (*Id.* ¶ 5.)

On April 6, 1996, Stone invested $100,000 in the Asian Opportunity Fund, a private placement, on behalf of the Avery J. Stone Trust. (*Id.* ¶ 24.) Doerge sent Stone a Confidential Information Memorandum, dated April 2, 1996, related to this investment. (*Id.* ¶ 25.) The Confidential Information Memorandum disclosed that David Doerge was a director in the fund, and warned that "An investment in the Shares involves certain risks relating to the investment strategies to be utilized by the Fund. No guarantee or representation is made that the Fund's Investment Objective will be successful." (*Id.* ¶ ¶ 26, 27.) Stone lost his investment in the Asian Opportunity Fund.

On June 30, 1997, Stone invested $200,000, on behalf of the Avery Stone Trust, in St. James Capital Partners, a limited partnership. (*Id.* ¶ 49.) In connection with this investment, Stone received from Doerge a private placement memorandum, a Limited Partnership Agreement and a Purchase Agreement. (*Id.* ¶ 50.) Stone executed and returned to St James Capital Partners the signature pages for the Limited Partnership Agreement and the Purchase Agreement. (*Id.* ¶ 51.) The Limited Partnership Agreement disclosed that the General Partner had the "sole and absolute discretion to invest in Investments or direct or indirect interests therein; provided, however, that the General Partner will adhere generally to the asset allocation guidelines of: Bridge Loans, 50%; Short Term Convertible Debt, 25%; and Equity Investments, 25%." (*Id.* ¶ 52.) Further, the Purchase Agreement contained a warranty that the Purchaser "is able to bear the substantial economic risks of an investment in the Interests for an indefinite period of time, has no need for liquidity in the such investment and, at the present time, could afford a complete loss of such investment," and that the Purchaser "recognizes that investment in the Interests involves substantial risks, including loss of the entire amount of such investment." (*Id.* ¶ ¶ 53, 54.) Other documentation in connection with the investment detailed the risk factors involved in an investment in St. James Capital Partners, including that "the risks include, but are not limited to, complete loss of principal or investment, lack of liquidity and high volatility associated with the stock of portfolio companies and a very limited operating history." (*Id.* ¶ 55.)

*2 On May 18, 1999, Avery Stone, on behalf of the Anita M. Stone Family Trust, invested $500,000 in Doerge Fortune Financial LLC ("Fortune"), a limited liability company. (*Id.* ¶ 32.) Stone executed a Subscription Agreement and a Limited Liability Company Agreement in connection with this investment. (*Id.* ¶ 33.) Stone also received a letter from Doerge Capital Management disclosing various facts related to Fortune and Fortune Financial Systems, Inc., the company to which Fortune was providing bridge loan financing. (*Id.* ¶ 34.) The Subscription Agreement informed Stone that any "investment in the Interests is inherently speculative in nature, and the undersigned may suffer a complete loss of his investment." (*Id.* ¶ 35.) Stone has not received any return on this investment.

On February 29, 2000, Stone invested $2,500,000 on behalf of the Trusts. The parties disagree over what Stone invested in. Stone contends that Doerge identified the investment as the "Doerge-TBU Bridge Loan LLC," the purpose of which was to make a secured short-term loan to an entity called travelbyus.com. (R. 78-1, Pl. Counterstmt. Facts ¶ ¶ 15-16.) Stone further asserts that Doerge told him that the TBU "was going to be borrowing money," and that the "TBU loan would be similar to other short term secured loans that Doerge had previously arranged for the Trusts." (*Id.* ¶ ¶ 17, 18.) Based on Doerge's alleged representations, Stone thought that Doerge had formed a limited liability company under the name of Doerge-TBU Bridge Loan LLC, that Doerge served as its manager, that the Trusts had acquired a membership interest in it, that Doerge had invested the Trusts in it, and that the company had made a secured loan to travelbyus.com. (*Id.* ¶ 23.) On the other hand, Doerge contends that Stone made the February 29, 2000 investment in preferred stock of Aviation Group, Inc. (R.72-1, Defs. Stmt. Facts ¶ 39.) On April 24, 2000, Doerge Capital Management sent Stone Subscription Agreements, Investor Questionnaires and a Summary of Terms for an investment in Aviation Group. (*Id.* ¶ 40.) According to Doerge, these documents which disclosed the risks inherent in the purchase of Aviation Group stock, were for the investments Doerge had made in February 2000. (*Id.* ¶ ¶ 41, 43, 44.) Stone disputes this contention.

From March 2000 to February 2002, Doerge sent the Trusts monthly statements reflecting their investments in Doerge-TBU Bridge Loan LLC. (R. 78-1, Pl. Counterstmt. Facts ¶ 31.) The investments in TBU became a total loss. (*Id.* ¶ 49.)

Count I is premised on a violation of Section 12(a)(2) of the of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. 771(a)(2). [FN1] Count II alleges a violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b). In Count III, Plaintiffs allege a violation of Sections 15 of the Securities Act and 20(a) of the Exchange Act. Count IV is premised on common law fraud. Count V is a breach of a fiduciary duty, and Count VI is a negligent misrepresentation claim. In Count VII, Plaintiff asks for an accounting.

FN1. Plaintiff agrees that summary judgment is appropriate on his Section 12(a)(2) claim because it is time barred.

LEGAL STANDARD

*3 Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of triable fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Pugh v. City of Attica*, 259 F.3d 619, 625 (7th Cir.2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A party will successfully oppose summary judgment only if it presents "definite, competent evidence to rebut the motion." *EEOC v. Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir.2000). The Court "considers the evidentiary record in the light most favorable to the nonmoving party, and draws all reasonable inferences in his favor." *Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 471 (7th Cir.2002).

LEGAL ANALYSIS

I. Some of Plaintiff's Claims Are Time Barred

Defendants seek to dismiss Plaintiff's federal securities fraud and state law claims as time barred under the applicable statute of limitations and statue of repose.

A. Federal Securities Fraud Claims

A plaintiff must file a federal securities fraud action "within one year after the discovery of the facts constituting the violation and within three years after such violation." [FN2] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991). The one-year statute of limitations for federal securities claims begins to run when the potential plaintiff is put on "inquiry notice." *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir.1997). "Inquiry notice starts the running of the statute of limitations when the victim of the alleged fraud became aware of the facts that would have led a reasonable person to investigate whether he might have a claim." *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 609 (7th Cir.1995) (quotation omitted). "However, more than 'merely suspicious circumstances' must exist; instead the plaintiff must learn of a circumstance that places him 'in possession of, or with ready access to, the essential facts that he needs in order to be able to sue.' " *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 670 (7th Cir.1998) (*quoting Fujisawa Pharm*, 115 F.3d at 1337).

> FN2. On July 30, 2002, Congress enacted the Sarbanes-Oxley Act and expanded the limitations period for securities fraud claims involving "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws" to two years after the discovery of the facts constituting the violation and within five years after such violation. 28 U.S.C. 1658(b). Because Plaintiff filed this case on February 27, 2002, the expanded limitations period does not apply here.

The three year statute of repose commences from the date of the violation. Defendants argue that the three year statue of repose bars the claims based on Plaintiff's investments in Asian Opportunity, Triune and St. James. The Court agrees. [FN3] Although Plaintiff attempts to keep these claims alive by arguing that the Court should toll the repose period given Defendants' "aggressive and continuing cover up" of the fraud, the Supreme Court has made clear that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Lampf*, 501 U.S. at 363, 111 S.Ct. at 2782. Further, "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Id.* Thus, "[t]he statute of repose for a federal securities claim may expire before the plaintiff discovers the fraud." *Neal v. Honeywell Inc.*, 33 F.3d 860, 865 (7th Cir.1994). Accordingly, Plaintiff's attempt to rely on the tolling doctrine to toll the statue of repose for their securities fraud claims fails. As a result, Plaintiff's Section 12(2) and 10(b) claims based on the September 1, 1996 investment in Triune Venture Partners III LP, the April 6, 1996 investment in Asian Opportunity Fund, and the June 30, 1997 investment in St. James Capital Partners LP are time barred by the statute of repose because the violation in connection with these investments occurred more than three years before Plaintiff filed this lawsuit.

> FN3. In a footnote, Plaintiff agrees that the claims regarding Asian Opportunity and Triune "appear to be time barred." (R. 80-1, Pl. Opp. at p15 n. 12.)

***4** Because the alleged violation in connection with the May 18, 1999 investment in Doerge Fortune Financial LLC and the February 29, 2000 investment in the TBU Bridge Loan LLC took place less than three years before February 27, 2002, the statute of repose does not time bar these claims. Defendants further argue that the claims based on these investments are also barred by the one year statute of limitations. Viewing the facts in the light most favorable to Plaintiff, as the Court must, the Court cannot conclude that Plaintiff was on inquiry notice by February 27, 2001. Accordingly, summary judgement as to these claims is denied.

B. State Law Claims Based on the Securities Transactions

Plaintiff's common law fraud (Count IV), breach of a fiduciary duty (Count V), and negligent misrepresentation claims (Count VI) are based upon Defendants' allegedly fraudulent sale of securities, thus they are governed by the three year statute of limitations period and a five year statute of repose set forth in the Illinois Securities Act, 815 ILCS 5/13(D). *See Tregenza v. Lehman Bros., Inc.*, 287 Ill.App.3d 108, 109-110, 678 N.E.2d 14, 14-15, 222 Ill.Dec. 607, 608 (1st Dist.1997). Although Plaintiff attempts to characterize the breach of fiduciary duty claim as not reliant on the fraudulent sale of securities and thus subject to a longer statute of limitations, the Court rejects this attempt to recharacterize the claim which Plaintiff has pled in the Second Amended Complaint and upon which Defendants have relied in defending this lawsuit. Given the five year statute of repose, the state law claims premised on the 1996 investments in Triune and Asian Opportunity are time barred. The Court cannot conclude, however,

that the state law claims based on the other investments at issue in this case are barred by the five year statute of limitations as a matter of law. There is an issue of fact as to when Plaintiff had actual knowledge of the alleged violation or when Plaintiff had notice of sufficient facts which, in the exercise of reasonable diligence, would have lead to actual knowledge of the alleged violations. Accordingly, these claims are not time barred.

II. The Elements of Plaintiff's Claims

Defendants argue that they are entitled to judgment as a matter of law on Plaintiff's claims because Plaintiff has failed to prove certain elements that are common to all of his claims. In order to survive summary judgment on a claim for securities fraud under Section 10(b) and Rule 10b-5, Plaintiff must show issues of fact that Defendants (1) made a false statement or omission; (2) of a material fact; (3) with scienter; (4) in connection with the purchase or sale of securities; (5) upon which Plaintiffs justifiably relied; and (6) the reliance proximately caused Plaintiffs' damages. *In re HealthCare Compare Corp.*, 75 F.3d 276, 280 (7th Cir.1996).

A. Misrepresentations or Omissions of Material Facts

Defendants argue that the alleged false statements are not material statements of fact. In the context of a securities fraud case, a misstatement or omission is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Basic Inc. v. Levinson*, 485 U.S. 224, *231, 108 S.Ct. 978, ----983, 99 L.Ed.2d 194 (1988). *See also Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir.1997). As the Seventh Circuit has stated, " 'the determination of materiality requires delicate assessments of the inferences a reasonable [investor] would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact; thus a materiality determination is rarely appropriate at the summary judgment stage, let alone on a motion to dismiss." *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 370 (7th Cir.1997) (citations and quotations omitted). Here, the Court cannot conclude as a matter of law that the alleged misrepresentations and omissions are not material.

B. Reliance

***5** Reliance is an element of a Section 10(b) claim. *In re HealthCare*, 75 F.3d at 280. In Illinois, reliance is also an element of both common law fraud and negligent misrepresentation claims. *See Cozzi Iron & Metal, Inc. v. U.S. Office*, 250 F.3d 570, 574 (7th Cir.2004), citing *Lidecker v. Kendall College*, 194 Ill.App.3d 309, 314, 141 Ill.Dec. 75, 550 N.E.2d 1121, 1124 (1st Dist.1990) (common law fraud); *Weisblatt v. Chicago Bar Ass'n*, 292 Ill.App.3d 48, 225 Ill.Dec. 993, 684 N.E.2d 984, 990 (1997) (negligent misrepresentation).

Defendants seek summary judgment on the argument that Plaintiff received written documentation setting forth the nature of the risks inherent in each of Stone's investments, and therefore Plaintiff could not have justifiably relied on any *oral* statements that preceded the written documentation. Defendants contend that these subsequent written terms trump any oral statements regarding the investments.

1. Fortune

On May 18, 1999, Plaintiff invested $500,000 in Fortune, a private placement offering. (¶ 32.) Stone signed a subscription agreement for this investment acknowledging that "[t]here are substantial risks incident to the purchase of the Interests, as explained in the Investment Materials. An investment in the Interests is inherently speculative in nature, and the undersigned may suffer a complete loss of his investment." (R. 79-1, Pl. Resp. to Defs. Stmt. of Facts ¶ 35.) In addition, Doerge Capital Management sent Stone a letter regarding Fortune. (*Id.* ¶ 34, 225 Ill.Dec. 993, 684 N.E.2d 984.) That letter indicated the "company has experienced difficult times since 1997." (*Id.* ¶ 38, 225 Ill.Dec. 993, 684 N.E.2d 984.) Plaintiff does not respond to this argument regarding his investment in Fortune. In his complaint, Plaintiff alleges that Doerge represented to him that "this was a safe bridge loan investment." (R. 70-1, SAC, ¶ 29.) He generally asserts that "Doerge extolled his success in developing this collateralized bridge loan program stating '[o]ur prime concern is safety and payment of principal followed by a strong yield usually between 12-15%." (R. 78-1, Pl.Counterstmt.Facts, ¶ 13.) Even assuming that Doerge made this particular statement regarding the Fortune investment, Plaintiff could not have justifiably relied upon it when he contemporaneously executed a subscription agreement that informed him of the "substantial risks" involved in his investment. "[P]eople claiming to be *victims* of securities fraud may not claim to rely on oral statements inconsistent with written documents (even tedious prospectuses) available to them." *S.E.C. v. Jakubowski*, 150 F.3d 675, 681 (7th Cir.1998) (emphasis in original). Plaintiff has failed

to raise any genuine issues of material fact regarding the reliance element of his investment in Fortune, thus summary judgment is granted as to this investment.

2. Doerge TBU Bridge Loan

Defendants also seek summary judgment on Plaintiff's claim based on the Doerge TBU Bridge Loan under the same reliance theory. They argue that Stone received, signed, and returned to Doerge a Subscription Agreement which fully disclosed the terms of his investment.

***6** On April 24, 2000--approximately two months *after* Plaintiff invested-- Doerge Capital Management sent Stone subscription agreements, investors questionnaires and a summary of terms for securities in Aviation Group. There is an issue of fact as to whether these investment materials pertained to investments that Stone made in February 2000 or whether they pertained to a new proposed investment in Aviation Group. According to Plaintiff, in February 2000, Doerge solicited him to invest in the Doerge-TBU Bridge Loan LLC to make a "secured short-term loan to an entity called travelyus.com." (R. 78-1, R.Pls. Stmt. Facts ¶ ¶ 15, 16.) Defendants, however, argue that the February 29, 2000 investment was in Aviation Group--the same investment set forth in the April 24, 2000 investment materials. Viewing these facts in the light most favorable to Plaintiff, summary judgment is precluded.

Even if an issue of fact did not exist regarding what investment Plaintiff made in February of 2000, summary judgment still is not warranted based on Defendants' reliance argument. Defendant did not send the materials with the disclosure until approximately two months *after* Plaintiff invested in Doerge-TBU Bridge Loan LLC. Moreover, there is an issue of fact as to whether the investment documents disclosed the truth. *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1545 (7th Cir.1990) (where a document is silent as to the issues that plaintiff claims were lies, it "does not prevent action based on an antecedent lie."). *See also* Sequel Capital, LLC v. Rothman, 2003 WL 22757758 at *16 (N.D.Ill. Nov.20, 2003).

Defendants' reliance on *Rissman v. Rissman*, 213 F.3d 381 (7th Cir.2000) is misplaced. In *Risman*, the Seventh Circuit held that a non-reliance clause in a written agreement precluded a plaintiff from premising his securities fraud claim on oral statements made prior to the execution of the written stock purchase agreement. *Id.* at 383-84. The non-reliance clause in *Rissman* specifically stated that the parties had not relied on any other representations. In contrast, the written purchase agreements at issue in this case did not contain any such provisions.

Similarly, *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544 (7th Cir.1996), does not provide otherwise. In *Carr*, the Seventh Circuit affirmed the dismissal of a securities fraud suit where the defendant provided the investor with contemporaneous documentation clearly stating that the investment was risky, even though the defendant allegedly orally stated that it was safe. The Seventh Circuit held that "[i]f a literate, competent adult is given a document that in readable and comprehensible prose says X., and the person who hands it to him tells him, orally, not-X ..., our literate, competent adult cannot maintain an action for fraud against the issuer of the document." *Id.* at 547. The Seventh Circuit noted, however, that "not all disclaimers are clear." *Id.* at 548. Because there is an issue here of whether the written investment documents disclosed the truth and conflict with the oral statements, summary judgment is improper.

