IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ZAZZALI, as Trustee for the DBSI Private Actions Trust, Plaintiff, v. ALEXANDER PARTNERS, LLC, et al., Defendants.	C.A. No. 12-cv-828-GMS

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAINT FOR (1) IMPROPER VENUE AND (2) FAILURE TO SUFFICIENTLY STATE CLAIMS FOR RELIEF

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Plaintiff James R. Zazzali, as Trustee for the DBSI Private Actions Trust ("PAT") ("Plaintiff" or "Trustee"), respectfully submits this Answering Brief in opposition to certain Defendants' motions to dismiss (1) for improper venue [D.I. 467][1] and (2) for failure to sufficiently state claims for relief [D.I. 465] (the "Venue Motion" and the "12(b)(6) Motion," respectively, and the "Motions" collectively).[2]

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

By Order dated October 26, 2010, the Bankruptcy Court entered its Findings of Fact, Conclusions of Law, and Order [Bankruptcy D.I. 5924] (the "Confirmation Order") confirming the *Second Amended Joint Chapter 11 Plan of Liquidation Filed by the Chapter 11 Trustee and the Official Committee of Unsecured Creditors* [Bankruptcy D.I. 5699] (the "Plan") in the Chapter 11 cases. *See In re DBSI Inc.*, Bankr. D. Del., 08-12687 (PJW). The Plan substantively consolidated the estates of the Plan Debtors and certain Consolidated Non-Debtors (as defined in the Plan), *nunc pro tunc* to November 10, 2008. The Plan created, *inter alia*, two distinct trusts: the DBSI Estate Litigation Trust and the Private Actions Trust ("PAT") and approved the appointment of James R. Zazzali as the Trustee of both. (Amended Complaint [D.I. 436] ("Am. Compl.") ¶ 13.) Pursuant to the Plan, certain Investors who purchased DBSI Securities from brokers voluntarily assigned their personal Non-Estate Causes of Action against those brokers to the PAT. (Am. Compl. ¶ 14.)

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[1] The Defendants who have moved to dismiss for improper venue are Jeffrey Augspurger, Ron Barton, Tod Billings, Trent Byerly, Scott Cavey, Allan Crumes, Ron Davies, Tim Duma, Mike Eden, David Kowalski, Robert Kuh, Michael Myers, Dwain Owens, Mark Pearson, and Royce Ruth. [D.I. 467.] They are referred to herein as the "Venue Defendants."

[2] The Defendants who have moved to dismiss for failure to sufficiently state claims for relief are Ron Barton, Tod Billings, Trent Byerly, Tim Duma, Mike Eden, Michael Myers, and Mark Pearson. [D.I. 465.] Each of the Defendants who have moved to dismiss for failure to state a claim has also moved to dismiss for improper venue. They are referred to herein as the "12(b)(6) Defendants."

On June 27, 2012, the PAT Trustee filed the Complaint in this action [D.I. 1] against numerous broker-dealers, registered representatives, and control persons (the "Defendants" or "Broker Defendants") for their role in the sale of DBSI Securities. Certain Defendants filed a series of motions to dismiss the Complaint, and on September 25, 2013, the Court denied the motions in part and granted the motions in part. [D.I. 420, 421] The Court directed Plaintiff to file a motion for leave to amend to clarify certain allegations and to correct any pleading deficiencies identified in the Court's opinions and order. [D.I. 420] Plaintiff moved for leave to amend pursuant to the Court's instructions, and after the Court granted the unopposed motion, Plaintiff filed the Amended Complaint [D.I. 436] on February 7, 2014. The Amended Complaint alleges, *inter alia*, common law fraud, negligence, and breach of fiduciary duty against the Defendants who have now moved to dismiss under Fed. R. Civ. P. 12(b)(3) [D.I. 467] and (6) [D.I. 465]. This Answering Brief responds to those Motions.

SUMMARY OF ARGUMENT

1. Venue is proper in Delaware as to the Venue Defendants because it is required by the Plan and Confirmation Order. The Venue Defendants had notice, but did not timely object to the Plan before confirmation and did not appeal the Confirmation Order despite having had a full and fair opportunity to do so. The Venue Defendants are thus bound by the venue provisions contained in the Plan and Confirmation Order, which require venue in Delaware.