3. St. James

***7** The securities fraud claim based on the St. James investment is time barred, but the state law claims of common law fraud and negligent misrepresentation remain as to the St. James investment. Defendants argue that no issue of genuine facts exists regarding the element of justified reliance as to this investment. Plaintiff has failed to directly respond to this argument. The Court agrees with Defendants.

On June 30, 1997, Plaintiff invested $200,000 in St. James Capital Partners, L.P. He received a private placement memorandum, a Limited Partnership Agreement and a Purchase Agreement. He signed and returned both the Limited Partnership Agreement and the Purchase Agreement signature pages (R.72-1, Defs. Stmt. Facts ¶ 51.) The Purchase Agreement disclosed that "The Purchaser recognizes that investment in the interests involves substantial risks, including loss of the entire amount of such investment." (*Id.* ¶ 54.) The Limited Partnership Agreement disclosed that the general partner would invest in bridge loans, short term convertible debt, and equity investments. In his complaint, Plaintiff alleges that Doerge "held out St. James as a 'safe place' to invest and as an opportunity to realize 'greater-than-market' return at a 'lower-than-market risk." Although Plaintiff has not addressed the

reliance argument for this investment, even if Doerge did make such a representation, it is directly contradicted by the terms of the Purchase Agreement which Plaintiff signed. Accordingly, reliance on any such statements is not justified and summary judgment is granted as to the common law fraud and negligent misrepresentation claims based on the St. James investment.

C. Causation

Defendants argue that Plaintiff has failed to offer any evidence of loss causation. In the securities fraud context, the loss causation requirement requires a plaintiff to demonstrate that "the very facts about which the defendant lied ... caused its injuries." *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir.1997). The Seventh Circuit has held that "[t]o defeat [plaintiff's] claim at summary judgment, therefore, [defendant] would have to establish that, as a matter of undisputed fact, the depreciation in the value of the notes could not have resulted from the alleged false statement or omission of the defendant." *Id.* Defendants have not shown that "as a matter of undisputed fact" Plaintiff's loss "could not have resulted from the alleged false statement or omission of the defendant[s]." *Id.* at 650.

III. Absence of Fiduciary Relationship

Defendants seek judgment on Plaintiff's claim for breach of a fiduciary duty. In order to succeed on a breach of fiduciary duty claim under Illinois law, a plaintiff must establish the following elements: (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Romanek v. Connelly*, 324 Ill.App.3d 393, 404, 257 Ill.Dec. 436, 753 N.E.2d 1062, 1072 (1st Dist.2001). A fiduciary relationship may "arise from the facts of a particular situation, for example, where there is trust reposed on one side and resulting superiority and influence on the other." *In re Estate of Rothenberg*, 176 Ill.App.3d 176, 179, 125 Ill.Dec. 739, 741, 530 N.E.2d 1148, 1150 (1988). Under Illinois law, brokers who receive fees or commissions for executing investment transactions can serve as agents to their customers, and thus have a fiduciary duty to their customers that is limited to actions occurring within the scope of their agency. *See Martin v. Heinhold Commodities, Inc.*, 117 Ill.2d 67, 78, 109 Ill.Dec. 772, 510 N.E.2d 840 (1987); *Index Futures Group, Inc. v. Ross*, 199 Ill.App.3d 468, 475, 145 Ill.Dec. 574, 557 N.E.2d 344 (Ill.App.1990). The fiduciary duty for a broker varies depending on whether he or she has discretionary trading authority over the account at issue. "The duty of care owed by a broker carrying a nondiscretionary account for a customer is an exceedingly narrow one, consisting at most of a duty to properly carry out transactions ordered by the customer." *Index Futures Group*, 199 Ill.App.3d at 475, 145 Ill.Dec. 574, 557 N.E.2d 344. On the other hand, where an account is discretionary, the broker is a fiduciary. *See CFTC v. Heritage Capital Advisory Servs., Ltd.*, 823 F.2d 171, 173 (7th Cir.1987). The parties here dispute whether Doerge had discretionary trading authority, thus an issue of fact exists and this issue is inappropriate for resolution on a summary judgment motion.

CONCLUSION

***8** As discussed above, Defendants' motion for summary judgment is granted in part and denied in part.

Not Reported in F.Supp.2d, 2004 WL 3019173 (N.D.Ill.), Fed. Sec. L. Rep. P 93,093

Motions, Pleadings and Filings (Back to top)

- 2004 WL 2257536 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Further Support of Their Motion for Summary Jugment (Aug. 05, 2004)

- 2004 WL 2257537 (Trial Motion, Memorandum and Affidavit) Defendants' Response in Further Support of Their Motion for Summary Judgment to Plaintiff's Counterstatement of Facts Pursuant to Local Rule 56.1(b)(3) (Aug. 05, 2004)

- 2004 WL 2257534 (Trial Motion, Memorandum and Affidavit) Plaintiff's Response to Defendants' LR 56.1(a) Statement of Facts Pursuant to Local Rule 56.1(b)(3) (Jul. 09, 2004)

- 2004 WL 2257535 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum In Opposition to Motion for Summary Judgment (Jul. 09, 2004)

- 2004 WL 2257533 (Trial Pleading) Answer and Affirmative Defenses to Second Amended Complaint (Jun. 03, 2004)

- 2004 WL 2257531 (Trial Motion, Memorandum and Affidavit) Defendants' Motion for Summary Judgment (May. 24, 2004)

- 2004 WL 2257529 (Trial Pleading) Second Amended Complaint (May. 20, 2004)

• 2004 WL 2257527 (Trial Pleading) Amended Answer to Amended Complaint (Jan. 29, 2004)

• 2003 WL 23819714 (Trial Pleading) Answer to Amended Complaint (Sep. 08, 2003)

• 2003 WL 23819711 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Further Support of Their Motion to Dismiss the Amended Complaint (Jul. 21, 2003)

• 2003 WL 23819709 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum in Opposition to Motion to Dismiss Complaint for Lack of Particularity (Jul. 14, 2003)

• 2003 WL 23819706 (Trial Motion, Memorandum and Affidavit) Defendant's Motion and Memorandum of Law to Dismiss Plaintiff's Complaint for Lack of Particularity (Jun. 30, 2003)

• 2003 WL 23819705 (Trial Motion, Memorandum and Affidavit) Motion of Plaintiff D. Michael Meyer for Reassignment Based on Relatedness (Feb. 21, 2003)

• 2003 WL 23819703 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Support of Their Motion for Stay or Continuance of Proceedings Pending Appeal (Jan. 27, 2003)

• 2003 WL 23819702 (Trial Motion, Memorandum and Affidavit) Plaintiff's Response to Motion for Stay or Continuance of Proceedings Pending Appeal (Jan. 21, 2003)

• 2002 WL 32681542 (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Defendant Balis, Lewittes & Coleman, Inc.'s Motion for Sanctions Pursuant to Rule 11, Fed. R. Civ. P. (Jul. 11, 2002)

• 2002 WL 32681537 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum in Opposition to Defendant Balis, Lewittes & Coleman's Rule 11 Motion for Sanctions (Jun. 27, 2002)

• 2002 WL 32681534 (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Petition by Defendants Balis, Lewittes & Coleman, Inc. and David Doerge to Compel Arbitration (Jun. 05, 2002)

• 2002 WL 32681521 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum in Opposition to Defendants' Petition to Compel Arbitration (May. 30, 2002)

• 2002 WL 32681528 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Defendant Balis, Lewittes & Coleman, Inc.'s Motion for Sanctions Pursuant to Rule 11, Fed. R. Civ. P. (May. 30, 2002)

• 2002 WL 32681512 (Trial Pleading) Amended Complaint (Apr. 09, 2002)

• 2002 WL 32681501 (Trial Pleading) Complaint (Feb. 27, 2002)

• 1:02CV01450 (Docket) (Feb. 27, 2002)

END OF DOCUMENT

TAB 2

Westlaw.

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 2526390 (N.D.Ill.)
(Cite as: 2004 WL 2526390 (N.D.Ill.))

C

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.
WACHOVIA SECURITIES, LLC, a Delaware corporation, Plaintiff,
v.
David NEUHAUSER, Andrew A. Jahelka, Richard O. Nichols, Leon A. Greenblatt, III, Defendants.
No. 04 C 3082.

Nov. 5, 2004.

Christopher Scott Griesmeyer, Chicago, IL, for Plaintiff.

C. Philip Curley, Steven Pascal Gomberg, Gary Irwin Blackman, Christopher Scott Griesmeyer, Robinson, Curley & Clayton, P.C., Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

HART, J.

*1 Plaintiff Wachovia Securities LLC [FN1] contends that defendants David Neuhauser, Andrew Jahelka, Richard Nichols, and Leon Greenblatt [FN2] misused Wachovia margin accounts opened in the names of Loop Corp. and NOLA, LLC. Loop and NOLA are not defendants in the present lawsuit. The Loop and NOLA accounts allegedly were being used to surreptitiously obtain a controlling interest in Health Risk Management, Inc. ("HRMI"). When NASDAQ discontinued trading of HRMI stock, Wachovia was left with a $2,900,000 margin call that has not been paid. Wachovia contends Loop and NOLA were shell companies and that the Neuhauser Individuals are liable for the unpaid margins either directly or as alter egos of the two entities.

FN1. Wachovia is the successor in interest to Prudential Securities Incorporated, which will also be referred to as "Wachovia."

FN2. These four individuals will be collectively referred to as "the Neuhauser Individuals."

Initially, based on arbitration provisions in the margin accounts of the two entities, Wachovia brought an arbitration proceeding against the two entities and the Neuhauser Individuals as well. The Neuhauser Individuals then filed a lawsuit in the Circuit Court of Cook County, Illinois in which they sought a declaration that they were not bound by any arbitration provision of the margin accounts and also requested an injunction preventing Wachovia from proceeding against them in arbitration. The state court lawsuit was removed to federal court based on complete diversity of citizenship. In federal court, Wachovia answered the removed complaint and also filed a countercomplaint against the Neuhauser Individuals in which Wachovia raised federal securities law, state law fraud, breach of contract, and alter ego claims. At a court hearing, Wachovia subsequently represented that it would no longer proceed against the Neuhauser Individuals in the arbitration proceeding and instead would proceed against them in this federal lawsuit. Wachovia continued the arbitration proceeding as against the two entities. The parties then submitted an agreed draft order, which was entered by the court. The order dismissed the action that had been removed and realigned Wachovia as plaintiff with its counterclaims as the complaint. [FN3] Wachovia thereafter moved the arbitration panel to stay the arbitration as regards the Neuhauser Individuals.

FN3. The counterclaims will henceforth be referred to as the "Complaint."

Presently pending are two motions of the Neuhauser Individuals. They move to reinstate their original action on the ground that Wachovia only stayed the arbitration action against them and did not actually dismiss it. The Neuhauser Individuals also move to dismiss Wachovia's Complaint for failure to state a basis for relief.

Wachovia contends that it requested a stay so that it could reinstate the arbitration against the Neuhauser Individuals in the event that, in the lawsuit, it proves the Neuhauser Individuals are alter egos of Loop and NOLA. They further contend that a stay is preferable to a dismissal because the Neuhauser Individuals may be difficult to find for service in the event that it

becomes necessary to bring them back into a dismissed arbitration proceeding. Statements that Wachovia may later proceed against the Neuhauser Individuals in arbitration, however, are inconsistent with Wachovia's statements in a hearing in the federal lawsuit. At a hearing, counsel for Wachovia stated that Wachovia "will litigate in the district court rather than in arbitration.... So the issues that would have been raised in the arbitration will now be raised in our counterclaim,...." May 24, 2004 Tr. at 5. In a further colloquy, the court stated: "Now, the parties can always waive arbitration, so that is okay. But if anybody wants arbitration, you have to ask for it and you have to make the appropriate motion for it. And you can forego that and resolve the case apparently on the counterclaim, right?" *Id.* at 6. Counsel for Wachovia responded: "Correct, Judge. And the arbitration will proceed as to other entities." *Id.* Following the May 24 hearing, the parties submitted an agreed draft order that was entered by the court. The order included a representation by Wachovia that it is "not proceeding with its claims" against the Neuhauser Individuals in arbitration. Based on these representations, the Neuhauser Individuals' removed action was dismissed with prejudice.

***2** Wachovia makes no argument as to why the federal action would be inadequate to obtain any necessary relief from the Neuhauser Individuals. If Wachovia is successful in the present lawsuit, there would be no need for further proceedings against these individuals in the arbitration. Based on its prior representations, Wachovia will now be expressly ordered to dismiss the arbitration action as against the Neuhauser Individuals. Since that order will be entered, there will be no need to reinstate the action of the Neuhauser Individuals.

Wachovia's complaint contains eight counts labeled as follows: (I) Common Law Fraud; (II) [Federal] Securities Fraud; (III) Conspiracy to Commit Fraud; (IV) Declaratory Judgment--Alter Ego (Loop Corp.); (V) Declaratory Judgment--Alter Ego (NOLA, LLC); (VI) Piercing the Corporate Veil (Loop Corp.); (VII) Piercing the Corporate Veil (NOLA, LLC); and (VIII) Breach of Contract. Jurisdiction is based on both federal question jurisdiction over Count II and diversity jurisdiction. Although some of the agreements relied upon have a New York choice of law provision, the parties agree that Illinois law applies to the issues presently being raised regarding the state law counts. The Neuhauser Individuals contend all counts are subject to dismissal on a Rule 12(b)(6) motion.

On a Rule 12(b)(6) motion to dismiss, plaintiff's well-pleaded allegations of fact are taken as true and all reasonable inferences are drawn in plaintiff's favor. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Dixon v. Page*, 291 F.3d 485, 486 (7th Cir.2002); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir.2000). Ordinarily, a complaint need not set forth all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1008 (7th Cir.2002); *Anderson v. Simon*, 217 F.3d 472, 474 (7th Cir.2000), *cert. denied*, 531 U.S. 1073, 121 S.Ct. 765, 148 L.Ed.2d 666 (2001); *Scott v. City of Chicago*, 195 F.3d 950, 951 (7th Cir.1999). Ordinarily, a plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the claim. Fed.R.Civ.P. 8(a)(2); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Scott*, 195 F.3d at 951; *Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir.1997); *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir.1995). However, to the extent fraud is alleged, it must be pleaded with particularity. *See* Fed.R.Civ.P. 9(b); *Slaney v. The International Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir.), *cert. denied*, 534 U.S. 828, 122 S.Ct. 69, 151 L.Ed.2d 35 (2001); *Shapo v. O'Shaughnessy*, 246 F.Supp.2d 935, 955-56 (N.D.Ill.2002). Additionally, even if not required to plead specific facts, a plaintiff can plead itself out of court by alleging facts showing there is no viable claim. *See Slaney*, 244 F.3d at 597; *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 669-70 n. 14 (7th Cir.1998), *cert. denied*, 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 788 (1999); *Jackson*, 66 F.3d at 153-54.

***3** Ordinarily, as long as they are consistent with the allegations of the complaint, a plaintiff may assert additional facts in its response to a motion to dismiss. *Brokaw v. Mercer County*, 235 F.3d 1000, 1006 (7th Cir.2000); *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir.2000); *Albiero*, 122 F.3d at 419; *Gutierrez v. Peters*, 111 F.3d 1364, 1367 n. 2 (7th Cir.1997). However, Rule 9(b) requires that the necessary allegations be in the complaint itself. *Kennedy v. Venrock Associates*, 348 F.3d 584, 593 (7th Cir.2003), *cert. denied*, --- U.S. ----, 124 S.Ct. 1889, 158 L.Ed.2d 470 (2004); *Abrams v. Van Kampen Funds, Inc.*, 2002 WL 1160171 *2 (N.D.Ill. May 30, 2002); *Chicago District Council of Carpenters Welfare Fund v. Angulo*, 169 F.Supp.2d

880, 886 (N.D.Ill.2001); *Implant Innovations, Inc. v. Nobelpharma AB*, 1995 WL 562092 *5 (N.D.Ill. Sept.14, 1995). Additional allegations contained in the responsive brief, however, may indicate that plaintiff should be given the opportunity to amend the complaint to comply with Rule 9(b). *See Ziemba v. Cascade International, Inc.*, 256 F.3d 1194, 1213 (11th Cir.2001); *Angulo*, 169 F.Supp.2d at 886; *Implant Innovations*, 1995 WL 562092 at *5. While additional allegations contained in a responsive brief are not considered to be incorporated in the complaint, documents that are referred to in the complaint and that are central to a claim that is made may be considered to be part of the complaint even if not actually attached to the complaint. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir.2002); *Duferco Steel Inc. v. M/V Kalisti*, 121 F.3d 321, 324 n. 3 (7th Cir.1997); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir.1993). Where the document may properly be considered, the actual document will override inconsistent descriptions of the document alleged in the body of the complaint. *See Rosenblum*, 299 F.3d at 661 (quoting 5 Wright & Miller, *Federal Practice & Procedure: Civil 2d* § 1327 at 766 (1990)); *In re Wade*, 969 F.2d 241, 249 (7th Cir.1992); *Beam v. IPCO Corp.*, 838 F.2d 242, 244-45 (7th Cir.1988).

In the complaint itself, it is unnecessary to specifically identify the legal basis for a claim as long as the facts alleged would support relief. *Forseth*, 199 F.3d at 368; *Scott*, 195 F.3d at 951; *Albiero*, 122 F.3d at 419; *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir.1992); *Dodaro v. Village of Glendale Heights*, 2003 WL 1720030 *8 (N.D.Ill. March 31, 2003). The plaintiff is not bound by legal characterizations of the claims contained in the complaint. *Forseth*, 199 F.3d at 368; *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir.1999). However, in response to a motion to dismiss that raises the issue, the plaintiff must identify a legal basis for a claim and make adequate legal arguments in support of it. *Kirksey*, 168 F.3d at 1041-42; *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir.1995); *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir.1996); *Gilmore v. Southwestern Bell Mobile Systems, L.L.C.*, 224 F.Supp.2d 1172, 1175 (N.D.Ill.2002); *Carpenter v. City of Northlake*, 948 F.Supp. 759, 765 (N.D.Ill.1996).

*4 Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The circumstances of fraud generally include "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Slaney*, 244 F.3d at 599; *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir.1997). A complaint must outline the alleged misrepresentations and reasonably notify a defendant of the specifics of the alleged fraudulent activity, including the particular defendant's role. *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 782 (7th Cir.1999); *Goren v. New Vision International, Inc.*, 156 F.3d 721, 730 (7th Cir.1998); *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir.1992); *Ward Enterprises, Inc. v. Bang & Olufsen*, 2003 WL 22859793 *1 (N.D.Ill.Dec.2, 2003); *Gilmore v. Southwestern Bell Mobile Systems, L.L.C.*, 210 F.R.D. 212, 224 (N.D.Ill.2001). Fair notice is the most basic consideration. *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777-78 (7th Cir.1994); *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, 2002 WL 31689264 *8 (S.D.Ind. Nov.20, 2002); *Gilmore*, 210 F.R.D. at 224. Additionally, the requirements of Rule 9(b) may be relaxed where the plaintiff makes an adequate showing that necessary information is within the control of a defendant so that particularized pleading cannot be fully accomplished prior to receiving discovery. *See Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir.), *cert. denied*, 525 U.S. 818, 119 S.Ct. 57, 142 L.Ed.2d 44 (1998).

The Neuhauser Individuals contend the Count II federal securities fraud claim is untimely. This claim is based on Section 10(b) (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). The Complaint was filed on May 21, 2004. In the Complaint, Wachovia alleges that the Neuhauser Individuals' "scheme came to light on or about May 21, 2001, when the NASDAQ halted trading of the common stock of HRMI on the news that the company's independent auditors had resigned. At this time, the stock declined from a prior day's close of $7.5 per share to $4.75 per share." Compl. ¶ 36. Accordingly, Wachovia demanded that Loop and NOLA, and eventually the Neuhauser Individuals, provide sufficient funds to satisfy the margin requirement. *Id.* at ¶ ¶ 37-39. These demands going unheeded, Wachovia "began to explore potential legal remedies." The Neuhauser Individuals contend that, based on the facts alleged in the Complaint, Wachovia was on inquiry notice as of May 21, 2001, but did not raise its securities fraud claim until three

years later. The Neuhauser Individuals further contend that this is beyond the one-year discovery period/three-year statute of repose that was in effect for § 10(b)/Rule 10b-5 claims as of 2001. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991); *Levitan v. McCoy*, 2001 WL 1117279 *5 (N.D.Ill. Sept.21, 2001); *Stauffer v. Westmoreland Obstetric and Gynecologic Associates, S.C.*, 2001 WL 585510 *5 (N.D.Ill. May 25, 2001); *Great Neck Capital Appreciation Investment Partnership, L.P. v. PricewaterhouseCoopers, L.L.P.*, 137 F.Supp.2d 1114, 1125 (E.D.Wis.2001). Alternatively, they contend the claim is untimely under the two-year discovery period/five-year statute of repose that became effective July 30, 2002. *See* 28 U.S.C. § 1658(b). Wachovia argues that the allegations of the Complaint do not conclusively establish inquiry notice as of May 21, 2001. It also argues that the two-year period of § 1658(b) applies and further contends that this period did not begin to run until August 16, 2001, based on estoppel due to alleged settlement negotiations with the Neuhauser Individuals. Alternatively, Wachovia contends the filing of the arbitration proceeding equitably estopped the running of the limitation period for the securities fraud claims.

***5** Wachovia contends that when it was placed on inquiry notice is a question of fact that cannot be resolved on a Rule 12(b)(6) motion. Inquiry notice that begins the running of the limitation period for a securities fraud claim arises "when (often between the date of occurrence and the date of the discovery of the fraud) the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one's legal rights, enough facts to enable him by such further investigation as the facts would induce in a reasonable person to sue within a year." *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir.1997). However, the Seventh Circuit has rejected the proposition that, on a motion to dismiss, allegations of a "conjunction of optimistic forecasts with a sharp drop in price establishes inquiry notice as a matter of law." *LaSalle v. Medco Research, Inc.*, 54 F.3d 443, 447 (7th Cir.1995). *See also Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir.1997); *Abrams v. Van Kampen Funds, Inc.*, 2002 WL 1160171 *10 (N.D.Ill. May 30, 2002). Here, the relationship is even more attenuated because the Neuhauser Individuals were purchasers of HRMI stock, not officers or directors of the corporation who would more likely appear to have control over the corporation or nonpublic knowledge of events that could affect the stock's price. In addition to knowledge of the drop in price that precipitated the margin call, some information about the relationships between the Neuhauser Individuals, Loop, and NOLA, their percentage of ownership of HRMI stock, and the cause of the drop in value of HRMI stock was also necessary before Wachovia would be on inquiry notice. There is no allegation in the Complaint that, as of May 21, 2001, Wachovia already had knowledge of all the HRMI stock that Greenblatt controlled through accounts with other brokers. Although, Wachovia alleges that it began an investigation following the margin call, it does not allege the precise dates that the investigation began or when it learned particular facts. The Neuhauser Individuals focus on the allegation that the "scheme came to light on or about May 21, 2001." Viewed in isolation at face value, that conclusory allegation supports that sufficient notice existed as of May 21, 2001. The additional and more specific factual allegations contained in the Complaint, however, support only that May 21, 2001 was the date the stock price dropped that resulted in a margin call and ultimately further investigation. The Complaint does not show the precise date when inquiry notice would be satisfied.

In response to the motion to dismiss, however, Wachovia concedes that its securities fraud claim accrued by August 2001. Wachovia contends that its May 2004 Complaint is timely because the two-year limitation period of § 1658(b) applies and it brought the arbitration action in May 2003. Taking as true that the securities fraud claim did not accrue until August 2001, the former one-year statute of limitation had not expired prior to the effective date of § 1658(b). While the Neuhauser Individuals argue that the enactment of § 1658(b) did not revive claims for which the statute of limitations had already expired, *see In re Enterprise Mortgage Acceptance Co., L.L.C. Securities Litigation*, 295 F.Supp.2d 307 (S.D.N.Y.2003), they do not dispute that § 1658(b) applies to securities fraud claims for which the previously existing limitation period had not yet expired as of July 30, 2002. Therefore, Wachovia had until August 2003 to bring its claim.

***6** The question is whether bringing the arbitration action in May 2003 equitably estopped the further running of the limitation period. At the time Wachovia brought its securities claims in this court, the arbitration proceeding against the Neuhauser Individuals was still pending. Wachovia relies on New York Stock Exchange Rule 606(a) which provides: "Where permitted by law, the time limitation(s) which would otherwise run or accrue for

the institution of legal proceedings shall be tolled when a duly executed Submission Agreement is filed by the claimant(s). The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted." National Association of Securities Dealers Rule 10307 is essentially identical.

Parties may agree to extend a period of limitation. *See Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir.), *cert. denied*, 540 U.S. 876, 124 S.Ct. 227, 157 L.Ed.2d 138 (2003). Thus, to the extent the parties had an arbitration agreement, the arbitration proceeding that was instituted would have tolled the limitation period during the pendency of the arbitration proceeding. Since the arbitration proceeding was initiated prior to the expiration of the limitation period and the claims were raised in this court while the arbitration proceeding was still pending, the federal securities law claims are timely as long as there was an enforceable arbitration agreement. However, if there was no enforceable arbitration agreement as against the Neuhauser Individuals, improperly naming them in the arbitration proceeding would not have extended the limitation time period for bringing a federal securities fraud claim against them. *See Rampersad v. Deutsche Bank Securities, Inc.*, 2004 WL 616132 *5-6 (S.D.N.Y. March 30, 2004).

The question is whether Wachovia has pleaded itself out of court by alleging facts which conclusively establish that all or some of the Neuhauser Individuals were not parties to or otherwise bound by any arbitration agreement with Wachovia. Wachovia attaches to its Complaint copies of the margin agreements that contain the arbitration provisions relied upon by Wachovia. The Neuhauser Individuals contend they were not bound to arbitrate any dispute because the margin agreements were signed in a representative capacity on behalf of Loop and NOLA. Additionally, Greenblatt and Nichols make the point that they did not sign the agreements in any manner whatsoever. However, Wachovia contends that the corporate veils may be pierced so that the Neuhauser Individuals would be directly liable for actions of Loop and NOLA. A person who is not otherwise a party to an agreement containing an arbitration provision may still be bound by the agreement to arbitrate based on piercing the corporate veil. *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir.2002) (citing *American Bureau of Shipping v. Tencara Shipyard, S.P.A.*, 170 F.3d 349, 352 (2d Cir.1999)); *Thompson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 777 (2d Cir.1995); *Zurich American Insurance Co. v. Cebcor Services Corp.*, 2003 WL 21418237 *4 (N.D.Ill. June 18, 2003). Therefore, there is a basis for finding Wachovia's federal securities claim to be timely and Wachovia has not pleaded facts that are necessarily inconsistent with this theory. Since, the statute of limitations is an affirmative defense, it is sufficient that Wachovia points out a basis for there being a timely claim; it is not necessary for Wachovia to affirmatively and sufficiently plead these facts in its Complaint. The federal securities claims will not be dismissed as untimely.

*7 The Neuhauser Individuals contend the fraud counts (Counts I, II, and III) all fail because Wachovia has not pleaded facts supporting that they made any misrepresentations upon which Wachovia relied to its detriment. Wachovia alleges that, in October 2000, Neuhauser opened a Wachovia account in the name of Loop. Neuhauser represented that he worked for Greenblatt, who controlled Loop. Greenblatt, Jahelka, and Nichols signed a statement verifying that they were the sole owners of Loop. Between then and March 31, 2001, HRMI stock sold for between $6.00 and $7.875 per share. By March 31, 2001, the Loop account included 225,000 shares of HRMI and all margin calls had been met. In April 2001, HRMI stock sold for as high as $10.65 per share. By the end of April, the Loop account had 321,000 shares of HRMI. $160,000 in cash had been paid to purchase $650,000 of HRMI stock.

In late February 2001, [FN4] Neuhauser opened the NOLA account, using the same Wachovia broker as for the Loop account. The account for NOLA was labeled as a partnership account and Neuhauser identified as the general partner, "[a]lthough NOLA is purportedly a limited liability company." [FN5] Compl. ¶ 22. It is alleged that Neuhauser also signed a document making him personally liable for activity in the account and the documents are attached as exhibits. *Id.* ¶ 23. When opening the account, Neuhauser again disclosed that he worked for Greenblatt. It is expressly alleged that, as of mid-March 2001, Greenblatt worked directly with the Wachovia broker regarding both accounts. As of the end of March 2001, the NOLA account had 10,000 shares of HRMI valued at $69,380, with a $36,000 margin debt. In April 2001, the NOLA account added an additional 143,500 shares of HRMI with a total purchase price of $1,150,000 and for which less than $200,000 in cash was deposited in the account.

FN4. The Complaint (¶ 22) alleges

> February 2001. One of the attached exhibits (F) is dated February 27, 2001 and Exhibits E and F both have apparent fax notations indicating February 28, 2001 in the top margin.
>
> FN5. There is no express allegation that NOLA actually is a limited liability company nor is there any allegation as to the state in which such a company may have been formed.

In a Schedule 13D filing dated April 5, 2001, Greenblatt and his wife represented they controlled 30% of HRMI's outstanding shares, which included holdings through other entities in addition to Loop. In an April 23, 2001 update, they disclosed that they controlled 39% of HRMI stock. The Greenblatts' Schedule 13D filing also included disclosure of a standstill agreement that they would not acquire more than 40% of HRMI's outstanding shares. The Schedule 13D filings, however, failed to disclose HRMI stock held in the NOLA account. Inclusion of that stock in the April 23 update would have disclosed that the Greenblatts controlled approximately 42% of HRMI stock.

Wachovia alleges that NOLA was established for the sole purpose of being a vehicle to avoid detection of the fact that the standstill agreement and securities regulations were being violated. It is also alleged that the Wachovia margin accounts were used as a vehicle to place the risk of the investment scheme on Wachovia. It is alleged that the purchase of a controlling share of HRMI stock was intended to drive up the price of HRMI stock and that the Neuhauser Individuals "intended to use the buying power generated by the price increase of the HRMI stock that they already owned to purchase substantial additional shares on margin. The 50% margin requirement contemplated by the regulatory bodies and embodied in the margin rules for the purchase of securities was ignored as the price rise in the stock served as a smoke screen for the [Neuhauser Individuals'] purchases of HRMI without cash." Compl. ¶ 43. The alleged misrepresentations to Wachovia regarded the related ownership interests of the two accounts and the intent to obtain a controlling interest in HRMI. *Id.* ¶ 50. Additionally, it is alleged that, had Wachovia "known about the [Neuhauser Individuals'] intention to use Loop Corp. and NOLA, LLC to surreptitiously acquire a controlling interest in HRMI's shares--or had [Wachovia] even known of the joint ownership and control of Loop Corp. and NOLA, LLC--[Wachovia] never would have allowed the [Neuhauser Individuals] to open their margin accounts." *Id.* ¶ 33.

***8** On May 21, 2001, following the resignation of HRMI's independent auditors, NASDAQ halted trading in HRMI stock. At the time there was a one-day decline from $7.50 to $4.75 per share. In June 2001, Wachovia made margin calls of close to $3,000,000 and demanded payment from Loop, NOLA, and the Neuhauser Individuals. None made any payment.

Although Wachovia conclusorily alleges that the Neuhauser Individuals hid the relationship between the two accounts, specific allegations of the Complaint are to the contrary. Although Neuhauser signed the documents opening the NOLA account, as he had also done for the Loop account, it is expressly alleged that he again informed the Wachovia broker that he was working for Greenblatt. By "mid-March", approximately two weeks after the NOLA account was opened, the Wachovia broker was dealing directly with Greenblatt regarding both accounts. Although the SEC Schedule 13D filings omitted Greenblatt's interest in the NOLA account, Greenblatt's interest in that account was not hidden from Wachovia as well. Although inconsistent pleading is permitted under the Federal Rules, allegations of fraud must be specifically pleaded. *See* Fed.R.Civ.P. 9(b). The specific allegations control over the conclusory allegation that Greenblatt's interest in the NOLA account was hidden from Wachovia. *See Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir.1994); *Perlman v. Zell*, 938 F.Supp. 1327, 1347 (N.D.Ill.1996), *aff'd*, 185 F.3d 850 (7th Cir.1999). Since the relationship between the two accounts was disclosed to Wachovia, the fraud claims cannot be based on the failure to disclose the relationship.