2. The Court has previously held that Plaintiff has sufficiently stated claims of common law fraud and breach of fiduciary duty against the 12(b)(6) Defendants, and the Amended Complaint only strengthens those allegations. Although Plaintiff's federal claims against the 12(b)(6) Defendants have been dismissed, its common law claims remain, and the Court should exercise supplemental jurisdiction and pendent personal jurisdiction over them. Finally, it is premature to determine whether Plaintiff's common law claims may be barred by the statute of limitations.

STATEMENT OF FACTS

The Amended Complaint alleges that the Defendants, including those who have filed the instant Motions, were complicit in a Ponzi scheme effected through DBSI Inc. -- formerly known as DBSI Housing Inc. -- and its affiliates ("DBSI Companies") that cheated thousands of Investors out of, in some cases, their life savings. The Defendants reaped substantial financial rewards by way of commissions earned on sales of investments in certain DBSI Companies ("DBSI Securities") and vast "due diligence fees" for due diligence never conducted, at the substantial and, in some cases, devastating expense of the beneficiaries of the PAT.

While the DBSI Companies projected an illusion of wealth and competence, in reality they were fraudulently kept afloat, not with any real expectation on the part of DBSI management or the Defendants that the securities they marketed would actually return the promised dividends. While the Defendants were collecting their due diligence fees, hundreds of sham entities passed assets back and forth, preserving the illusion that Investors would enjoy the promised returns. This false depiction of financial stability was also maintained by the consistent influx of cash from new Investors with the aid of the Defendants, including through sales of tenant-in-common interests in property at prices that frequently exceeded the fair market value of that property. Positive cash flow came only from new Investor money, which was used to pay off old Investors.[3]

The Defendants were not mere spectators. They affirmatively recommended each investment in DBSI Securities to the Investors. Am. Compl. ¶¶ 45. The private placement memoranda ("PPMs") each Defendant delivered to each Investor referenced the due diligence fees the Defendants would receive upon the sale of the DBSI Securities they recommended. *Id.*

[3] On April 14, 2014, Douglas Swenson, David Swenson, Jeremy Swenson and Mark Ellison were convicted of 44 counts of federal securities fraud in connection with the sale of DBSI investments. Douglas Swenson was also convicted of 34 counts of wire fraud. *United States v. Douglas Swenson, et al.,* 13-cr-00091, Verdict Sheet, Dkt. No. 502 (D. Idaho).

¶¶ 37, 44, 49. In addition, in the Subscription Agreements, Letters of Intent, and Purchaser Questionnaires through which the DBSI Securities were sold, the Defendants certified that they had a reasonable basis to believe that the DBSI Securities were suitable for purchase. *Id.* ¶ 77. The Investors signed the Subscription Agreements and/or Purchase Agreements stating that they relied on the information and representations contained in the PPMs. *Id.* ¶ 41.

By virtue of recommending the sale of DBSI Securities and representing that they had a reasonable basis to believe that investment was suitable for each Investor, Defendants were obligated to: (1) conduct a due diligence investigation into the investment; (2) confirm the accuracy of the representations contained in the PPMs regarding the creditworthiness and financial strength of the DBSI Companies; (3) investigate the issuer and the issuer's representations so that they understood the nature of the investments and their risks; and, (4) follow up on any adverse information that might reasonably be construed as a "red flag." *Id.* ¶ 260. Defendants were also required to disclose to the Investors any essential information that they lacked about the investments and any risks attendant to that lack of information. *Id.* Nevertheless, Defendants failed to investigate numerous red flags included in the PPMs. *Id.* ¶ 262-263.

The Amended Complaint alleges that Defendants failed to conduct the due diligence necessary to discover the effect of any red flags, and they did not disclose to Investors any of the red flags of which they were either aware or which reasonable due diligence would have revealed. Am. Compl. ¶¶ 78, 260, 267, 276. While failing to fulfill those due diligence representations and obligations, Defendants collected fees for the due diligence they failed to conduct. *Id.* ¶¶ 37, 44, 49, 266, 268. As a proximate result of their failure, the Investors sustained the damages alleged in the Amended Complaint.