Wachovia argues that Neuhauser's representation that he was NOLA's general partner was fraudulent. Even assuming this was a false representation, [FN6] there is no allegation that Wachovia detrimentally relied on this false representation. Reliance on a fraudulent statement is a necessary element of Wachovia's fraud claims. *Hefferman v. Board of Trustees of Illinois Community College Dist. 508*, 310 F.3d 522, 526 (7th Cir.2002); *Rissman v. Rissman*, 213 F.3d 381, 383 (7th Cir.), *cert. dismissed*, 531 U.S. 987, 121 S.Ct. 508, 148 L.Ed.2d 450 (2000). Even assuming NOLA is actually a limited liability company, Wachovia does not allege where it was incorporated so the potential liability of the members cannot be determined. Ordinarily,

members of a limited liability company are like limited partners of a partnership. Unlike a general partner regarding debts of the partnership, members of a limited liability company generally are not liable for the debts of the company. *See* Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir.1998). *See, e.g.*, 805 ILCS 180/10-10. So being a general partner could be materially different from being a member of a limited liability company. However, there is no allegation that Wachovia relied on Neuhauser's personal creditworthiness in permitting the NOLA account to be opened. There is no allegation that Wachovia investigated Neuhauser's credit or that it would have investigated NOLA's financial condition had it known Neuhauser was only a member of a limited liability company. Moreover, Neuhauser signed a document promising to personally pay liabilities on the account, so Wachovia had the same protection that it would have had even if Neuhauser had been a general partner. [FN7] The allegations do not support that Wachovia would have acted differently, that is not open the account, had it known NOLA was not a partnership with Neuhauser as a general partner. Therefore, the reliance requirement cannot be satisfied regarding this aspect of the alleged fraud.

> FN6. There is no allegation that NOLA actually was a limited liability company instead of a general partnership, only an allegation that NOLA "purportedly is a limited liability company." Compl. ¶ 22.
>
> FN7. As is discussed regarding Count VIII, though, Neuhauser contends any documents he signed were in a representative capacity. That would require consideration of facts outside the Complaint.

***9** Wachovia also argues that its fraud claims are based on the alleged failure to disclose that the Neuhauser Individuals were attempting to gain control of HRMI and drive up the price of its stock in violation of federal securities law. [FN8] Wachovia relies on two different theories to support that this constitutes fraud. One is that the Neuhauser Individuals had a duty to disclose their intentions. The other is that this intention was inconsistent with the representation in the Loop margin agreement that they would "conduct [the] account in accordance with all applicable laws or regulations." Compl. Exh. B ¶ 4.

> FN8. Although the Complaint contains allegations as to misrepresentations contained in the Schedules 13D, Wachovia does not dispute that there is no allegation that it saw the Schedules or relied on the misrepresentations contained therein.

As to the Neuhauser Individuals' duty to disclose, Wachovia contends there was such a duty because the parties were in a fiduciary relationship. The Neuhauser Individuals agree that, under Illinois law, a fiduciary generally has a duty to disclose and that the broker-client relationship is a fiduciary relationship, at least to the extent that the broker is giving nondiscretionary investment or financial advice and not just executing transactions directed by the client. *See* Carr v. Cigna Securities, Inc., 95 F.3d 544, 547 (7th Cir.1996). There is no allegation in the Complaint that Wachovia provided any investment advice regarding the Loop and NOLA accounts. But even assuming the existence of a fiduciary relationship, it is the broker (Wachovia) that is the fiduciary, not the clients (the Neuhauser Individuals). Wachovia points to no case holding that the client in such a relationship also has a duty to disclose. Wachovia has not alleged a cognizable fraudulent concealment claim.

Wachovia's other contention is that the Neuhauser Individuals fraudulently violated their contractual promise to obey securities laws and regulations. This is a promissory fraud claim, that is, "a false representation of intent regarding future conduct, such as a promise to perform a contract when there is no actual intent to do so." Houben v. Telular Corp., 231 F.3d 1066, 1074 (7th Cir.2000). Illinois law recognizes such a fraud claim. *See id.* Promissory fraud can also be a basis for a § 10(b)/Rule 10b-5 claim. Burns v. Paddock, 503 F.2d 18, 22-23 (7th Cir.1974); Snap-On Inc. v. Ortiz, 1999 WL 592194 * 7 & n. 4 (N.D.Ill. Aug.3, 1999); Grove v. Gilman Securities, Inc., 1996 WL 18893 *2 (N.D.Ill. Jan.17, 1996); Thompson ex rel. Thorp Family Charitable Remainder Unitrust v. Federico, 324 F.Supp.2d 1152, 1162-63 (D.Ore.2004). The Neuhauser Individuals contend such a claim is not contained in the Complaint itself, only argued in Wachovia's brief, which would not satisfy Rule 9(b). However, it is alleged in the Complaint that, at the time the Loop account was opened, the Neuhauser Individuals intended to use the account in a scheme to obtain control of HRMI, a scheme that was in violation of securities laws and regulations, and that they hid this intention from Wachovia. It is also alleged that, had Wachovia known the Neuhauser Individuals were involved in this scheme, they would not have permitted them to use the account. While the body of

the Complaint does not expressly refer to promissory fraud or the promise not to violate laws, the margin agreement containing the promise is expressly referenced in the body of the Complaint and is attached as an exhibit. The facts supporting promissory fraud are alleged in the Complaint even if the theory is not expressly stated. Promissory fraud is sufficiently raised.

***10** Although it is a recognized basis for a fraud claim, promissory fraud claims are disfavored. *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir.1992); *Association Benefit Services, Inc. v. AdvancePCS Holding Corp.*, 2004 WL 2101928 *1 (N.D.Ill. Sept.21, 2004). The Seventh Circuit has cautioned against transforming every breach of contract into a claim of fraud. *Consolidation Services, Inc. v. KeyBank National Association*, 185 F.3d 817, 823 (7th Cir.1999); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1354 (7th Cir.1995); *AdvancePCS*, 2004 WL 2101928 at *1. To protect against this, promissory fraud claims will only be permitted to proceed if they are alleged to be part of a scheme to defraud, that is part of a pattern of fraudulent acts. *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 866 (7th Cir.1999); *AdvancePCS*, 2004 WL 2101928 at *2. [FN9] Here, Wachovia has alleged other fraudulent acts besides the alleged false promise to obey the law. Wachovia has specifically alleged false representations contained in the Schedules 13D. Also, Wachovia has alleged that the Neuhauser Individuals also used accounts at other brokers to execute the scheme. Wachovia has sufficiently alleged promissory fraud based on promising to engage in legal transactions at the time the Loop margin account was opened even though the Neuhauser Individuals had the then-present intent to violate securities laws and regulations. Contrary to the Neuhauser Individuals' contention, Wachovia's allegations more than adequately satisfy Rule 9(b)'s particularity requirement regarding pleading each individual's participation and role in the scheme. *Cf. Duggan v. Terzakis*, 275 F.Supp.2d 968, 973 (N.D.Ill.2003).

> FN9. The cases relied upon for this standard all involve the application of Illinois law. Since the promissory fraud allegations are not being dismissed, it may be assumed for present purposes that the federal securities claims must also satisfy this standard.

Wachovia also argues that it can pursue a promissory fraud theory based on the Neuhauser Individuals' promise to pay any margin calls even though they had no such intent at the time the accounts were opened. The problem with this contention is that the Complaint contains no allegation that the Neuhauser Individuals had an intent not to pay at the time either of the accounts were opened and the margin agreements signed.

Wachovia's Count I, II, and III fraud claims will be dismissed except to the extent they are based on the alleged promissory fraud of the Neuhauser Individuals that, at the time of opening of the Loop account, they would not use the account for transactions that would violate securities laws and regulations.

The Neuhauser Individuals contend the allegations regarding piercing the corporate veil and alter ego [FN10] are inadequate because they are premature and do not satisfy the particularity requirement of Rule 9(b). Their first contention is that these claims cannot be pursued until Loop and/or NOLA are first found liable and unable to pay a judgment. The cases relied on by the Neuhauser Individuals do not support that proposition. *American Society of Contemporary Medicine, Surgery & Ophthalmology v. Murray Communications, Inc.*, 547 F.Supp. 462, 466 & n. 8 (N.D.Ill.1982), concerns whether it was appropriate to bring a fraudulent inducement claim prior to the plaintiff suffering a detriment through a breach of contract by a third party; the case does not discuss when it is appropriate to bring a piercing claim. *International Financial Services Corp. v. Chromas Technologies Canada, Inc.*, 356 F.3d 731, 735-39 (7th Cir.2004), holds that an Illinois piercing the corporate veil claim is an equitable claim for the court, not a jury. It does not hold that the piercing the corporate veil claim could not be raised in the complaint until after the corporation was first found liable and unable to pay a judgment. All it indicates on the timing issue is that the jury issues should be tried first so that the court accords proper deference to the right to have a jury determine the facts for the related legal claims. *See id.* at 737-38. Similarly, the quoted general principle from *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill.2d 166, 198 Ill.Dec. 404, 632 N.E.2d 1015, 1018 (1994) (quoting 1 W. Fletcher, *Private Corporations* § 41.10 at 615 (rev. ed. 1990)) ("The corporate form may be disregarded only where equity requires the action to assist a third party."), does not address the question of when a piercing claim is ripe for adjudication. It simply states a necessary element of the piercing claim. A plaintiff may prove that a corporation will not be able to make good on a debt without first successfully bringing a separate lawsuit against the corporation

and waiting for that judgment to go unpaid. No case has been found which supports the Neuhauser Individuals' contention that a piercing claim is not ripe until a separate lawsuit is first brought and fully adjudicated as against the corporation that is being pierced.

> FN10. These claims will be referred to jointly as "piercing claims."

***11** The Neuhauser Individuals' other contention is that the piercing allegations do not satisfy the requirements of Rule 9(b). Rule 9(b), however, generally does not apply to piercing allegations. *See United States ex rel. Bidani v. Lewis*, 1999 WL 163053 *2 (N.D.Ill. March 12, 1999); *Kruse v. Aamed, Inc.*, 1997 WL 102528 *4 (N.D.Ill. March 4, 1997); *Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Systems, Inc.*, 915 F.Supp. 939, 942 (N.D.Ill.1996); *Francosteel Corp. v. National Industries, Inc.*, 1991 WL 166732 *1-2 (N.D.Ill. March 16, 1991). *But see Trustees of Cement Masons Fund, Local 502 v. F & V Cement Contractors, Inc.*, 2004 WL 765368 *3 (N.D.Ill. April 7, 2004); *New Freedom Mortgage Corp. v. C & R Mortgage Corp.*, 2004 WL 783206 *8-9 (N.D.Ill. Jan.15, 2004); *Typo graphics Plus, Inc. v. I.M. Estrada & Co.*, 2000 WL 1006572 *4 (N.D.Ill. July 19, 2000). To the extent fraud is a necessary element, however, the fraud must be alleged with particularity. *See Bidani*, 1999 WL 163053 at *2. Here, Wachovia primarily alleges that Loop and NOLA were not adequately funded, were not treated as distinct entities, and corporate regularities were not followed. [FN11] These aspects of the piercing claims need not be alleged with particularity. To the extent the fraudulent scheme is a necessary element of the piercing claims, as previously discussed, Wachovia has adequately alleged a scheme to violate the securities laws and the promissory fraud claim that is not being dismissed. The piercing claims will not be dismissed for failure to plead with adequate specificity.

> FN11. If NOLA is an Illinois limited liability company, following company formalities would not be pertinent to piercing its veil. *See* 805 ILCS 180/10-10(c).

Count VIII is a claim for breach of contract. Wachovia alleges the margin agreements for both accounts were breached when the margin calls were not paid. It is alleged that all the Neuhauser Individuals are liable for the breaches based on the piercing doctrines. Additionally, it is alleged that Neuhauser is liable for the margin call on the NOLA account because he personally promised to pay any margin call. Compl.¶ 97.

The Neuhauser Individuals do not contend that the breach of the margin agreements is not adequately alleged. They only argue that their personal liability for any such breach is not adequately alleged. As previously discussed, the piercing claims are adequately alleged so Count VIII may continue as to all the Neuhauser Individuals.

Additionally, Neuhauser contends that the allegations that he is liable based on his personal promise does not state an alternative basis for relief. Neuhauser focuses on the partnership account agreement (Compl.Exh. E), a document he signed and in which he represented he was the general partner of NOLA. He contends that he cannot be personally liable based on that agreement because NOLA is a limited liability company, not a partnership, and members of a limited liability company are not liable for the company's debts. Wachovia relies, in part, on 805 ILCS 205/16(1), which provides in part: "When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership,...." Neuhauser contends he cannot be liable based on § 16(1) because "LLC" in NOLA's name made clear that it was a limited liability company, not a partnership. He also contends that it was evident there was no partnership because it is alleged he represented that he worked for Greenblatt and because he was the only one signing the partnership form and a partnership cannot consist of just one partner. Neuhauser also contends that the detrimental reliance necessary for liability under the statute is not alleged.

***12** First, Neuhauser ignores that he also signed the NOLA opening margin agreement (Compl.¶ 23, Exh. F) in which he promised to pay any margin call. *See id.* Exh. F ¶ 4. There is nothing on that form indicating that he signed it in a representative capacity only. To the extent he did sign it in a representative capacity only, he would have to rely on evidence outside the allegations of the Complaint to make such a showing. The allegations of ¶ 23 and Exhibit F are a sufficient alternative basis for finding Neuhauser personally liable for any margin call due

for the NOLA account.

Even if the partnership account agreement remained the only basis for finding Neuhauser liable, these allegations state a basis for relief. It is alleged that NOLA "purportedly" is a limited liability company. There is no allegation that NOLA actually is a limited liability company. The fact that LLC is in NOLA's name does not necessarily make it a limited liability company. In Illinois, and likely other states, a limited liability company does not come into existence until it actually files its articles of incorporation. *See* 805 ILCS 180/5-40(a). If articles of incorporation were never filed, NOLA may have been a *de facto* partnership. Also, the partnership account agreement does not state that Neuhauser is the only partner. It only states that Neuhauser is the general partner. Other partners may have been limited partners who would not have to be listed on the form. Although Neuhauser stated that he worked for Greenblatt, it is still possible that he would be a general partner for a partnership related to other Greenblatt controlled entities. The Complaint does not allege facts inconsistent with Wachovia reasonably believing that NOLA was a partnership. Also, the allegations of the Complaint are distinguishable from *Longview Aluminum, L.L.C. v. Industrial General, L.L.C.*, 2003 WL 21518585 (N.D.Ill. July 2, 2003), which Neuhauser contends is "squarely on point." Unlike Neuhauser's signing of a form that expressly used the term partnership, there was no representation in *Longview* that the pertinent entity was a partnership. *See id.* at *4. It is true, as Neuhauser contends, that liability under § 16(1) requires detrimental reliance on Wachovia's part. *See Longview*, 2003 WL 21518585 at *4. As previously discussed regarding the fraud claims, Wachovia has not specifically alleged reliance on the representation that Neuhauser is a partner. Rule 9(b), however, does not apply to the Count VIII breach of contract claim.

Wachovia has sufficiently alleged that Neuhauser is liable for the NOLA margin call based on both the partnership account agreement and the opening margin agreement. As to all the Neuhauser Individuals, Wachovia has adequately alleged that they are liable for the Loop and NOLA margin calls based on piercing theories. Count VIII will not be dismissed in any part.

IT IS THEREFORE ORDERED that the Neuhauser Individuals' motion to reinstate their complaint [6] and motion to dismiss Wachovia's complaint [9] are granted in part and denied in part. Within 15 days, Wachovia shall file a motion in New York Stock Exchange arbitration Proceeding 2003-011927 requesting that the claims in that proceeding as against the Neuhauser Individuals be dismissed without prejudice. Counts I, II, and III of Wachovia's complaint are dismissed except to the extent they include a claim for promissory fraud based on the Neuhauser Individuals' contractual promise that they would use the Loop account for lawful transactions. Within 15 days, the Neuhauser Individuals shall answer the remaining allegations of Wachovia's complaint. All discovery is to be completed by February 27, 2005. Status hearing will be held on December 8, 2004 at 11:00 a.m.

Not Reported in F.Supp.2d, 2004 WL 2526390 (N.D.Ill.)

Motions, Pleadings and Filings **(Back to top)**

- 2004 WL 2817486 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum in Support of Their 12(b)(6) Motion to Dismiss Complaint (Aug. 18, 2004)

- 2004 WL 2817476 (Trial Motion, Memorandum and Affidavit) Wachovia Securities, LLC's Response Brief in Opposition to Defendants' 12(b)(6) Motion to Dismiss Complaint (Jul. 21, 2004)

- 2004 WL 2817467 (Trial Motion, Memorandum and Affidavit) Reply Brief in Support of Defendants' Motion to Reinstate Complaint (Jun. 28, 2004)

- 2004 WL 2817459 (Trial Motion, Memorandum and Affidavit) Wachovia Securities, LLC's Response Brief in Opposition to Defendants' Motion to Reinstate Complaint (Jun. 16, 2004)

- 1:04CV03082 (Docket) (Apr. 29, 2004)

END OF DOCUMENT

TAB 3

Westlaw.

2004 WL 2191596

--- F.Supp.2d ----, 2004 WL 2191596 (N.D.Ill.), Fed. Sec. L. Rep. P 92,926

(Cite as: 2004 WL 2191596 (N.D.Ill.))

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Motions, Pleadings and Filings

United States District Court,
N.D. Illinois, Eastern Division.
ZURICH CAPITAL MARKETS INC., et al.,
Plaintiffs,
v.
Michael COGLIANESE, et al., Defendants.
No. 03 C 7960.

Sept. 23, 2004.

David P. Sanders, Terence George Banich, II, Chadwick O. Brooker, Jenner & Block, LLC, Chicago, IL, Philippe Z. Selendy, Alan B. Vickery, Stephen A. Larson, Frank C. Moore, III [PhV], Howard Vickery, Boies, Schiller and Flexner LLP, New York, NY, Courtney R. Rockett, Boies, Schiller & Flexner LLP, Armonk, NY, for Plaintiffs.

Mark H. Carnow, Grippo & Elden, John Donovan Lien, Robert Montell Stephenson, Nathaniel Lee Strup, Foley & Lardner, Barry Francis Macentee, Hinshaw & Culbertson, Peter Vincent Baugher, Jason M. Rosenthal, Schopf & Weiss, Gerald Haberkorn, Robert Hill Smeltzer, Martin W. McManaman, Lowis & Gellen, Chicago, IL, Sheldon H. Elsen, John J. Montone, Orans, Elsen & Lupert, LLP, New York, NY, for Defendants.

MEMORANDUM OPINION AND ORDER

ST. EVE, J.

***1** This is a securities fraud action against multiple defendants in connection with Plaintiffs' investment in an allegedly fraudulent scheme executed by Defendants through M.J. Select Global Fund, Ltd. ("M.J.Select"), a Bahamian mutual fund. The Court previously addressed the motions to dismiss filed by multiple Defendants. *See Zurich Capital Markets Inc. v. Coglianese, et al.*, No. 03 C 7960, 2004 WL 1881782 (N.D.Ill. Aug.2, 2004) (the "August 2, 2004 Opinion"). In this opinion, the Court rules on the issues raised by Defendants Oceanic Bank and Trust Limited, Kenneth Clowes, and Terah Rahming (collectively, the "Oceanic Defendants") in their motion to dismiss.

The Oceanic Defendants have moved to dismiss ZCM's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2) and 12(b)(6). Defendants claim that the Court lacks subject matter jurisdiction over the Amended Complaint and personal jurisdiction over each of the Oceanic Defendants. They also argue that ZCM lacks standing to assert the claims, and that the Amended Complaint is untimely and fails to state a claim upon which relief can be granted. As discussed in detail below, Defendants' motion is granted in part and denied in part.

BACKGROUND

Plaintiffs allege that the Oceanic Defendants and their co-Defendants engaged in a complex scheme to defraud Plaintiffs out of over $24 million. The details of the alleged fraud are set forth in the Court's August 2, 2004 Opinion and will not be repeated here.

1. Factual Allegations

Plaintiff Zurich Capital Markets Inc. ("ZCM Inc.") is a Delaware corporation and was one of the world's largest custodians of hedge funds. Plaintiff ZCM Matched Funding Corp., a Delaware corporation, ("ZCM MFC") is a wholly owned subsidiary of ZCM Inc., and specializes in the offering and sale of derivative instruments. ZCM Bermuda is a Bermuda corporation and an affiliate of ZCM Inc. that operates as a holding company for offshore investments. Plaintiff ZCM Asset Holding Company LLC ("ZCM Asset") is a Delaware corporation and a wholly owned subsidiary of ZCM Inc. that operates as a holding company for offshore investments. Collectively, Plaintiffs are referred to as "ZCM."

Defendant Oceanic is the administrator, registrar, and transfer agent of M.J. Select, with its principal place of business in the Bahamas. ZCM alleges that Oceanic transacted business through its agents in Illinois, and had systematic and continuous contacts with Illinois. (*Id.*)

Defendant Terah Rahming, a citizen of the Bahamas, was a director of M.J. Select and was employed by Oceanic as the Manager of the Funds Department. ZCM alleges that Rahming transacted business through her agents in Illinois and had systematic and continuous contacts with Illinois.

Defendant Kenneth Clowes, also a citizen of the Bahamas, was a director of M.J. Select and the Chief Operating Officer of Oceanic. ZCM alleges that he transacted business through his agents in Illinois, and had systematic and continuous contacts with Illinois, in his role as M.J. Select Director and Oceanic's Chief Operating Officer.

A. Oceanic's Role in the Scheme

*2 ZCM alleges that the Oceanic Defendants were integral to the fraudulent scheme carried out by all of the defendants in connection with the investment scheme in M.J. Select. Plaintiffs allege that Oceanic became administrator, registrar and transfer agent of M.J. Select in 1998. In that role, Oceanic was responsible for the day-to-day administration of M.J. Select, including the transfer of assets into and out of M.J. Select and the processing of redemption requests.

Asset Allocation Fund, L.P. ("Asset Allocation") was M.J. Select's first and largest investor. Martin James Capital Management, Inc. ("Martin James") served as the general partner of Asset Allocation, and Martin Allamian was the sole owner and principal of Martin James. Martin James also invested two other partnerships under its control--M.J. Diversified Fund, L.P. ("MJD") and M.J. Financial Arbitrage, L.P. ("MJFA")--in M.J. Select.

ZCM alleges that Oceanic appointed M.J. Select's board of directors in 1999. It named its employees--Defendants Rahming and Clowes--as the sole directors. In this capacity, Rahming and Clowes assumed control over M.J. Select.

B. The Assignment Recognition Letter

As discussed in detail in the August 2, 2004 Opinion, in May 2000, ZCM MFC entered into a call option transaction with Asset Allocation which was a derivative instrument. Under the terms of the call option, ZCM MFC agreed to accept an assignment of Asset Allocations' interests in various investments, including M.J. Select, MJD and MJFA, as an initial premium payment to acquire the option transaction. Before ZCM MFC would accept this assignment, however, it required, among other things, a written confirmation from Oceanic that it would recognize the assignments and ZCM MFC as the sole owner of 100% of the interests in these entities formerly held by Asset Allocation. In response, Coglianese arranged for Rahming to sign the confirmation on behalf of M.J. Select and Oceanic.

The confirmation--referred to as an "assignment recognition letter"--allegedly fraudulently induced ZCM into investing millions of dollars into M.J. Select. ZCM alleges that the May 31, 2000 "assignment recognition letter" falsely represented that Oceanic would recognize ZCM MFC as the sole owner of 100% of the shares in M.J. Select that had previously been invested under the name of Asset Allocation. They further allege that Oceanic and Rahming falsely represented that ZCM MFC "as sole owner ... will have all of the rights and privileges that normally accompany such ownership." In addition, ZCM alleges that Rahming and Oceanic fraudulently omitted that M.J. Select had a discriminatory redemption policy and that ZCM's share interests were not effectively redeemable consistent with the offering documents.

Based, in part, on the assignment confirmation letter, ZCM MFC accepted an assignment of Asset Allocations interests in M.J. Select, MJD and MJFA. In 2001, ZCM instructed Oceanic to redeem its interests in M.J. Select. Contrary to its representations, Oceanic did not redeem ZCM's shares. Instead, Oceanic honored subsequently submitted redemption requests made on behalf of co-defendants Coglianese's and Martin James' friends, family and business associates. ZCM still has not received its redemptions.

II. The 2001 ZCM Action

*3 On August 14, 2001, ZCM Bermuda filed a securities fraud action against Oceanic and various other defendants (the "2001 Action"). The 2001 Action was based on the defendants' "fraudulent offering, conversion, and transfer of limited partnership interests" in MJD, MJFA and M.J. Select. ZCM Bermuda alleged that Oceanic "affirmatively represented in the offering documents that the partnership interests and shares would be readily redeemable on short notice, and Plaintiff relied upon those representations of liquidity in making its investments."

Count I of the 2001 Action alleged that Oceanic and other defendants misrepresented that the plaintiff's shares in M.J. Select were redeemable within 30 days written notice. They alleged that defendants, including Oceanic, instead intended to control, convert, and transfer the plaintiff's interests regardless of Plaintiff's redemption demands.

On October 10, 2001, ZCM Bermuda filed an amended complaint adding ZCM, Inc., ZCM Matched Funding Corp. and ZCM Asset Holindg Company I.LC as plaintiffs to the 2001 Action and numerous defendants to that case. In addition, plaintiffs alleged in the amended complaint that Oceanic, with two of its co-defendants, controlled M.J. Select. On January 1, 2002, ZCM filed a second amended complaint in the 2001 Action.

On March 25, 2002, Judge Lindberg granted Oceanic's motion to dismiss the second amended complaint in the 2001 ZCM Action. The court dismissed the case with respect to Oceanic with prejudice on the ground that ZCM had failed to plead the Rule 10b-5 claim against Oceanic with particularity pursuant to Rule 9(b) and had failed to plead scienter under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (the "PSLRA"). The court further found that ZCM had failed to plead that Oceanic had a duty to disclose.

On August 30, 2002, the 2001 Action was transferred to this Court. *See 766347 Ontario Ltd. v. Zurich Capital Markets, Inc.*, 249 F.Supp.2d 974 (N.D.Ill.2003) for a discussion of the case.

ANALYSIS

I. Legal Standards

The Oceanic Defendants bring this motion pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6). A Rule 12(b)(1) motion to dismiss tests the federal jurisdiction of a complaint. *See* Fed.R.Civ.P. 12(b)(1). Plaintiffs bear the burden of proving the existence of subject matter jurisdiction. *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir.1980). In analyzing a Rule 12(b)(1) motion, the Court may look beyond the pleadings. *See Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir.1999); *Int'l Harvester*, 623 F.2d at 1210. The Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Long*, 182 F.3d at 554.

A Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction tests whether a federal court has personal jurisdiction over a defendant. *See* Fed.R.Civ.P. 12(b)(2). Similar to subject matter jurisdiction, a plaintiff has the burden of demonstrating the existence of personal jurisdiction over a defendant. *Jennings v. AC Hydraulic A/S*, No. 03-2157, 2004 WL 1965661, at * 1 (7th Cir. Sept.2, 2004); *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir.1997). A plaintiff need only make a prima facie case that jurisdiction over a defendant is proper. *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir.2002). In determining whether a plaintiff has met this burden, a court may consider affidavits from both parties. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir.1987). The court must accept as true all allegations in the complaint which are not challenged by a defendant's affidavit; any conflicts in the affidavits must be resolved in favor of the plaintiff. *Id.*

***4** The purpose of a motion to dismiss under Rule 12(b)(6) is to "test the sufficiency of the complaint, not to decide the merits" of the case. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 586 (7th Cir.1989). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court views "the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from those allegations in his or her favor." *Lee v. City of Chicago*, 330 F.3d 456, 459 (7th Cir.2003). Dismissal is appropriate only where it appears beyond doubt that under no set of facts would plaintiff's allegations entitle him or her to relief. *See Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir.1999).

II. Subject Matter Jurisdiction

The Court will first address the issue of subject matter jurisdiction. The Oceanic Defendants argue that the Court lacks subject matter jurisdiction over ZCM's federal securities fraud claims because the dispute exists between ZCM Bermuda, a Bermuda corporation, and Oceanic, a Bahamian corporation. As addressed in the Court's August 2, 2004 Opinion, a securities fraud claim involving foreign transactions must comply with either the "conduct" or the "effects" approach in order to confer subject matter jurisdiction on a federal court. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir.1998). "These two approaches ... focus on whether the activity in question has had a sufficient impact on or relation to the United States, its markets or its citizens to justify American regulation of the situation. Specifically, one approach focuses on the domestic conduct in question, and the other focuses on the domestic effects resulting from the transaction at issue." *Id.*

Under the effects approach, "courts have looked to whether conduct occurring in foreign countries had caused foreseeable and substantial harm to interests in the United States." *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.3d 1103, 1108 (7th

Cir.1984). As for the conduct approach, "federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success. This conduct must be more than merely preparatory in nature; however, we do not go so far as to require that the conduct occurring domestically must itself satisfy the elements of a securities violation." [FN1] *Kauthar*, 149 F.3d at 667.

ZCM alleges in Count II that Rahming and Oceanic made false and misleading statements and omissions on or about May 31, 2000 in connection with the purchase and sale of securities issued by M.J. Select. ZCM alleges that M.J. Select's shares were offered and sold in the United States to United States' investors as a premium payment from Asset Allocation, an Illinois limited partnership. ZCM alleges that Coglianese and/or Martin James prepared the fraudulent assignment recognition agreement in Illinois, and that Martin James faxed a copy of the blank assignment confirmation to Coglianese, an Illinois resident, who arranged for Rahming to sign it. The Court draws the reasonable inference that one of these Illinois residents contacted Rahming for the purpose of signing it. ZCM further alleges that Oceanic and Rahming mailed the May 31, 2000 letter to ZCM in New York in order to induce them to invest in M.J. Select. They allege that Oceanic and Rahming had frequent communications with Coglianese, an Illinois resident, and the Coglianese Accounting Entities, one of which is an Illinois professional corporation and one is an Illinois corporation, regarding the promotion of M.J. Select securities and the daily operations of M.J. Select. Plaintiffs allege that Oceanic and Rahming conspired with Martin James in Illinois to treat Martin James and Asset Allocation, Illinois entities, as the owners of ZCM's shares and to improperly convert ZCM's redemption proceeds to insiders in the United States. These allegations are sufficient to confer subject matter jurisdiction over Count II.

*5 Regarding ZCM's control person claim in Count III, ZCM has alleged both that Defendants caused foreseeable harm to United States' interests and that conduct within the United States was material to Defendants' successful completion of the allegedly fraudulent scheme. ZCM alleges that the Oceanic Defendants were control persons of M.J. Select. They allege that defendants in Illinois prepared and circulated the false misrepresentations in the M.J. Select offering materials, and that various co-defendants who are Illinois residents offered and sold M.J. Select's shares in the United States. ZCM alleges that Illinois accountants and auditors sent fraudulent M.J. Select financial statements to the Oceanic Defendants, who in turn sent them to United States' investors. ZCM further alleges that ZCM MFC, a Delaware corporation, accepted shares in M.J. Select as a premium payment from Asset Allocation, an Illinois limited partnership, in exchange for carrying out the call option transaction. Defendants, according to Plaintiffs, funneled substantial sums from the fraudulent scheme to the Coglianese Defendants in Illinois. Based on these allegations, this Court has subject matter jurisdiction over Count III.

III. Personal Jurisdiction

The Oceanic Defendants also seek to dismiss the complaint for lack of personal jurisdiction. They argue that they did not have continuous and systematic business contacts that would provide this Court with personal jurisdiction over them.

A. Federal Claims

Because Count III remains against Oceanic, Clowes, and Rahming, [FN2] the jurisdictional provisions of the Securities Exchange Act apply. Specifically, Section 27 of the Act provides, in relevant part:

> Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any ... district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 78aa (2000). "Service of process is how a court gets jurisdiction over the person." *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir.1987). Because the Act provides for nationwide service of process, it confers personal jurisdiction in federal court over defendants with minimum contacts with the *United States*, as long as the mandates of constitutional due process are met. *Id.* (emphasis added); *Fitzsimmons v. Barton*, 589 F.2d 330, 332 (7th Cir.1979). *See also Kundrat v. Chicago Bd. Options Exch.*, No. 01 C 9456, 2002 WL 31017808, at *3 (N.D.Ill. Sept.6, 2002). *See also* Fed.R.Civ.P. 4(k)(2) ("If the exercise of jurisdiction is consistent with the Constitution and laws of the United States,

serving a summons ... is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state"); *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir.2004). Thus, the Court will analyze the limitations of federal constitutional due process to determine if personal jurisdiction exists over each of the Oceanic Defendants. *United Rope Distribs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir.1991).

***6** Federal due process requires that each Defendant have "certain minimum contacts with [the United States] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *RAR*, 107 F.3d at 1277 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). The Oceanic Defendants' contacts with the United States must be such that they "should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations omitted). Each Defendant must have purposefully availed himself or herself of the privilege of conducting activities in the forum state, invoking the benefits and protections of its laws. *Id.* at 475, 105 S.Ct. at 2183. Given Section 78aa, the Court will focus its due process analysis on whether the Oceanic Defendants have minimum contacts with the United States. The minimum contacts standard varies depending on whether the plaintiff asserts general or specific jurisdiction. Here, Plaintiffs argue that the Court has both general and specific jurisdiction.

General jurisdiction is proper when the defendant has "continuous and systematic general business contacts" with the forum. *RAR*, 107 F.3d at 1277 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1875, 80 L.Ed.2d 404 (1984)). Specific jurisdiction exists if the claims "arise out of or relate to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414 n. 8, 104 S.Ct. at 1872 n. 8.