By way of further background, the Plan was accompanied by a Disclosure Statement (the "Disclosure Statement"). Schedule 11 to the Disclosure Statement ("Schedule 11") identified potential defendants in "Non-Estate Causes of Action" (as that term is defined in the Plan). *See*

Viceconte Decl., Ex. A. The persons and entities listed on Schedule 11, as well as creditors and other persons and entities, were served with the Plan, the Disclosure Statement and notice of the Plan confirmation hearing. *See* Viceconte Decl., Ex. B. The Venue Defendants had notice of the filing of the Plan, notice that their broker-dealer firms were potential defendants in the Non-Estate Causes of Action, and had an opportunity to object to the Delaware venue provisions contained in the Plan pre-confirmation. Critically, none of the Venue Defendants objected to the Plan's confirmation or the provision fixing venue for all subsequent actions by the Trustee in Delaware, despite the fact that their broker-dealer firms were identified as potential defendants in the Non-Estate Causes of Action for selling the very same securities the Venue Defendants sold.[4] Moreover, the Venue Defendants made no attempt to appeal the Confirmation Order.

ARGUMENT

POINT I

DEFENDANTS ARE PRECLUDED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL FROM CHALLENGING THE BANKRUPTCY COURT'S DETERMINATION THAT VENUE WAS PROPER IN DELAWARE.

The Venue Motion is untimely, as the issue of venue was squarely addressed in the Plan and Confirmation Order, which ***require*** venue in Delaware. *See* Viceconte Decl., Ex. C. Consequently, the Trustee had no choice but to bring this action here. *See Meyer v. Young Conaway Stargatt & Taylor LLP*, 2011 U.S. Dist. LEXIS 35947, at *7 (D. Idaho Mar. 31, 2011) (transferring venue of a case involving DBSI from Idaho to Delaware in part because "[t]he confirmed plan provides that the Delaware bankruptcy court shall have exclusive jurisdiction over all disputes arising in connection with the Highlands & Southcreek bankruptcy case."). With respect to the Plan, the Venue Defendants had notice, but did not timely object to the Plan before confirmation and did not appeal the Confirmation Order despite having had a full and fair

[4] Although other parties objected to the Plan, ultimately those objections to the Plan were amicably resolved.

opportunity to do so. *See* Fed. R. Bankr. P. 3017 and 3020(b) (time limits for objections to a plan); 8002(a) (time limits for appeal). As a result, the Confirmation Order, which was never appealed,[5] is binding on the Venue Defendants with regard to all issues, including venue, and the Motion is an impermissible collateral attack on this final order.

A "confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation." *Donaldson v. Bernstein*, 104 F.3d 547, 554 (3d Cir. 1997) (quoting *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989)); *see also Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938) (treating a bankruptcy court's order of confirmation as a final judgment with *res judicata* effect). Moreover, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not such creditor . . . has accepted the plan." 11 U.S.C. § 1141(a). "Consequently, parties may be precluded from raising claims or issues that they could have or should have raised before confirmation of a bankruptcy plan, but failed to do so." *First Union Commercial Corp. v. Nelson, Mullins, Riley, & Scarborough (In re Varat Enters.)*, 81 F.3d 1310, 1315 (4th Cir. 1996) (citation omitted); *see also Katchen v. Landy*, 382 U.S. 323 (1966) ("The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts."). The Plan provides for venue of the Trustee's claims on behalf of the PAT in Delaware.[6] Each of the Venue Defendants was served with the Plan, the Disclosure Statement,

[5] An appeal to the Confirmation Order was filed on November 10, 2010, by certain TIC investors related to the treatment of Administrative TIC Rent Claim under the Administrative TIC Rent/Expense Claims Protocol. [D.I. 6811]. However, the appeal, which was untimely, was withdrawn on February 2, 2011. [D.I. 7093].

[6] Plaintiff recognizes that in an opinion in a separate case connected to the DBSI bankruptcy, with different defendants and different allegations, Judge Leonard P. Stark held that the Plan and Confirmation Order did not bar the defendants in that case from contesting venue. *See Zazzali v. Swenson*, 852 F. Supp. 2d 438, 444 (D. Del. 2012). Plaintiff respectfully disagrees with Judge Stark's conclusion, which in any event, is not binding on this Court. *See Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. Del. 1991) (stating that a district court decision is not binding on other courts, even in the same district); 18 James W. Moore et al., Moore's Federal Practice ¶ 134.02[1][d] (3d ed. 2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").

and notice of the Plan confirmation hearing. Their broker-dealer firms' were all listed on the non-exclusive list of potential defendants for selling the same securities the Venue Defendants sold. Thus, they had notice of the filing of the Plan and that they may later be sued, and they had an opportunity to object to the Delaware venue provisions contained in the Plan pre-confirmation. Having failed to object to the Plan or appeal the Confirmation Order, the Venue Defendants are now bound by its terms and the Motion must be denied.

In the event the Court finds that the Plan and Confirmation Order do not bar the Venue Defendants from maintaining the instant motion, Plaintiff respectfully requests that it be permitted to take limited discovery relating to the questions of jurisdiction and venue. "[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 n.13 (1978); *see also Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983) ("Where the plaintiff's claim is not clearly frivolous, the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden."). The Trustee's claims here are certainly not frivolous, as the Court has ruled that they are sufficient to survive a motion to dismiss. As such, discovery as to jurisdiction and venue is proper.

In the alternative, if the Court is inclined to grant the Venue Motion, Plaintiff respectfully submits that the Amended Complaint be transferred to the U.S. District Court for the District of Idaho instead. Pursuant to 28 U.S.C. § 1406(a), "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Indeed, should the Court find that venue in the District of Delaware is improper, the hundreds of DBSI Investors who were defrauded could forever be prevented from obtaining a remedy. Such an injustice is the very ill § 1406(a) was designed to avoid.

> The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs

> from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. . . . The language and history of § 1406 (a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962); *see also Lafferty v. Gito St. Riel*, 495 F.3d 72, 79 (3d Cir. 2007) ("[T]he § 1406(a) transfer provision is designed to preserve claims that rigid application of dismissal rules may bar . . . ."). Although the Trustee maintains that venue is proper in the District of Delaware, should the Court find otherwise, a transfer to the District of Idaho, the state of incorporation of each of the DBSI entities whose interests the Venue Defendants sold, would be in the interests of justice.

POINT II

THE AMENDED COMPLAINT SUFFICIENTLY STATES CLAIMS OF COMMON LAW FRAUD AND BREACH OF FIDUCIARY DUTY.

In its ruling on prior motions to dismiss, the Court held that the original Complaint adequately pleaded claims of common law fraud and breach of fiduciary duty. [D.I. 420.] The Amended Complaint only strengthens those allegations by elaborating on the red flags the 12(b)(6) Defendants ignored when recommending DBSI Securities to Investors. Unbowed, the 12(b)(6) Defendants again seek to dismiss, but the 12(b)(6) Motion is premised on a misleading view of the Amended Complaint and restates arguments previously rejected.[7]

[7] Plaintiff notes that if the Court grants the Venue Motion, it should decline to consider the 12(b)(6) Motion. *See Martin v. Del. Law Sch. of Widener Univ.*, 625 F. Supp. 1288, 1294 (D. Del. 1985) ("The Court finds that venue in this district is improper, and that this Court cannot exercise in personam jurisdiction over these Defendants. Therefore, the Court does not reach the other grounds raised.").

As an initial matter, the section of the 12(b)(6) Defendants' brief entitled "Plaintiff's Allegations" grossly misstates the allegations actually contained in the Trustee's Amended Complaint. In an apparent attempt at misdirection, the 12(b)(6) Defendants suggest that the gravamen of the Amended Complaint is that the 12(b)(6) Defendants made misrepresentations contained in the PPMs. This could not be further from the truth. As the 12(b)(6) Defendants acknowledge, the Court previously held that Defendants did not make the representations in the PPMs. In response, the Trustee amended the complaint to focus on and provide more detail regarding the allegation that the 12(b)(6) Defendants represented that they had "reasonable grounds to believe, on the basis of information supplied by the Purchaser, and other pertinent information," that the DBSI security was a "suitable investment for the Purchaser." Indeed, contrary to the inaccurate picture painted by the 12(b)(6) Defendants, the import of the Amended Complaint is that there were several red flags contained in the PPMs that should have caused Defendants to investigate DBSI and its offerings further, and that the 12(b)(6) Defendants failed to undertake such an investigation. Defendants' characterization of the Amended Complaint is plainly intended to distract the Court. Cutting through the 12(b)(6) Defendants' rhetoric, it is clear that the Trustee has adequately pleaded its common law claims.