ZCM argues that Oceanic's minimum contacts with the United States are met through the following: 1) Oceanic communicates with investment managers and related personnel in the United States regarding the funds at issue in this case; 2) Oceanic administers investment funds totaling approximately $5 billion in assets in the United States, including M.J. Select and two funds in New York; 3) Oceanic advertises through a Client Information Package that "Oceanic works with domestic advisors to preserve wealth and minimize estate taxes for U.S. residents;" 4) Oceanic derives approximately 20-25% of its overall income from administering funds with U.S. investment managers; 5) many of the trusts administered by Oceanic have United States beneficiaries; 6) Oceanic deals with major banks, money managers' dealers in the United States; 7) Oceanic advertises that it "works with domestic advisors to preserve wealth and minimize estate taxes for United States residents; 8) Clowes testified that "senior management [of Oceanic] are constantly making client relationship management trips to the USA;" 9) Oceanic maintains accounts at eight brokerage firms in the United States with monthly balances in each account exceeding $10,000; 10) many wire transfers to and from Oceanic were routed through a correspondent bank account in New York; and 11) Oceanic has an interactive website located at *www.oceanic.bs* on which it actively advertises and promotes its services to residents of the United States. [FN3] These contacts with the United States justify the Court's exercise of personal jurisdiction over Oceanic. *See Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 474-79 (S.D.N.Y.2001); *Samuel H.Esterkyn, M.D., Inc. Pension Sharing and Profit Sharing Plan v. Van Hedge Fund Advisors, Inc.*, 108 F.Supp.2d 876, 890 (M.D.Tenn.1999).

***7** ZCM also has identified Rahming and Clowes' contacts with the United States. ZCM has established that Rahming has attended various conferences in the United States for business purposes. Rahming sent electronic mail to United States residents soliciting them to visit Oceanic's website; frequently communicated via telephone, e-mail, facsimile and mail with the Coglianese co-defendants in Illinois; is licensed by the Colorado Board of Accountancy as a Certified Public Accountant, sat for her Certified Public Accountant exam in California, attended Florida Memorial College in Florida, regularly visited the State of Floria; transmitted or caused to be transmitted information on redemption requests to the Coglianese defendants in Illinois for clearance and approval; contacted the Coglianese defendants and Martin James in Illinois to obtain contact information for the other M.J. Select shareholders; sent or caused to be sent performance evaluation and monthly and annual account statments and financial statements to M.J. Select shareholders residing in the United States; issued the fraudulent assignment recognition agreement to ZCM in New York; and communicated with ZCM in New York via faxes, phone calls and e-

mails to falsely confirm that M.J. Select would honor ZCM's redemption requests.

ZCM argues that Clowes made seven trips to the United States from 1999 to the present, including one to Illinois. They also contend that Clowes sent e-mail to United States residents to advertise Oceanic's website and solicit them to visit the website; directed wire transfers through Oceanic's and M.J. Select's correspondent bank account at Barclays Bank in New York, including funds at issue in this case that originated and ended in Illinois; communicated with the Coglianese Defendants in Illinois regarding the daily operations of M.J. Select, the termination of M.J. Select's trading advisor and the liquidation of M.J. Select; communicated with the Coglianese Defendants in Illinois regarding numerous other funds administered by Oceanic for which Clowes served as Director; and filed numerous declarations in the 2001 Action to conceal the true facts of this case. Clowes' actions were purposely directed toward the United States.

These contacts with the United States satisfy the due process clause and establish personal jurisdiction over the securities fraud claims with respect to Rahming and Clowes. *See San Mateo County Transit Dist. v. Dearman, Fitzgerald and Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir.1992); *United Phosphorous, Ltd. v. Angus Chem. Co.*, 43 F.Supp.2d 904, 912 (N.D.Ill.1999).

B. Fair Play and Substantial Justice

The Court must next determine whether its exercise of personal jurisdiction over the Oceanic Defendants comports with "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987) (quoting *Int'l Shoe Co.*, 326 U.S. at 316). *See also Jennings*, 2004 WL 1965661, at *2. A party's assertion of jurisdiction must be reasonable in light of the burden on the defendant, the plaintiff's interest in obtaining relief, the interests of Illinois, the judicial system's interest in efficiently resolving controversies, and the "shared interest of the several States in furthering fundamental substantive social policies." *Asahi*, 480 U.S. at 113 (citations omitted). The Court must determine whether this is "one of these rare cases in which minimum requirements inherent in the concept of fair play and substantial justice ... defeat the reasonableness of jurisdiction." *Id.* at 116, 107 S.Ct. at 1034 (Brennan, J., concurring) (citations omitted).

***8** Exercise of the Court's jurisdiction in this case is fair and just. "The United States has a substantial interest in the enforcement of its securities laws and the protection of investors in the United States securities markets." *Cromer Fin., Ltd.*, 137 F.Supp.2d at 479. Illinois also has an interest in enforcing its securities laws. Further, the burden on Oceanic is small given that it has continuous business in the United States. Given the Defendants' substantial contacts with the forum and their systematic and continuous business in the United States, the Court will exercise its jurisdiction over them.

C. Fiduciary Shield Doctrine

Defendants Clowes and Rahming argue that they are protected under the fiduciary shield doctrine because their only connection to this case is through their work as Oceanic's employees. In Illinois, the "fiduciary shield doctrine" precludes courts from exercising jurisdiction over a non-resident corporate official when the only contacts that individual has with Illinois are made in his or her corporate capacity. *See Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 912 (7th Cir.1994) ("This doctrine ... denies personal jurisdiction over an individual whose presence and activity in the state in which the suit is brought were solely on behalf of his employer or other principal.") (internal citations omitted). Where an individual defendant's conduct in Illinois "was a product of, and was motivated by, his employment situation and not his personal interests, ... it would be unfair to use this conduct to assert personal jurisdiction over him as an individual." *Rollins v. Ellwood*, 141 Ill.2d 244, 280, 152 Ill.Dec. 384, 400, 565 N.E.2d 1302, 1318 (1990). The fiduciary shield doctrine, however, "is a matter of state law only," not federal law. *Hardin Roller Corp. v. Universal Printing Mach., Inc.*, 236 F.3d 839, 842 (7th Cir.2001). Accordingly, it does not apply to ZCM's federal securities fraud claims.

Even if the doctrine applies, Clowes and Rahming are not protected by it based on the allegations in the Amended Complaint. It is clear that the fiduciary shield doctrine is discretionary or equitable, rather than an absolute entitlement. *See Burnhope v. National Mortgage Equity Corp.*, 208 Ill.App.3d 426, 439-40, 153 Ill.Dec. 398, 405-06, 567 N.E.2d 356, 363-64 (1st Dist.1990). There are two exceptions to the doctrine: "(1) the shield is removed if the individual's personal interests motivated his actions, and (2) the shield generally does not apply when the individual's actions are discretionary." *Jones v. Sabis Educ. Sys., Inc.*, 52 F.Supp.2d 868, 883

(N.D.Ill.1999) (internal citations omitted). *But see Robinson v. Sabis Educ. Sys., Inc.*, 1999, No 98 C 4251, WL 412642, at *3 (N.D.Ill. May 28, 1999) (questioning whether these exceptions exist without the corporation also being a sham entity).

ZCM alleges that both Clowes and Rahming served as the two most senior persons in Oceanic's fund administration department. Rahming served as the Manager of the Fund, and Clowes served as the Chief Operating Officer of Oceanic. The allegations in the Amended Complaint are sufficient to infer that Rahming and Clowes had significant discretion at Oceanic, including discretion in determining whether to conduct business in the United States. Accordingly, the doctrine does not apply to them. *See Minkus v. Los Alamos Technical Assoc. Inc.*, No. 03 C 4216, 2004 WL 1459499, at *3 (N.D.Ill. June 28, 2004); *Brujis v. Shaw*, 876 F.Supp. 975, 978-80 (N.D.Ill.1995).

D. Pendent Personal Jurisdiction

***9** Because the Court has personal jurisdiction over the Oceanic Defendants, it also can assert personal jurisdiction over the state law claims under the doctrine of "supplemental" or "pendent" personal jurisdiction. *Robinson Eng'g. Co., Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449-50 (7th Cir.2000). Oceanic's motion to dismiss for lack of personal jurisdiction is therefore denied.

IV. Statute of Limitations

In its August 2, 2004 Opinion, the Court set forth in detail the law governing statute of limitations in federal securities fraud actions. As the Court noted, if a "plaintiff pleads facts that show its suit [is] barred by a statute of limitations, it may plead itself out of court under a Rule 12(b)(6) analysis." *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 608 (7th Cir.1995). "[B]ecause the question of whether a plaintiff had sufficient facts to place it on inquiry notice of a claim for securities fraud is one of fact, it may be 'inappropriate for resolution on a motion to dismiss under Rule 12(b)(6).' " *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 669-70, (citing *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 367 (7th Cir.1997)).

The Oceanic Defendants argue that Plaintiffs' federal securities law claims are barred by the statute of limitations because they are reasserting the same claims they filed against Defendant Oceanic in the 2001 action. Because ZCM filed the 2001 Action on November 7, 2003--more than two years before they filed this case--the Oceanic Defendants argue that this case is time barred.

A. The Applicable Limitations Period

The Court must first determine the applicable statute of limitations period. Prior to July 30, 2002, a plaintiff had to file a Section 10(b) action "within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991). On July 30, 2002, Congress enacted the Sarbanes-Oxley Act and expanded the limitations period for such claims involving "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws" to two years after the discovery of the facts constituting the violation and within five years after such violation. Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 804, 116 Stat. 745, 801 (2002) (to be codified at 28 U.S.C. 1658(b)). Section 804(b) of the Sarbanes-Oxley Act specifically provides that the expanded limitations period "shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act." *Id.*

The Seventh Circuit has embraced the concept that courts may not apply a statute that lengthens an applicable statute of limitations to revive claims that are otherwise time-barred under the old statute of limitations because "to do so would 'alter the substantive rights' of a party and 'increase a party's liability' " *Stone v. Hamilton*, 308 F.3d 751, 757 (7th Cir.2002) (quoting *Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir.1994)). Numerous courts have applied this concept to the Sarbanes-Oxley extension of the statute of limitations in securities fraud cases, and held that the extended limitations period does not apply to claims that were time-barred when Congress enacted Sarbanes-Oxley. *See e.g., In re ADC Telecomm., Inc., Sec. Litig.*, No. CIV. 03-1194, 2004 WL 1898469, at ----3-5 (D.Minn. May 17, 2004) (Sarbanes-Oxley does not apply retroactively to revive time-barred claims); *Ato Ram, II, Ltd. v. SMC Multimedia Corp.*, No. 03 Civ. 5569, 2004 WL 744792, at *5 (S.D.N.Y. Apr.7, 2004) ("Plaintiff's claims were not yet barred when Sarbanes-Oxley was enacted and, accordingly, the amended statute of limitations applied"); *In re Enron Corp. Sec., Derivative & Erisa Litig.*, No. MDL-1446, Civ.A. H-01-3624, 2004 WL 405886, at *12 (S.D.Tex. Feb.25, 2004) (same); *Glaser v. Enzo*

Biochem, Inc., No. CIV.A. 02-1242-A, 2003 WL 21960613, at *5 (E.D.Va. July 16, 2003); *In re Heritage Bond Litig.*, 289 F.Supp.2d 1132, 1148 (C.D.Cal. Jan.6, 2003); *but see Roberts v. Dean Witter Reynolds, Inc.*, No. 8:02-CV-2125-T-26, 2003 WL 1936116, at *3 (M.D.Fla. Mar.31, 2003) (applying Sarbanes-Oxley retroactively to all claims, including time-barred claims because "Congress intended to lengthen the statute of limitations to enable people who lost their life-savings to companies like Enron to recover some of their investments"). The Court agrees with the reasoning of these decisions. The plain language of the statute does not clearly reflect a Congressional intention to apply the extended limitations period retroactively to revive time-barred claims. *See INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 2288, 150 L.Ed.2d 347 (2001) ("A statute may not be applied retroactively [ ] absent a clear indication from Congress that it intended such a result").

***10** As discussed in the next section of this opinion, the Court cannot conclude at this stage that Plaintiffs' claims were barred as a matter on law on July 31, 2002 when Congress passed Sarbanes-Oxley. Plaintiffs' Section 10b-5 claim accrued by August 14, 2001 when Plaintiffs filed the August 2001 Action. Under the one year statute of limitations, the period would not have expired until August 14, 2002--*after* Congress passed the Sarbannes-Oxley Act. Because it was not time-barred as a matter of law at that time, the amended statute of limitations--and its two year time period--applies to Plaintiffs' securities fraud claims in this case.

Defendants' heavy reliance on *In re Enterprise Mortgage Acceptance Co. L.L.C. Sec. Litg.*, 295 F.Supp.2d 307, 312-17 (S.D.N.Y.2003), is misplaced. In *Enterprise*, the court held that the two years statute of limitations under Sarbanes-Oxley did not apply to the plaintiff's securities fraud claims because such claims were already time-barred prior to the effective date of Sarbanes-Oxley. Here, ZCM's claims were not time-barred as a matter of law when Sarbanes-Oxley became effective. The *Enterprise* reasoning, therefore, does not apply to this case.

B. Accrual

Because it is often difficult for a plaintiff to know that he or she has been the victim of securities fraud until years after the commission of the fraud, the statute of limitations for federal securities fraud claims commences under the doctrine of "inquiry notice." *Fujisawa Pharm. Co., Ltd., v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir.1997). Under inquiry notice, the "statute of limitations applicable to suits under Rule 10b-5 begins to run not when the fraud occurs, and not when the fraud is discovered, but when (often between the date of occurrence and the date of the discovery of the fraud) the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one's legal rights, enough facts to enable him by such further investigation as the facts would induce in a reasonable person to sue within a year." *Id.*, citing *Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir.1997). For inquiry notice, more than "merely suspicious circumstances" must exist. *Fujisawa*, 115 F.3d at 1337. "The facts constituting such notice must be sufficiently probative of fraud--sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated--not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit." *Id.* at 1335.

One important factor courts consider in determining when the statute of limitations begins is a party's ease of access to evidence that would trigger an appropriate inquiry. *See Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 (7th Cir.1997). Additionally, "[t]here must also be a suspicious circumstance to trigger a duty to exploit the access; an open door is not by itself a reason to enter a room.... *How* suspicious the circumstance need be to set the statute of limitations running ... will depend on how easy it is to obtain the necessary proof by a diligent investigation aimed at confirming or dispelling the suspicion." *Fujisawa*, 45 F.3d at 1335.

1. Claims Against Oceanic

***11** ZCM Bermuda sued Oceanic and others in the 2001 Action for securities fraud on August 14, 2001. The Oceanic Defendants argue that the 2001 Action clearly demonstrates that Plaintiffs had actual notice of the alleged violations as of August 14, 2001.

a. Section 10(b) Claim

Both the 2001 Action and this case are based on a complex fraudulent investment scheme involving M.J. Select. Both actions involve ZCM's injury arising from their investment in M.J. Select. ZCM alleges in both cases that it reasonably relied on alleged misrepresentations regarding redemption of interest in M.J. Select when it purchased the partnership interests. Similarly, ZCM alleges in both actions that it suffered its losses as a result of the

defendants' failure to redeem ZCM's partnership interests and shares, and because the defendants fraudulently converted and transferred ZCM's interests.

The 2001 Action alleged that Oceanic had made false and material misrepresentations in M.J. Select's Private Placement Memorandum ("PPM"). Although ZCM bases the case before the Court on a May 31, 2000 "assignment recognition agreement," Plaintiffs had that agreement as early as September 2001. (2001 Action, 01 C 6250, R. 134-1, Ex.B3 at 568-69, Tr. Of 9/24/01 Martin Allamian Dep.). In the 2001 Action and this case, Plaintiffs allege that Oceanic was the administrator, registrar, and transfer agent of M.J. Select. In both cases, Plaintiffs allege they demanded that Oceanic pay ZCM the proceeds from the redemption of its limited partnership interests, and that Oceanic failed to recognize ZCM Bermuda as the owner of certain shares because it failed to process ZCM Bermuda's redemption request.

Even though in 2001 ZCM did not have all of the details of the alleged fraud committed by Oceanic, the allegations in the 2001 Action demonstrate that it knew enough facts to enable it to further investigate when it filed the 2001 Action. ZCM was on inquiry notice of its Section 10(b) claim when it filed the 2001 Action. The allegations against Oceanic are based on the same fraudulent scheme, the same injury, the same theories, the same cause of action, and the same omissions. The Court holds that as a matter of law Plaintiffs were on inquiry notice of their Section 10(b) claim when they filed the 2001 Action.

Although Plaintiff claims that Oceanic fraudulently concealed some crucial facts in this case, "when knowledge or notice is required to start the statute of limitations running, there is no room for equitable tolling." *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 721 (7th Cir.1993) (emphasis omitted). Equitable tolling does not apply to the statute of limitations in the securities fraud case. *Whirlpool*, 67 F.3d at 610. *See Lampf*, 501 U.S. at 363-64 ("[T]he equitable tolling doctrine is fundamentally inconsistent with the 1- and 3-year structure [of the statute of limitations].... The 3-year limit is a period of repose inconsistent with tolling.... Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F.Supp.2d 416, 426 (S.D.N.Y.2003) ("Equitable tolling is inconsistent with the discovery period because if a defendant actively conceals a fraud, then plaintiff will not discover the facts suggesting the violation and the statute will not begin to run, making tolling unnecessary.... Equitable tolling is also fundamentally inconsistent with the repose period because that limit is 'clearly to serve as a cutoff' and it would have no significance as an outside limit if it could be tolled" ').

b. Section 20(a) Claim

*12 A Section 20(a) claim includes different elements than a Section 10(b) claim. In the amended complaint to the 2001 Action, ZCM alleged that Oceanic controlled M.J. Select. Although this allegation suggests ZCM was on inquiry notice regarding the general control element of a Section 20(a) claim, the Court cannot conclude as a matter of law that ZCM was on inquiry notice two years in advance of November 7, 2003 when it filed this suit of the specific control element of its Section 20(a) claim against ZCM. The Court admits that this issue is a close one, but at this stage, the Court cannot conclude "definitively" that ZCM has pled itself out of court as to the Section 20(a) claim against Oceanic. *See Barry Aviation Inc. v. Land O'Lakes Municipal Airport Com'n*, 377 F.3d 682, 688 (7th Cir.2004). Accordingly, that claim remains.

2. Claims Against Rahming and Clowes

In contrast to Oceanic, the 2001 Action does not demonstrate that ZCM was on inquiry notice regarding Rahming and Clowes. The 2001 Action does not mention either individual nor detail their roles in the alleged fraud. At this stage of the litigation, the Court cannot conclude that the statute of limitations accrued as to Rahming and Clowes when ZCM filed the 2001 Action.

C. Statute of Repose

The Sarbanes-Oxley five year statute of repose applies at this stage of the litigation for the same reasons the two year statute of limitations applies. ZCM's securities fraud claims involve alleged misrepresentations on May 31, 2000 and April 1, 2000. Because ZCM filed this action on November 7, 2003, these dates comfortably fall within the five year statute of repose.

V. Standing

The Court addressed the standing issue in its August 2, 2004 Opinion. Defendants' motion to dismiss for

lack of standing is denied for the reasons set forth in that Opinion.

VI. Plaintiffs Sufficiently Allege Federal Securities Fraud Violations

A. Count II--Section 10(b)

Although the Court is dismissing Count II against Oceanic as time-barred, Plaintiffs' Count II claim for securities fraud under Section 10(b) and Rule 10b-5 remains against Rahming. Plaintiffs must allege that Defendant Rahming (1) made a false statement or omission; (2) of a material fact; (3) with scienter; (4) in connection with the purchase or sale of securities; (5) upon which Plaintiffs justifiably relied; and (6) the reliance proximately caused Plaintiffs' damages. *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir.1996).

Both Federal Rule of Civil Procedure 9(b) and the PSLRA apply to these allegations and impose heightened pleading requirements on Plaintiffs. Rule 9(b) requires that Plaintiffs plead fraud allegations with particularity. Fed.R.Civ.P. 9(b). In addition to Rule 9(b), the strict pleading mandates of the PSLRA apply to Plaintiffs' complaint. In order to meet the PSLRA's dictates for a securities fraud claim, "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) (2000).

1. Alleged Misrepresentations and Omissions

***13** Count II against Rahming is premised on the May 31, 2000 "assignment recognition agreement," signed by Rahming. Plaintiffs allege that Rahming made false and misleading statements in this May 31 letter in connection with the purchase and sale of securities issued by M.J. Select. Plaintiffs allege that the assignment recognition agreement is false and misleading because 1) it falsely represented that Oceanic would recognize ZCM MFC as the sole owner of 100% of M.J. Select's shares assigned to ZCM MFC and subsequently ZCM Bermuda; 2) it falsely represented that ZCM MFC, and subsequently ZCM Bermuda, would have all the rights and privileges that normally accompany sole ownership; 3) it failed to disclose the existence of a discriminatory redemption policy; and 4) it failed to disclose that ZCM's share interest were not redeemable in accordance with the Offering Memoranda because Oceanic and Rahming intended to retain control over them. They further allege that ZCM MFC and ZCM Bermuda would not have accepted the assignment of, or purchased, the M.J Select securities if they had known the true facts or the existence of the omitted facts. These allegations sufficiently state a misrepresentation in Count II. Although Rahming characterizes this letter as "a perfunctory two-sentence form letter" that does not contain any misrepresentations, that issue is not properly decided at this stage of the litigation.

Rahming, relying on *Chiarella v. United States*, 445 U.S. 222, 228, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), argues that she did not have a duty to disclose the allegedly omitted information in the assignment recognition letter. Such a duty arises if a defendant makes a statement that would be misleading without disclosing certain other information. "If one speaks, he must speak the whole truth." *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir.1995) (citations omitted). ZCM alleges that Rahming made certain representations in the assignment agreement, and therefore had a duty to disclose the omitted information because such information was necessary to make Rahming's statements not misleading. At this stage, these allegations are sufficient to survive a motion to dismiss.

2. Scienter

Rahming also argues that Plaintiffs have failed to adequately plead scienter in Count II. Plaintiffs must "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) (2000). Plaintiffs may use "motive and opportunity" or "circumstantial evidence" to establish scienter under the PSLRA, as long as the allegations support a strong inference that the defendants acted recklessly or knowingly when they made the alleged misrepresentations. *766347 Ontario Ltd. v. Zurich Capital Mkts., Inc.*, 249 F.Supp.2d 974, 987 (N.D.Ill.2003). *See also Chu v. Sabratek Corp.*, 100 F.Supp.2d 815, 823 (N.D.Ill.2000).

ZCM alleges that Rahming knew or recklessly disregarded the falsity of the misrepresentations because she knew that Defendant Michael Coglianese and representatives of Martin James controlled the redemptions of share interests, she had followed each and every direction of Coglianese and Martin James regarding redemption payments without questioning whether such redemptions complied with M.J.

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Select's Offering Memorandum, and she had authorized payments from M.J. Select's account at Coglianese's direction without approval from Oceanic or Martin James. ZCM also alleges that Rahming had a motive to make the alleged misrepresentations and omissions because she "had the opportunity to realize monetary gains from these investments."

***14** These scienter allegations focus primarily on the alleged omissions in the assignment recognition letter. They fail to give rise to a strong inference that Rahming knew or recklessly disregarded the alleged misrepresentations regarding recognizing ZCM MFC as the sole owner of the shares with all of the rights and privileges that normally accompany such ownership. Plaintiffs do not allege with any particularity how Rahming knew in May 2000 that statements about ZCM Bermuda's ownership rights were false. Furthermore, as Rahming points out, ZCM has not alleged with any particularity how increasing the investments of M.J. Select would motivate Rahming when Oceanic received a flat $5,000 fee per year for its administrative services. [FN4]

With regard to the omission regarding the alleged discriminatory redemption policy, ZCM also has not alleged facts that satisfy the scienter requirements regarding Rahming. Accordingly, Count II is dismissed without prejudice.

B. Control Person Liability (Count III)

In Count III, ZCM alleges that Oceanic, Rahming and Clowes were control persons pursuant to Section 20(a) of the Exchange Act. [FN5] In order to allege a Section 20(a) claim, Plaintiffs must allege (1) a primary securities violation; (2) each of the individual defendants exercised general control over the operations of M.J. Select; and (3) each of the individual defendants "possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, whether or not that power was exercised." *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 881 (7th Cir.1992). Rule 9(b)'s particularity requirements apply to Count III.

1. General Control

The Oceanic Defendants challenge Plaintiffs' allegations of general and specific control. General control requires ZCM to allege that the Oceanic Defendants "actually participated in, that is, exercised control over, the operations of [M.J. Select] in general." *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 614 (7th Cir.1996). Defendants correctly point out that alleging mere titles does not suffice to establish control person liability. ZCM's allegations, however, go beyond mere titles. ZCM alleges that Oceanic had the power to appoint and did appoint M.J. Select's entire Board of Directors. They contend that Oceanic issued account and financial statements for M.J. Select. ZCM also alleges that Oceanic had the responsibility for processing all subscriptions, redemptions, transfers and assignments of M.J. Select's shares and issuing monthly financial statements, had the authority to request checks drawn on M.J. Select's bank accounts and direct wire transfers from such accounts to redeem shares, had the authority to refuse to comply with redemption requests, and had the power to place (and in fact placed) M.J. Select into liquidation. These allegations satisfy ZCM's burden regarding Oceanic's general control over M.J. Select.

***15** Regarding Rahming and Clowes, ZCM alleges that they served as directors of M.J. Select from 1999 forward. Rahming requested legal opinions for M.J. Select, issued account and financial statements, and issued audited financial statements confirming fraudulent results. ZCM alleges that Rahming had the authority to place M.J. Select into liquidation and to delegate M.J. Select's business affairs. These allegations particularize Rahming's general control over the operations of M.J. Select.

In addition to being an M.J Select director, ZCM alleges that Clowes was the Chief Operating Officer of Oceanic. ZCM alleges that Clowes maintained a correspondent bank account on behalf of M.J. Select in the United States and directed the wire transfer of funds through this bank account. Plaintiffs contend that Clowes communicated frequently with Michael Coglianese regarding the daily operations of M.J. Select, issued account and financial statements to M.J. Select's shareholders, and issued audited financial statements confirming fraudulent results. ZCM has alleged Clowes' general control over M.J. Select's operations.

The Oceanic Defendants ask the Court to consider a declaration from Defendant Clowes regarding Oceanic's role as administrator. At the motion to dismiss stage, the Court cannot consider this information.

2. Specific Control

ZCM alleges that the Oceanic Defendants had

specific control over M.J. Select's offering documents that are the focus of the alleged primary violation in Count III. ZCM does not allege that any of the Oceanic Defendants drafted M.J. Select's Offering Memoranda. Instead, ZCM contends that the Oceanic Defendants had the power and ability to suspend the operations of M.J. Select unless it corrected the false statements in M.J. Select's Offering Memoranda or discontinued their use in soliciting new investors. They allege that Rahming and Clowes, as sole directors of M.J. Select, had this control. ZCM alleges that each of the Oceanic Defendants had the power to control the day-to-day operations of M.J. Select which gave them control over the Offering Memoranda. ZCM also contends that Oceanic, Rahming, and Clowes had the statutory and common law duty under Bahamian law to require the issuance of corrected offering documents. The Oceanic Defendants argue that the Administration Agreement did not give them the authority to do so. This contention, however, raises an issue of fact that is not appropriate for the Court to resolve at this stage. ZCM has met its pleading burden.

VII. Illinois Securities Law (Count VII)

Count VII alleges that Oceanic violated the Illinois Securities Law of 1953 (the "Act"). 5 ILCS 5/1-5/19 (2002). The Act provides that "[e]very sale of a security made in violation of the provisions of this Act shall be voidable at the election of the purchaser ... and the issuer, controlling person, underwriter, dealer or other person by or on behalf of whom said sale was made, and each underwriter, dealer, or salesperson who shall have participated or aided in any way in making the sale ... shall be jointly and severally liable to the purchaser." 815 ILCS 5/13A. Oceanic must fall within the definition of an "issuer, controlling person, underwriter, dealer or other person by or on behalf of whom said sale was made" or that of an "underwriter, dealer or salesperson" who participated in the sale. ZCM alleges that Oceanic is a "controlling person" or a "primary violator." Oceanic argues that because it merely served as the administrator of M.J. Select, it cannot be held liable as either a principal violator or a control person under the Act.

***16** The Act defines a "controlling person" as "any person offering or selling a security, or group of persons acting in concert in the offer or sale of a security, owning beneficially ... either (i) 25% or more of the outstanding voting securities of the issuer of such security" or (ii) "such number of outstanding securities of the issuer of such security as would enable such person, or group of persons, to elect a majority of the board of directors or other managing body of such issuer." 815 ILCS 5/2.4. "[U]nlike the 1934 Exchange Act, where 'controlling persons' may be read broadly to reach many parties, the Illinois Act has been applied only to persons playing 'central and specialized roles.' " *Carlson v. Bear, Stearns & Co. Inc.*, 906 F.2d 315, 318 (7th Cir.1990) (citation omitted). Moreover, "[w]hile overt action by a member of a controlling group would not always be required, there must be some showing of assent, approval or concurrence, albeit tacit approval, in the action of the group in selling securities, before an individual will be held liable for the actions of the controlling group. A person is not liable merely because one can add his shareholding onto the holdings of a controlling group and they still remain a controlling group. Some connection with the sale, or decision to sell, securities is required under the statute...." *Frochlich v. Matz*, 93 Ill.App.3d 398, 406, 48 Ill.Dec. 781, 788, 417 N.E.2d 183, 190 (1981).

ZCM does not allege that Oceanic owned any shares in M.J. Select. Instead, they argue that because Oceanic selected the directors for M.J. Select, the Court can infer that it owned sufficient shares in M.J. Select to do so. Based on the allegations in the Amended Complaint, the Court will not make this jump in logic. *See Purmal v. Supreme Ct. of Ill.*, No. 03 C 6061, 2004 WL 542528 at *1 (N.D.Ill. Feb.26, 2004). Count VII is dismissed without prejudice.

Oceanic correctly points out that the term "primary violator" does not appear in the statute. ZCM does not allege that Oceanic was an underwriter, issuer, dealer or salesperson. They have not satisfied the pleading requirements.

VIII. Fraud and Conspiracy to Defraud (Counts VIII and IX)

Count VIII alleges common law fraud and Count XI alleges a conspiracy to defraud. The Oceanic Defendants seek to dismiss Counts VIII and IX for failure to plead fraud with the requisite particularity required under Rule 9(b).

The elements of a claim for fraud in Illinois are: (1) a false statement of material fact; (2) knowledge or belief of the falsity by the party making the statement; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance. *WTM, Inc. v. Henneck*, 125 F.Supp.2d 864, 869 (N.D.Ill.2000).

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Plaintiffs have satisfied the mandates of Rule 9(b) with respect to each of the Oceanic Defendants in Count VIII.

*17 Regarding Count IX, in order to state a claim for conspiracy to defraud in Illinois, ZCM must allege "(1) a conspiracy; (2) an overt act of fraud in furtherance of the conspiracy; and (3) damages to the plaintiff as a result of the fraud." *Bosak v. McDonough*, 192 Ill.App.3d 799, 803, 139 Ill.Dec. 917, 920, 549 N.E.2d 643, 646 (1989). The Court agrees that the allegations in Count IX regarding Defendants Oceanic, Rahming and Clowes do not meet Rule 9(b)'s particularity requirements. Count IX is dismissed without prejudice.

VIII. Unjust Enrichment (Count X)

The Oceanic Defendants argue that the Court should dismiss Count X because Plaintiffs have failed to allege that they retained a benefit to Plaintiffs' detriment. The Court addressed this issue in its August 2, 2004 Opinion, and denies the motion on this basis.

In addition, the Oceanic Defendants argue that the Court should dismiss the unjust enrichment count because Plaintiffs allege that an express contract governs their relationship, and thus unjust enrichment does not apply. Even if the the Oceanic Defendants' premise is accurate, a plaintiff may plead in the alternative. *See* Fed.R.Civ.P. 8(e)(2); *Pickrel v. City of Springfield, Ill.*, 45 F.3d 1115, 1119 (7th Cir.1995). If a contract did not exist between the parties, then, assuming Defendants are correct, Plaintiffs could proceed on this count.

IX. Conversion (Count XI)

Plaintiffs allege conversion against Defendant Oceanic in Count XI. "A conversion is any unauthorized act that deprives a person of his or her or its property permanently or for an indefinite time." *Turner Investors v. Pirkl*, 338 Ill.App.3d 676, 681, 273 Ill.Dec. 423, 427, 789 N.E.2d 323, 327 (2003) (citations omitted). In order to state a claim for conversion in Illinois, Plaintiff must allege that (1) it has a right to the property at issue; (2) it has an absolute and unconditional right to the immediate possession of that property; (3) it made a demand on the defendant for possession of the property; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property. *Cirrincione v. Johnson*, 184 Ill.2d 109, 114, 234 Ill.Dec. 455, 458, 703 N.E.2d 67, 70 (1998). As explained by the Seventh Circuit, "[a]n asserted right to money normally will not support a claim for conversion. Only if the money at issue can be described as 'specific chattel,' ... in other words, 'a specific fund or specific money in coin or bills,' ... will conversion lie. Moreover, the plaintiff's right to the money must be absolute. It must be shown that the money claimed, or its equivalent, at all times belonged to the plaintiff and that the defendant converted it to his own use." *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir.2002) (citations and quotations and emphasis omitted).

Here, the money at issue was used to purchase share interests in M.J. Select. Plaintiffs' interests did not represent the only purchased shares of M.J. Select. Further, ZCM has not alleged that its interests were separated in a specific fund from other interests in M.J. Select. Its interests, therefore cannot be deemed specific for conversion purposes. *See Fogel v. Gordon & Glickson, P.C.*, No. 03 C 1617, 2003 WL 22057194, at *3 (N.D.Ill. Sept.3, 2003). Count XI is dismissed.