A. Regardless of the Effect of the Statute of Repose on the Trustee's Federal Securities Claims Against the 12(b)(6) Defendants, the Trustee's Common Law Claims Remain.

The 12(b)(6) Defendants' first contention is that the federal securities law claims against them must be dismissed by operation of the statute of repose embodied in 28 U.S.C. § 1658(b)(2). Yet these claims have already been dismissed. In its September 25, 2013 opinion denying in part and granting in part various defendants' motions to dismiss, the Court held that "[i]t is clear, however, that any remaining § 10(b) claims based upon misrepresentations alleged to have been made before June 27, 2007 are barred by the five-year statute of repose set forth in 28 U.S.C. § 1658(b)(2)." [D.I. 420 at 20.] The 12(b)(6) Defendants identified their sales that took place prior to that date, and as such, the federal securities law claims against them were

dismissed. Nevertheless, the Trustee has common law claims against the 12(b)(6) Defendants for common law fraud, negligence, and breach of fiduciary duty. It was therefore not necessary for the Trustee to dismiss all of its claims against the 12(b)(6) Defendants based on the Court's September 25 Order.

B. The Court Has Supplemental Jurisdiction Over Plaintiff's State Law Claims Against the 12(b)(6) Defendants and Pendent Personal Jurisdiction Over Them.

Notwithstanding the dismissal of the federal claims against the 12(b)(6) Defendants, the Court has supplemental jurisdiction over Plaintiff's state law claims against them, and it should exercise supplemental jurisdiction in the interests of judicial economy, convenience, and fairness to the litigants. In addition, having already exercised personal jurisdiction over the 12(b)(6) Defendants under the Exchange Act's nationwide service of process provision, the Court should maintain jurisdiction over them pursuant to the doctrine of pendent personal jurisdiction.

Under 28 U.S.C. §1367(c), the Court has the discretion to retain supplemental jurisdiction over non-federal claims if its original federal jurisdiction has been nullified by dismissal of all federal claims. *See, e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *TelQuest Int'l, Corp. v. Dedicated Bus. Sys.*, 2009 U.S. Dist. LEXIS 90537, at *5-6 (D.N.J. Sept. 29, 2009). In making that determination, courts must consider factors including judicial economy, convenience, and fairness to the litigants. *Id.* at *6. As the Court is aware, this Complaint is closely related to hundreds of cases currently pending in the Delaware District and Bankruptcy Courts. Moreover, the Trustee's claims against the 12(b)(6) Defendants are closely intertwined with the rest of its claims against other defendants in this action. Splitting off claims from this action would impair judicial economy by multiplying litigation. It would also be inconvenient and unfair for the parties, particularly the Trustee, as it would heighten the risk of inconsistent judgments and strain the resources of the PAT, thereby diminishing recoveries for the innocent Investors who have assigned their claims to the PAT. Despite the relatively early stage of this particular proceeding, in light of the District of Delaware's familiarity with the subject matter of

this case, it makes judicial and economic sense for the Court to retain jurisdiction over Plaintiff's state law claims.

The interests of judicial economy and convenience also militate in favor of the Court's exercising pendent personal jurisdiction over Plaintiff's remaining claims against the 12(b)(6) Defendants. Whether to retain pendent claims after federal claims have been dismissed lies within the discretion of the Court, *Fox v. Dream Trust*, 743 F. Supp. 2d 389, 395 (D.N.J. 2010), and the Court should exercise that discretion in favor of retaining jurisdiction where "notions of judicial economy and fairness and convenience to the litigants" warrant, *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 518 F. Supp. 602, 604 (S.D. Fla. 1981).

For example, in *Belke*, the court noted that the same issues involved in the claims against the moving defendants would have to be tried with regard to other defendants, and it found that "it w[ould] not be judicially inconvenient to retain jurisdiction." *Id.* at 605. The Court further opined that "[t]he dismissal of the Federal Security claims prevents [plaintiff] from further serving extra-territorial defendants, but those already within the Court's fold are not thereby released." *Id.* Indeed, courts have found that when a plaintiff "serve[s] [a] defendant pursuant to § 78aa, that section's nationwide service of process provision operate[s] to give th[e] court personal jurisdiction over the defendant," and the dismissal of federal claims against the defendant "does not alter the fact that the court has personal jurisdiction over [the] defendant." *Poindexter v. Wedbush, Noble, Cooke, Inc.*, 1983 U.S. Dist. LEXIS 19848, * 7-8 (D. Ore. Jan. 24, 1983). Here, in order to conserve judicial resources and ensure that all of the claims in this action are consistently resolved, the Court should exercise pendent personal jurisdiction over the remaining claims against the 12(b)(6) Defendants.

C. The Amended Complaint Adequately Pleads Both Common Law Fraud and Breach of Fiduciary Duty.

As noted above, the Court has already held that the Trustee has adequately pleaded claims of common law fraud and breach of fiduciary duty. The 12(b)(6) Motion merely makes already-rejected and baseless arguments.

First, the 12(b)(6) Defendants suggest that the Amended Complaint attempts to plead a private cause of action under the rules of the NASD. The Court, however, has already held that that is not the case. Rather, as the Court previously held, the Amended Complaint alleges that the 12(b)(6) Defendants made affirmative representations that they had undertaken sufficient due diligence to form a reasonable basis for believing that the DBSI Securities were suitable investments. To wit, the Court held that "[t]he implied representation theory attacked by the Moving Defendants would infer a representation from the mere fact of the brokers' legal obligations -- Paragraph 56, on the other hand, finds a due diligence representation in the defendants' explicit statements that they would comply with those obligations." [D.I. 420 at 9 n.5.] The due diligence representation found in paragraph 56 of the original Complaint is the bedrock of the Amended Complaint. Am. Compl. ¶¶ 42, 77, 261. In any event, the NASD's suitability rule is highly relevant here in that it informs the defendants' duty of care to their clients. *See Mihara v. Dean Witter & Co.*, 619 F.2d 814, 823-824 (9th Cir. 1980) (stating that NASD rules may set a broker's common law duties of care toward clients). To this end, the Amended Complaint alleges that the 12(b)(6) Defendants had duties to their clients that are given substance by the NASD rules, that they breached those duties, and that their Investors were damaged as a result.

In addition, the 12(b)(6) Defendants make a feeble argument that the Amended Complaint does not comply with Fed. R. Civ. P. 9(b), stating that the Trustee has "failed to provide any particularity as the remaining allegations as to Representative Defendants as required under both Rule 9(b) and the PLSRA." [D.I. 466 at 12.] As stated above, the Court has

already determined that the Trustee has sufficiently alleged that Defendants' misrepresented that they had reasonable grounds to believe the DBSI Securities they recommended were suitable investments. Those allegations have only been strengthened in the Amended Complaint, which describes in great detail the many red flags Defendants ignored.

The Amended Complaint also adequately alleges claims for breach of fiduciary duty. Purporting to apply the law of six separate states, the 12(b)(6) Defendants contend that five of those states -- with California being the exception -- do not recognize a fiduciary duty between securities brokers and their customers, or that those states only recognize such a duty in certain circumstances. Yet the case law demonstrates that each state identified by the 12(b)(6) Defendants recognizes a fiduciary duty where there is a "special relationship" between the broker and the customer or "special confidence" reposed in the broker.