X. Breach of Contract (Count XII)

*18 For the reasons set forth in the Court's August 2, 2004 Opinion, Count XII stands.

XI. Intentional Interference with Contract (Count XIII)

In order to state a claim in Illinois for tortious interference with a contract, a plaintiff must allege the following elements: (1) the existence of a valid and enforceable contract between plaintiffs and another, (2) the defendant's awareness of the contract; (3) an intentional interference by the defendant inducing breach of contract; (4) a breach of contract caused by the defendant's acts; and (5) damages to the plaintiff. *Smock v. Nolan*, 361 F.3d 367, 372 (7th Cir.2004). *See also Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill.App.3d 597, 611, 243 Ill.Dec. 740, 752, 724 N.E.2d 49, 61 (1999). Plaintiffs have alleged each of these elements. Count XIII stands.

XII. Breach of Fiduciary Duty (Count XIV)

For the reasons set forth in the Court's August 2, 2004 Opinion regarding Defendant Coglianese, Count XIV stands.

XIII. Breach of Contract (Count XVI)

Plaintiffs allege that Defendant Oceanic entered into

a written contract with ZCM MFC on May 31, 2000 in which it promised to recognize ZCM MFC as the sole owner of 100% of the shares that Martin James had invested with them, and confirmed that ZCM MFC would have all the rights and privileges that accompany such ownership. ZCM MFC thereafter transferred its rights under this contract to ZCM Bermuda, and Oceanic expressly recognized these assignments to ZCM Bermuda. Plaintiffs allege that Oceanic breached this contract with ZCM Bermuda by refusing to honor its valid redemption requests and converting ZCM Bermuda's interests in M.J. Select at the request of Martin James. Plaintiffs sufficiently allege a breach of contract claim based on the May 31, 2000 assignment recognition agreement.

XIV. Bahamian Law

ZCM premises Counts XVII and XVIII on violations of Bahamian law. In Count XVII, ZCM Bermuda alleges that the Oceanic Defendants violated the Bahamian Mutual Funds Act, 1995, and regulations thereunder. In Count XVIII, ZCM alleges that the Oceanic Defendants breached their common law duty of care under Bahamian law. The Oceanic Defendants argue that ZCM's Bahamian law claims do not apply outside the Bahamas.

Regarding Count XVII, the Oceanic Defendants argue that no legislation is presumed to operate outside the territorial jurisdiction of the country enacting it. Although "under international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe," Restatement (Third) of Foreign Relations Law § 431 (1987) (comment a), for the purposes of this § 431, a "judgment of a court awarding or denying damages in a civil action would generally not be seen as enforcement." Restatement (Third) of Foreign Relations Law § 431 (comment b). Further, ZCM may raise, and this Court is authorized to determine, an issue concerning the law of a foreign country. Fed.R.Civ.P. 44.1; *See, e.g., Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir.1999) (Mexican law governed substantive issues); *Cummings v. Club Mediterranee, S.A.*, No. 01 C 6455, 2003 WL 22462625 (N.D.Ill. Oct.29, 2003) (court applied Bahamian law on all substantive issues). Indeed, Federal Rule of Civil Procedure 44.1 provides that "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice." This rule contemplates that federal courts can entertain questions of foreign law. Accordingly, ZCM may plead this cause of action.

***19** Count XVIII alleges that Oceanic breached its common law duty of care. This cause of action is not based in statute, but the common law. Thus, Oceanic's argument regarding statutory effect does not apply to this cause of action. Additionally, as discussed in the previous paragraph, this Court is authorized to determine issues of foreign law. Accordingly, ZCM may plead this cause of action.

CONCLUSION

The Oceanic Defendants' motion to dismiss is granted in part and denied in part. It is granted with respect to Count II. Count II is dismissed with prejudice as to Oceanic, and without prejudice as to Rahming. It is also granted without prejudice as to Counts VII, IX and XI. It is denied as to Counts III, VIII, X, XII through XV, XVII and XVIII. Plaintiffs have until October 22, 2004 to file a Second Amended Complaint consistent with this opinion and the Court's August 2, 2004 Opinion.

FN1. *See* August 2, 2004 Opinion for a comparison of the different approaches the Courts of Appeals have established regarding the extent of conduct in the United States that will trigger subject matter jurisdiction over foreign securities fraud claims. *Zurich Capital Markets Inc. v. Coglianese*, No. 03 C 7960, 2004 WL 1881782, at *29 n. 10 (N.D.Ill. Aug.2, 2004).

FN2. As discussed below, the Court is dismissing Count II against Oceanic with prejudice as untimely. The Court is dismissing Count II against Rahming without prejudice for failure to state a claim.

FN3. This is not inconsistent with the Seventh Circuit's recent decision in *Jennings v. AC Hydraulic A/S*, No. 03-2157, 2004 WL 1965661, at *2 (7th Cir. Sept.2, 2004) where the court concluded that "a defendant's maintenance of a passive website does not support the exercise of personal jurisdiction over that defendant in a particular forum just because the website can be accessed there." Here, Oceanic has an "interactive" website, not a passive one. Although the Seventh Circuit has not decided "what level of 'interactivity' is sufficient to establish personal jurisdiction based on the operation of an interactive website," *id.*, Oceanic's interactive website,

in combination with its numerous other contacts with the United States, gives this Court jurisdiction over it.

FN4. The flat fee of $5,000 per year for administrative services is set forth in the Administration Agreement. On this motion to dismiss, the Court can consider this document because it is referred to in the Amended Complaint and central to ZCM's claims. *Dans v. Potter*, 301 F.Supp.2d 850, 856 (N.D.Ill.2004).

FN5. ZCM also named Coglianese in this count. The Court addressed Coglianese in its August 2, 2004 Opinion.

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• 2004 WL 2173927 (Trial Motion, Memorandum and Affidavit) Landmark Defendants' Memorandum of Law in Support of Their Consolidated Motion for Reconsideration and Clarification of This Court's Memorandum Opinion and Order Dated August 2, 2004 (Aug. 13, 2004)

• 2004 WL 2173924 (Trial Motion, Memorandum and Affidavit) Oceanic, Kenneth Clowes, and Terah Rahming's Reply in Support of Their Motion to Dismiss ZCM's Amended Complaint for Lack of Personal Jurisdiction (Jun. 28, 2004)

• 2004 WL 2175095 (Trial Motion, Memorandum and Affidavit) Supplemental Memorandum of Law in Opposition to the Coglianese Defendants' Motion to Dismiss the Zurich Plaintiffs' Amended Complaint (Jun. 21, 2004)

• 2004 WL 2175091 (Trial Motion, Memorandum and Affidavit) Landmark Defendants' Reply Memorandum of Law in Support of Consolidated Motion to Dismiss Zurich Plaintiffs' Amended Complaint (May. 28, 2004)

• 2004 WL 2175086 (Trial Motion, Memorandum and Affidavit) Coglianese Defendants Reply in Support of Their Motion to Dismiss ZCM Plaintiffs' Amended Complaint (May. 27, 2004)

• 2004 WL 2173919 (Trial Motion, Memorandum and Affidavit) Oceanic, Kenneth Clowes, and Terah Rahming's Reply in Support of Their Motion to Dismiss (May. 20, 2004)

• 2004 WL 2173911 (Trial Motion, Memorandum and Affidavit) Vorisek Defendants' Reply Memorandum in Support of Their Rule 12(B)(6) Motion to Dismiss the ZCM Investors' Amended Complaint (May. 18, 2004)

• 2004 WL 2175882 (Trial Motion, Memorandum and Affidavit) The Zurich Plaintiffs' Reply Brief in Support of Their Motion to Compel Answers to Interrogatories, and for Costs (May. 13, 2004)

• 2004 WL 2175871 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Opposition to Landmark Defendants' Consolidated Motion to Dismiss Zurich Plaintiffs' Amended Complaint (Apr. 29, 2004)

• 2004 WL 2175876 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Opposition to the Coglianese Defendants' Motion to Dismiss the Zurich Plaintiffs' Amended Complaint (Apr. 29, 2004)

• 2004 WL 2175867 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Opposition to Oceanic's Motion to Dismiss Zurich's Amended Complaint Pursuant to Fed. R. Civ. P. 12(B)(6) (Apr. 15, 2004)

• 2004 WL 2175839 (Trial Motion, Memorandum and Affidavit) Coglianese Defendants' Amended Memorandum of Law in Support of Motion to Dismiss ZCM Plaintiffs' Amended Complaint (Mar. 03, 2004)

• 2004 WL 2173906 (Trial Motion, Memorandum and Affidavit) Coglianese Defendants Memorandum of Law in Support of Motion to Dismiss ZCM Plaintiffs' Amended Complaint (Feb. 27, 2004)

• 2004 WL 2173901 (Trial Motion, Memorandum and Affidavit) Oceanic Bank and Trust Limited, Kenneth Clowes, and Terah Rahming's Motion to Dismiss (Feb. 11, 2004)

• 1:03CV07960 (Docket) (Nov. 07, 2003)

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TAB 4

Westlaw.

Not Reported in F.Supp.
Not Reported in F.Supp., 1994 WL 71449 (N.D.Ill.)
(Cite as: 1994 WL 71449 (N.D.Ill.))

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.
Eunice DOHRA, Plaintiff,
v.
ALCON (PUERTO RICO), INC., Alcon Laboratories, Inc., Alcon Pharmaceutical Laboratories, Inc., Lafayette Pharmacal, Inc., Lafayette Pharmaceutical, Inc., and Eastman Kodak Company, Defendants.
No. 92 C 2624.

March 3, 1994.

MEMORANDUM OPINION AND ORDER

MAROVICH, District Judge.

***1** Plaintiff Eunice Dohra ("Dohra") filed suit against Alcon (Puerto Rico), Inc. ("Alcon Puerto Rico"), Alcon Laboratories, Inc. ("Alcon"), Alcon Pharmaceutical Laboratories, Inc. ("Alcon Pharmaceutical"), Lafayette Pharmacal, Inc. ("Pharmacal"), Lafayette Pharmaceutical, Inc., ("Lafayette"), and Eastman Kodak Company ("Eastman") (collectively "Defendants") alleging that she was injured nearly eighteen years ago by a drug commonly called "Pantopaque" which was used in a medical procedure which was performed on her. Dohra's three count Complaint alleges negligence, strict liability and breach of warranty respectively. Defendants move to dismiss Counts II and III claiming that these claims are time-barred under the applicable statute of repose. For the following reasons, we grant Defendants' motion to dismiss.

DISCUSSION

Plaintiff Dohra asserts that she suffers from injuries as a result of an injection into her spine of a drug called Pantopaque. This injection occurred nearly twenty years ago when Dohra had a diagnostic procedure performed on her called a myelogram. Recently, she discovered that she suffers from a condition called achriditis which is an inflammation of the lining surrounding her spinal cord. She now sues the manufacturer of the drug and the drug's distributors alleging negligence, strict liability and breach of warranty.

Dohra originally received this injection of Pantopaque during a procedure performed on September 6, 1974. She claims that she did not discover her injury until March of 1990 and she then filed her suit on March 25, 1992.

Product liability claims in Illinois are governed by the Illinois statute of repose which states in relevant part:

> (b) Subject to the provisions of subsections (c) and (d) no product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of the first sale, lease or delivery of possession by a seller or 10 years from the date of the first sale, lease or delivery of possession to its initial user, consumer or other nonseller, whichever period expires earlier....
>
> (d) Notwithstanding the provisions of subsection (b) ... if the injury complained of occurs within any of the periods provided by subsection (b) ..., the plaintiff may bring an action within 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the personal injury ..., but *in no event shall such action be brought more than 8 years after the date on which such personal injury ... occurred.*

ILCS 735 Section 5/13-215. (1992). This section of the Illinois statutes is a statute of repose, not a statute of limitations. The distinction becomes critical when we review the manner in which such statutes have been interpreted.

For example, the Illinois Supreme Court recently stated that:

> ***2** [A] period of **repose** gives effect to a policy different from that advanced by a period of limitations; the period of **repose** is **intended** to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge.

Cunningham v. Huffman, 609 N.E.2d 321, 325 (Ill.1993). When addressing this exact statute, this Court has held that a definite time period exists in which these strict liability claims should be brought:

> The expansion of strict liability in recent decades has shifted much of the liability for faultless injuries to the injurer. The Illinois legislature enacted § 13-213 in order to shift some of the burden back to the injured by establishing a date certain beyond which injuries resulting from a product will not rise to strict liability claims.
> *Taylor v. Raymond Corporation*, 719 F.Supp. 738, 742 (N.D.Ill.1989), *aff'd* 909 F.2d 225 (7th Cir.1990).

Under § 13-213(b), claims are time-barred unless they are brought within the "earlier of (1) 12 years from the date of the first sale, and (2) 10 years from the date of the first sale to the initial user." *Id.* at 742. Dohra's myelogram was performed on September 6, 1974. Obviously, the Pantopaque had been sold to the hospital by that time. Therefore, the statute of repose began to run no later than September 6, 1974. Dohra would then have ten years, or until September 6, 1984 within which to file her suit. She filed, however, in 1992, far outside that ten year period.

Section § 13-213(d) provides that "in no event shall [any strict liability] action be brought more than eight years after the date on which such personal injury occurred." This eight year repose period is "an absolute cut-off point beyond which no action can be brought regardless of whether the plaintiff knows of the damage or not." *McLeish v. Sony Corp. of America*, 504 N.E.2d 933, 935 (Ill.App.Ct.1987). Illinois courts have applied this eight year deadline in cases which involve exposure to the drug DES and exposure to asbestos. *Zimmerman v. Abbott Laboratories, Inc.*, 545 N.E.2d 547 (Ill.App.Ct.1989) (DES); *Olson v. Owens-Corning Fiberglass Corp.*, 556 N.E.2d 716, 716-719 (Ill.App.Ct.1990) (asbestos). In both cases, the plaintiff had been exposed to the drug or the cancer-causing agent many years prior to the manifestation or discovery of the illness, but the courts held that the suits were time-barred because they were not brought within the eight year time period after exposure.

Plaintiff alleges in response to the Defendants' statute of repose argument that the Defendants fraudulently concealed this cause of action from the Plaintiff and that the action was brought within five years of Plaintiff's discovery pursuant to ILCS 735 Section 5/13-215. Alternatively, even if this court were not to apply the fraudulent concealment proposition to the facts before it, Plaintiff asserts that because she neither knew nor could have known of her injury until March 1990, this Court should deny the motion.

***3** Plaintiff fails to cite any authority for the proposition that fraudulent concealment tolls the running of a statute of repose. In fact, fraudulent concealment applies when a state law recognizes the "discovery rule" in statute of limitations situations. However, even Plaintiff's assertions that she filed her claim within two years of March 1990, the date when she first discovered her claim, fails to save her claim from the applicable statute of repose. Under that statute, she must file within eight years of the date of injury.

In this case, the date of injury would be the date of the occurrence which gave rise to her injury, specifically, the injection of the drug. Plaintiff claims that her injury occurred when her injury manifested itself and that her claim should therefore survive. However, the Illinois Appellate Court has stated that for the purposes of the statute of repose, "injury" is the date upon which a plaintiff is exposed to the product in question, not the date that the adverse effects of exposure manifest themselves. *Olson v. Owens Corning Fiberglass Corp.*, 556 N.E.2d 716 (Ill.App.Ct.1990). In *Olson*, plaintiffs were exposed to asbestos from 1938 to 1974 and 1948 to 1972. They brought their suit in 1986. The court held that the claims were time-barred under the statute of repose, specifically section (d) of the same statute we have in this matter. Although the court recognized that "an asbestos claim accrues upon its discovery" of the injury, for the purpose of calculating the statute of repose, the injury occurs on the date of plaintiff's exposure to asbestos. *Id.* at 720.

The most recent Illinois court to address the statute of repose in a products liability case such as the one here, applied the same reasoning to a plaintiff's claim brought for injuries suffered from ingesting the drug DES. *Sparapany v. Rexall Corp.*, 618 N.E.2d 1098, 1102 (Ill.App.Ct.1993). In that case, the Illinois Appellate Court found that the plaintiff had ingested DES in 1956 but failed to bring suit until 1986 and therefore her claim was barred by the applicable 12 year statute of repose. *Id.*

The purpose of a statute of repose is to allow for a definite date by which plaintiff's claim must be brought. *Taylor v. Raymond Corp., Inc.*, 909 F.2d 225, 227 (7th Cir.1990). The legislature intended "to terminate the possibility of liability after a defined period of time." *Id.*

Dohra filed her suit more than 12 years after Pantopaque was first sold and she sued more than

eight years after she was injured. In keeping with the legislative purpose of the applicable statute of repose, and the case law in Illinois, Plaintiff's claim is time-barred. We therefore dismiss Counts II and III of Plaintiff's Complaint.

Not Reported in F.Supp., 1994 WL 71449 (N.D.Ill.)

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