For example, in Virginia, "[a] fiduciary relationship is established 'when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.'" *Ozberkmen v. Capital Asset Mgmt.*, 29 Va. Cir. 18, 20 (Va. Cir. Ct. 1992) (quoting *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 595 (1984)). The same is true in Idaho, *see High Valley Concrete, L.L.C. v. Sargent*, 234 P.3d 747, 752 (Idaho 2010) ("The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." (quoting *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 853 (1991)); Minnesota, *see McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 736 F.2d 1254, 1258 (8th Cir. 1984) ("Fiduciary duty arises out of a relationship between persons; it goes beyond the mere duty not to lie or deliberately omit material facts."); Oregon, *see Bennett v. Farmers Ins. Co.*, 26 P.3d 785, 799 (Or. 2001) ("The focus instead is on whether the nature of the parties' relationship itself allowed one party to exercise control in the first party's best interests."); and Washington, *see Swartz v. KPMG, LLC*, 401 F. Supp. 2d 1146, 1155-56 (W.D. Wash. 2004)

("'There must be additional circumstances, or a relationship that induce the trusting party to relax the care and vigilance which he would ordinarily exercise for his own protection.'" (quoting *Moon v. Phipps*, 411 P.2d 157, 161 (Wash. 1966))).

Here, Plaintiff has not alleged any general or open-ended fiduciary duty, but rather a fiduciary duty arising from the specific transactions with which the Defendants were entrusted by the Investors -- the purchase of DBSI Securities. Plaintiff has pleaded the existence of a fiduciary duty on the part of the Defendants in a manner that is sufficient to survive a motion to dismiss. Indeed, Plaintiff has alleged that the 12(b)(6) Defendants expressly undertook the obligation to conduct due diligence and investigate DBSI and the relevant DBSI Securities to ensure they had a reasonable basis for concluding that the investments were suitable for the Investors. As such, the 12(b)(6) Defendants voluntarily assumed control over the Investors' economic fortunes and accepted the responsibility of acting in their best interests. Plaintiff has sufficiently pleaded the breach of the Defendants' fiduciary duties by alleging that the Defendants failed to conduct any due diligence -- or, indeed, any reasonable investigation whatsoever -- in connection with their marketing and sale of DBSI Securities despite their obligations and express representations to the contrary and failed to disclose that no due diligence had been conducted.

D. The 12(b)(6) Defendants' Motion to Dismiss on Statute of Limitations Grounds Is Premature.

As the Court has previously held with regard to Plaintiff's federal claims, it is premature to decide the instant motions to dismiss on statute of limitations grounds. The analysis of whether the statutes of limitations will be tolled by, for example, any relevant state's time of discovery rule, is a fact-specific inquiry that cannot be decided on a motion to dismiss.

The affirmative defense of the statute of limitations "may be raised on a motion under rule 12(b)(6), but only if 'the time alleged *in the statement of a claim* shows that the cause of action has not been brought within the statute of limitations.'" *Bethel v. Jendoco Constr. Corp.*,

570 F.2d 1168, 1174 (3d Cir. 1978). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Id.* Because whether the Trustee's claims are time barred "is not apparent on the face of the complaint," and requires a fact-sensitive analysis, the 12(b)(6) Motion must be denied.

The 12(b)(6) Defendants offer various statutes of limitations for eight states: Arizona, California, Idaho, Minnesota, Oregon, Virginia, Washington, and Wyoming. They note in passing that the discovery rule may apply to many of the claims against them, but they fail to recognize that the discovery rule -- and the attendant need to develop the factual background -- is fatal to their Motion. For example, under the laws of each of these states, however, a cause of action for fraud does not accrue until the plaintiff discovers the facts constituting the fraud. *See* Ariz. Rev. Stat. § 12-543; Cal. Civ. Proc. Code § 338(d); Idaho Code Ann. § 5-218; Minn. Stat. § 541.05; Or. Rev. Stat. § 12.110; *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836, 844 (E.D. Va. 1968) ("In Virginia a cause of action of which the gravamen of same is fraud shall be deemed to accrue, both at law and equity, at the time such fraud is discovered, or by the exercise of due diligence ought to have been discovered."); Wash Rev. Code § 4.16.080; *Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 542 (Wyo. 2000) ("Wyoming is a discovery state, in which statute of limitations is triggered when a plaintiff knows or has reason to know of existence of a cause of action."). It is clear, then, that discovery is necessary to assess when the Trustee's claims accrued, and dismissal is inappropriate at this stage.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny certain Defendants' motions to dismiss (1) for improper venue [D.I. 467] and (2) for failure to sufficiently state claims for relief [D.I. 465].

Dated: April 23, 2014
Wilmington, Delaware

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